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CODE OF FEDERAL REGULATIONS

Title 48

Federal Acquisition Regulations System

Chapters 7 to 14

Revised as of October 1, 2024

Containing a codification of documents
of general applicability and future effect

As of October 1, 2024

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Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 48 CFR 701.106 *refers to title 48, part 701, section 106.*

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

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

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OMB CONTROL NUMBERS

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

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

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Provisions of the Code that are no longer in force and effect as of the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on any given date in the past by using the appropriate List of CFR Sections Affected (LSA). For the convenience of the reader, a ''List of CFR Sections Affected'' is published at the end of each CFR volume. For changes to the Code prior to the LSA listings at the end of the volume, consult previous annual editions of the LSA. For changes to the Code prior to 2001, consult the List of CFR Sections Affected compilations, published for 1949-1963, 1964-1972, 1973-1985, and 1986-2000.

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

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(a) The incorporation will substantially reduce the volume of material published in the Federal Register.

(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

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

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

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

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REPUBLICATION OF MATERIAL

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OLIVER A. POTTS,
Director,
Office of the Federal Register
October 1, 2024

THIS TITLE

Title 48—FEDERAL ACQUISITION REGULATIONS SYSTEM is composed of seven volumes. The chapters in these volumes are arranged as follows: Chapter 1 (parts 1 to 51), chapter 1 (parts 52 to 99), chapter 2, chapters 3 to 6, chapters 7 to 14, chapters 15 to 28, and chapter 29 to end. The contents of these volumes represent all current regulations codified under this title of the CFR as of October 1, 2024.

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

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

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

For this volume, Michele Bugenhagen, was Chief Editor. The Code of Federal Regulations publication program is under the direction of John Hyrum Martinez, assisted by Stephen J. Frattini.

Title 48—Federal Acquisition Regulations System

(This book contains chapters 7 to 14)

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EDITORIAL NOTE: Nomenclature changes to chapter 7 appear at 62 FR 40466, July 29, 1997, and corrected at 62 FR 45334, August 27, 1997.

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SUBCHAPTER A—GENERAL

PART 700 [RESERVED]

PART 701—FEDERAL ACQUISITION REGULATION SYSTEM

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AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13236, Apr. 3, 1984, unless otherwise noted.

Subpart 701.1—Purpose, Authority, Issuance

701.106 OMB approval under the Paperwork Reduction Act.

(a) The following information collection and record keeping requirements established by USAID have been approved by OMB and assigned an OMB control number as specified below:

(48 CFR) AIDAR segment	OMB control No.
752.219–8	0412–0520
752.245–70	0412–0520
752.245–71(c)(2)	0412–0520
752.247–70(c)	0412–0520
752.7001	0412–0520
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752.7003	0412–0520
752.7004	0412–0520
752.7032	0412–0520

(b) The information requested by the AIDAR sections listed in paragraph (a) is necessary to allow USAID to prudently administer public funds. It lets USAID make reasonable assessments of contractor capabilities and responsibility of costs. Information is required in order for a contractor and/or its employee to obtain a benefit-usually taking the form of payment under a Government contract.

(c) Public reporting burden for these collections of information is estimated as shown in paragraph (a) of this section. The estimated burden includes the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

[59 FR 33445, June 29, 1994, as amended at 61 FR 39090, July 26, 1996; 62 FR 40466, July 29, 1997; 64 FR 16648, Apr. 6, 1999; 72 FR 19670, Apr. 19, 2007. Redesignated and amended at 79 FR 74988, 74989, Dec. 16, 2014]

Subpart 701.3—U.S. Agency for International Development Acquisition Regulation

SOURCE: 64 FR 42040, Aug. 3, 1999, unless otherwise noted.

701.301 Policy.

(a) *Responsibility*. Subject to the direction of the Administrator, the Director, Bureau for Management, Office of Acquisition and Assistance (''M/OAA Director) is responsible for:

(1) Developing and maintaining necessary uniform procurement policies, procedures, and standards;

(2) Providing assistance to the contracting activities as appropriate;

(3) Keeping the Administrator and Executive Staff fully informed on procurement matters which should be brought to their attention; and

(4) All agency head duties and authorities stated in (48 CFR) FAR subpart 1.3, in accordance with (48 CFR) AIDAR 701.601. These responsibilities include but are not limited to developing, issuing, and maintaining the USAID Acquisition Regulation (''AIDAR'', 48 CFR chapter 7), USAID's supplement to the Federal Acquisition Regulation (48 CFR chapter 1), in coordination with the Office of the General Counsel and such other offices as may be appropriate.

(b) *Applicability*. (1) Unless a deviation is specifically authorized in accordance with subpart 701.4, or unless otherwise provided, the FAR and AIDAR apply to all contracts (regardless of currency of payment, or whether funds are appropriated or non-appropriated) to which USAID is a direct party.

(2) At Missions where joint administrative services are arranged, procuring offices may apply the Department of State Acquisition Regulation (48 CFR chapter 6) for all administrative and technical support contracts except in defined areas. The Bureau for Management, Office of Management Services (M/MS) will furnish the defined areas and administrative guidelines for procurement to the overseas Missions. Administrative and local support services include the procurement accountability, maintenance and disposal of all office and residential equipment and furnishings, vehicles and expendable supplies purchased with administrative and/or technical support funds, either dollars or local currency.

[64 FR 42040, Aug. 3, 1999, as amended at 72 FR 19670, Apr. 19, 2007; 79 FR 74989, Dec. 16, 2014]

701.303 Publication and codification.

(a) *General*. The AIDAR is USAID's Acquisition Regulation supplementing the FAR (48 CFR chapter 1) and is published as chapter 7 of title 48, Code of Federal Regulations. Changes to the AIDAR shall be published in compliance with FAR part 1.

(b) *Appendices*. Significant procurement policies and procedures that do not correspond to or conveniently fit into the FAR system described in FAR subpart 1.1 and 1.303 may be published as Appendices to the AIDAR. Appendices follow the main text of the AIDAR in a section entitled ''Appendices to Chapter 7'' and contain a table of contents and the individual appendices identified by letter and subject title (e.g., ''Appendix D—Direct USAID Contracts with a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad'').

(c) *Authorities*. Only the M/OAA Director has the authority to issue internal Agency guidance applicable to all Agency contracts. The heads of the various Agency contracting activities (see Subparts 701.6 and 702.170) may issue operating instructions and procedures consistent with the FAR, AIDAR, and other Agency regulations, policies, and procedures for application within their organizations. One copy of each such issuance must be forwarded to the Bureau for Management, Office of Acquisition and Assistance, Policy Division (M/OAA/P). Insofar as possible, such material must be numerically keyed to the AIDAR.

[64 FR 42040, Aug. 3, 1999, as amended at 72 FR 19670, Apr. 19, 2007; 79 FR 74989, Dec. 16, 2014; 89 FR 4202, Jan. 23, 2024]

Subpart 701.4—Deviations from the FAR or AIDAR

701.402 Policy.

It is USAID policy to approve deviations from the mandatory requirements of the FAR and AIDAR only if it is essential to effect necessary procurement actions and when special and exceptional circumstances make such deviation clearly in the best interest of the Government.

[79 FR 74989, Dec. 16, 2014]

701.470 Procedure.

(a) *Deviation from the FAR or AIDAR affecting one contract or transaction*. (1) Deviations that affect only one contract or procurement require prior approval by the head of the contracting activity.

(2) In preparing and submitting deviations for approval, USAID operating units must follow the applicable USAID policies in the ADS 300 series, including mandatory written consultations with the Bureau for Management, Office of Acquisition and Assistance, Policy Division (M/OAA/P) and the Office of the General Counsel. For deviations related to AIDAR appendices D and J, Director of M/OAA clearance is required in lieu of M/OAA/P consultations, as outlined in appendices D and J. The CO must retain all approved deviations in the contract file.

(b) *Class deviations from the FAR or AIDAR.* Class deviations are those that affect more than one contract or contractor. Deviations involving basic ordering agreements or indefinite-delivery contracts are class deviations as they are considered to involve more than one contract.

(1) Class deviations from the AIDAR will be processed in the same manner as prescribed in paragraph (a)(2) of this section.

(2) Class deviations from the FAR will be considered jointly by USAID and the Chairperson of the Civilian Agency Acquisition Council (C/CAAC) pursuant to FAR 1.404. M/OAA/P is responsible for consultations with the C/CAAC. If the head of the contracting activity determines that urgency precludes such consultations, the deviation must include the reason, certified by the head of the contracting activity, for not coordinating with the C/CAAC and must be promptly shared with M/OAA/P. M/OAA/P is responsible for notifying the C/CAAC of the class deviation.

(3) Individual heads of contracting activities have authority to approve class deviations affecting contracts only within the contracting activity under their management authority. Only the M/OAA Director has authority to approve class deviations that affect more than one contracting activity.

(4) Class deviations from the FAR and the AIDAR will expire two (2) years from the date of approval, unless a shorter period is specified in a deviation or approval is rescinded. Class deviations from the FAR or the AIDAR that are based on statutory requirements or those that are in an active agency or Federal rulemaking process may extend beyond the 2-year period until the rulemaking is completed. Expiration of the deviation or the completion of related rulemaking ends its availability for use in future awards and modifications. Expiration dates must be shown on all class deviations.

(5) Class deviations cannot be extended, except as provided in paragraph (b)(3) of this section. A new deviation to replace an expiring deviation must be prepared and approved in accordance with applicable Agency policy.

(6) Approved class deviations must be retained by the issuing office and also in each contract file where the deviation is used.

(c) *Deviation request requirements.* All requests for deviations must contain a complete description of the deviation, the effective date of the deviation, the circumstances in which the deviation will be used, a specific reference to the regulation being deviated from, an indication as to whether any identical or similar deviations have been approved in the past, a complete justification of the deviation including any added or decreased cost to the Government, and, as applicable, the name(s) of the contractor(s), and the contract or task order number(s).

(d) *Award terms.* Once the terms and conditions of an award are approved based on a deviation, they remain in effect unless such authority is limited by the terms of the contract or removed by a modification.

[89 FR 4203, Jan. 23, 2024, as amended at 89 FR 31658, Apr. 25, 2024]

Subpart 701.6—Career Development, Contracting Authority, and Responsibilities

701.601 General.

(a) *M/OAA Director.* (1) Pursuant to the delegations in USAID's Automated Directives System (ADS) Chapter 103, the M/OAA Director is authorized to act as the head of the agency for all purposes described in the Federal Acquisition Regulation (FAR, 48 CFR chapter 1), except for the authority in FAR 6.302–7, 17.602(a), 19.201(c), 27.306(a), and 30.201–5, or where the

''head of the agency'' authority is expressly not delegable under the FAR or AIDAR. Further, the M/OAA Director is responsible for implementing the procurement-related aspects of the Foreign Assistance Act, Executive Order 11223, the Office of Federal Procurement Policy Act, and other statutory and Executive Branch procurement policies and requirements applicable to USAID operations, including those authorities and responsibilities delegated to the Senior Procurement Executive as specified in the ADS.

(2) The M/OAA Director has specific authority to:

(i) Select and appoint contracting officers and terminate their appointments in accordance with FAR 1.603; and

(ii) Exercise or delegate the authorities identified in FAR subpart 1.4 with regard to deviations from FAR subpart 1.4.

(b) *Heads of contracting activities except the M/OAA Director*. Except as otherwise prescribed, the head of each contracting activity (as defined in 702.170) is responsible for the procurement of supplies and services within the contracting activity under their management authority. The heads of USAID contracting activities are vested with broad authority to carry out the programs and activities for which they are responsible. This includes authority to execute contracts and establish procurement guidance and standards (including delegations, assignments of responsibilities, work-flow procedures, and internal reporting requirements) for their programs and activities, subject to Government-wide and USAID requirements and limitations, such as those found in this section and particularly 701.603–70, the USAID policy regarding the direct-hire status of contracting officers.

(c) *Contracting activity procedures*. A contracting activity may establish procurement guidance, standards, strategies, practices, or procedures to implement its programs and activities. Such guidance, standards, strategies, practices, or procedures must be consistent with government-wide or agency-specific regulations and policies, or, if inconsistent, must be processed as a deviation in accordance with 701.470. A contracting activity may also establish procurement guidance, standards, strategies, practices, or procedures for its programs and activities, which are in the best interest of the Government and which are not specifically addressed in the government-wide or agency-specific regulations and policies, nor prohibited by law, Executive order, or other regulation.

(d) *Limitations*. The authority of heads of contracting activities to execute contracts is limited as follows:

(1) *The Assistant to the Administrator for the Bureau of Humanitarian Assistance (AtA/BHA)*. (i) Authority to execute and modify contracts for immediate disaster relief purposes, including personal services contracts up to $500,000 per transaction.

(ii) Authority to execute simplified acquisitions up to $50,000 for immediate disaster relief purposes, or delegate such authority to qualified individuals in BHA. Such individuals must be selected and appointed in accordance with the requirements in FAR 1.603 and AIDAR 701.603.

(2) *Overseas heads of contracting activities*. (i) Authority to execute contracts and modifications where the total estimated cost of the contract, including any modifications, does not exceed $1,000,000 (or local currency equivalent) for personal services contracts.

(ii) Authority to execute simplified acquisitions within the threshold defined in FAR 2.101 (or local currency equivalent).

(iii) May delegate the authority for simplified acquisitions up to $50,000 to qualified individuals within that contracting activity. Such individuals must be selected and appointed in accordance with the requirements in FAR 1.603 and AIDAR 701.603.

[89 FR 4203, Jan. 23, 2024]

701.602–1 Authority of contracting officers in resolving audit recommendations.

With the exception of termination settlements subject to part 749, contracting officers have the authority to negotiate and enter into settlements with contractors for costs questioned under audit reports, or to issue a contracting officer's final decision pursuant to applicable dispute resolution

procedures (in the event that questioned costs are not settled by negotiated agreement) in accordance with USAID's internal policy. The negotiated settlement or final decision will be final, subject only to a contractor's appeal under the provisions of the Contract Disputes Act of 1978, as amended (41 U.S.C. 601–613), or other procedures, as applicable. Internal policy and procedures for resolving audit recommendations are found in ADS series 500 chapters for audits.

[89 FR 4204, Jan. 23, 2024]

701.602–3 Ratification of unauthorized commitments.

(a) [Reserved]

(b) *Policy*. (1) [Reserved]

(2) In order to maintain management oversight and controls on unauthorized commitments, authority to ratify unauthorized commitments within USAID is reserved to the M/OAA Director.

[53 FR 6829, Mar. 3, 1988, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

701.603 Selection, appointment, and termination of appointment of contracting officers.

701.603–70 Designation of contracting officers.

A contracting officer represents the U.S. Government through the exercise of his/her delegated authority to negotiate, sign, and administer contracts on behalf of the U.S. Government. The contracting officer's duties are sensitive, specialized, and responsible. To ensure proper accountability, and to preclude possible security, conflict of interest, or jurisdiction problems, USAID contracting officers must be U.S. citizen direct-hire employees of the U.S. Government. However, Director, Bureau for Management, Office of Acquisition and Assistance (M/OAA Director) may also designate a U.S. Personal Services Contractor (USPSC) or a Cooperating Country National Personal Services Contractor (CCNPSC) as a contracting officer with a specific level of warrant authority. To qualify for a designation as a contracting officer, an individual must meet the requirements in FAR subpart 1.6 and the Agency's applicable warrant program.

[85 FR 11861, Feb. 28, 2020]

Subpart 701.7—Determinations and Findings

701.704 Content.

There is no USAID-prescribed format or form for determinations and findings (D&Fs). D&Fs are to contain the information specified in (48 CFR) FAR 1.704 and any information which may be required by the (48 CFR) FAR or AIDAR section under which the D&F is issued.

[58 FR 8702, Feb. 17, 1993, as amended at 62 FR 40466, July 29, 1997; 79 FR 74988, Dec. 16, 2014]

701.707 Signatory authority.

Unless otherwise specified in the FAR or AIDAR section under which the D&F is issued, the contracting officer is the signing official.

[58 FR 8702, Feb. 17, 1993, as amended at 79 FR 74988, Dec. 16, 2014]

PART 702—DEFINITIONS OF WORDS AND TERMS

Subpart 702.170—Definitions

Sec.
702.170–1 Definitions.

Subpart 702.270—Definitions Clause

702.270–1 Definitions clause.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13238, Apr. 3, 1984, unless otherwise noted.

Subpart 702.170—Definitions

702.170–1 Definitions.

A word or term, defined in this section, has the same meaning throughout the AIDAR.

Administrator means the Administrator or Deputy Administrator of the U.S. Agency for International Development.

Assistant Administrator means the principal officer and advisor in a

USAID Bureau who administers programs within delegated authorities and in accordance with policies and standards established by the Administrator. The position title Assistant Administrator also includes the position Assistant to the Administrator.

Automated Directives System (ADS) sets forth the Agency's policies and essential procedures, as well as supplementary informational references. It contains six functional series, valid USAID Handbook chapters, a resource library, and a glossary. References to ''ADS'' throughout 48 CFR chapter 7 are references to the Automated Directives System. The entire ADS is accessible to the general public at the following USAID Internet address: *http://www.usaid.gov/policy/ads/*.

Contracting activities also referred to as ''procuring activities'' within USAID are:

(1) *The USAID/Washington activities.* The contracting activities located in Washington, DC are: The Bureau for Management, Office of Acquisition and Assistance (M/OAA) and the Bureau for Humanitarian Assistance (BHA). Subject to the limitations in 701.601, BHA is responsible for procurements related to programs and activities for its area. M/OAA is responsible for procurements that do not fall within the responsibility of other contracting activities, or that are otherwise assigned to it.

(2) *The overseas field contracting activities.* Each USAID Mission or post overseas is a contracting activity responsible for procurements related to its programs and activities, subject to the limitations in 701.601.

Cooperating country means a foreign country in which there is a program or activity administered by USAID.

Cooperating country national (CCN) means an individual who is a cooperating country citizen or a non-cooperating country citizen lawfully admitted for permanent residence in the cooperating country.

Executive agency includes the U.S. Agency for International Development (USAID) and its predecessor agencies, including the International Cooperation Administration.

Foreign Assistance Act means the Foreign Assistance Act of 1961, as amended (22 U.S.C., Chapter 32).

Government, Federal, State, local and political subdivisions, as used in the FAR and AIDAR, do not refer to foreign entities except as otherwise stated.

Head of agency means, for USAID, the Administrator, the Deputy Administrator, and in accordance with the responsibilities and limitations set forth in (48 CFR) AIDAR 701.601(a)(1), the M/OAA Director.

Head of the contracting activity, as used in this chapter:

(1) The heads of USAID contracting activities are listed in this paragraph (1). The limits of their contracting authority are set forth in 701.601.

(i) *USAID/Washington heads of contracting activities.* (A) Director, Bureau for Management, Office of Acquisition and Assistance; and

(B) Assistant to the Administrator, Bureau for Humanitarian Assistance (BHA).

(ii) *Overseas heads of contracting activities.* Each Mission Director or principal USAID officer at post (for example, USAID Representative, USAID Affairs Officer, and similar designations).

(2) Individuals serving in the positions listed in paragraph (1) of this definition in a designated ''Acting'' capacity may exercise the authority delegated to that position.

Mission means the USAID mission or the principal USAID office or representative (including an embassy designated to so act) in a foreign country in which there is a program or activity administered by USAID.

Overseas means outside the United States, its possessions, and Puerto Rico.

Procurement Executive is synonymous with ''Senior Procurement Executive'' as defined in FAR 2.101 and means the USAID official who is responsible for the management direction of USAID's assistance and acquisition (''A&A'' system, as so delegated and more fully described in USAID's internal delegations found in the ADS.

Procuring activity means ''contracting activity'', as defined in this subpart.

Third country national (TCN) means an individual who is neither a cooperating country national nor a U.S. national, but is a citizen or lawful permanent resident (or equivalent immigration status) of any country other than the countries which are prohibited sources. (See 22 CFR 228.15).

USAID means the U.S. Agency for International Development and its predecessor agencies, including the International Cooperation Administration (ICA).

U.S. national (USN) means an individual who is a U.S. citizen or a non-U.S. citizen lawfully admitted for permanent residence in the United States.

[79 FR 74991, Dec. 16, 2014, as amended at 89 FR 4204, Jan. 23, 2024]

Subpart 702.270—Definitions Clause

702.270–1 Definitions clause.

Use the appropriate clause in 752.202–1, in addition to the clause in (48 CFR) FAR 52.202–1.

[49 FR 13238, Apr. 3, 1984, as amended at 79 FR 74988, Dec. 16, 2014]

PART 703—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 703.1—Safeguards

Sec.

703.104–4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.
703.104–7 Violations or possible violations.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 703.1—Safeguards

703.104–4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.

A contracting officer may authorize the release of proprietary and/or source selection information outside the Government for evaluation purposes pursuant to (48 CFR) FAR 15.305(c) and (48 CFR) AIDAR 715.305(c).

[79 FR 74991, Dec. 16, 2014]

703.104–7 Violations or possible violations.

Requests for concurrence under paragraph (a)(1) of (48 CFR) FAR 3.104–7 must be forwarded to one level above the contracting officer.

[79 FR 74991, Dec. 16, 2014]

PART 704—ADMINISTRATIVE AND INFORMATION MATTERS

Subpart 704.4—Safeguarding Classified Information Within Industry

Sec.

704.404 Contract clauses.

Subpart 704.5—Electronic Commerce in Contracting

704.502 Policy.

Subpart 704.8—Contract Files [Reserved]

Subpart 704.13—Personal Identity Verification

704.1303 Contract clause.

Subpart 704.21—Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment

704.2105 Solicitation provisions and contract clause.

Subpart 704.70—Partner Vetting

704.7001 Scope of subpart.
704.7002 Definitions.
704.7003 Policy.
704.7004 Procedures.
704.7004–1 Preaward requirements.
704.7004–2 Post award requirements.
704.7004–3 Subcontracts.
704.7005 Solicitation provision and contract clause.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 704.4—Safeguarding Classified Information Within Industry

704.404 Contract clauses.

(a) When the contract includes a requirement for the contractor to access classified (''Confidential'', ''Secret'', or ''Top Secret''), or administratively controlled (''Sensitive But Unclassified'') information, the contracting officer must insert (48 CFR) FAR clause 52.204–2, Security Requirements and (48 CFR) AIDAR clause 752.204–2, Security Requirements, in the solicitation and award.

(b) [Reserved]

[79 FR 74991, Dec. 16, 2014, as amended at 89 FR 19758, Mar. 20, 2024]

Subpart 704.5—Electronic Commerce in Contracting

704.502 Policy.

USAID encourages the use of electronic commerce through USAID's eSign Portal located at DocuSign. The agency head has determined that the eSign Portal is capable of ensuring authentication and confidentiality commensurate with the risk and magnitude of the harm from loss, misuse, or unauthorized access to or modification of the information. USAID uses Login.gov for secure sign in. USAID will accept electronic signatures in connection with contracts, modifications and any other documentation where digital signatures are authorized under the FAR.

[89 FR 4204, Jan. 23, 2024]

Subpart 704.8—Contract Files [Reserved]

Subpart 704.13—Personal Identity Verification

§ 704.1303 Contract clause.

When contract performance requires the contractor—including its employees, volunteers, or subcontractor employees at any tier—to have routine physical access to USAID-controlled facilities or logical access to USAID's information systems, the contracting officer must insert the clause found at FAR 52.204–9 and AIDAR 752.204–72 (''Access to USAID Facilities and USAID's Information Systems'') in the solicitation and contract.

[89 FR 19758, Mar. 20, 2024]

Subpart 704.21—Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment

704.2105 Solicitation provisions and contract clause.

(a)–(c) [Reserved]

(d) *Personal services contracts.* The requirements in paragraphs (a) through (c) of FAR 4.2105 do not apply to solicitations and contracts for personal services with individuals issued in accordance with appendices D and J of this chapter.

[89 FR 4204, Jan. 23, 2024]

Subpart 704.70—Partner Vetting

SOURCE: 77 FR 8170, Feb. 14, 2012, unless otherwise noted.

704.7001 Scope of subpart.

This subpart prescribes the policies and procedures to apply partner vetting to USAID acquisitions.

704.7002 Definitions.

As used in this subpart—

Key individual means:

(1) Principal officers of the organization's governing body (e.g., chairman, vice chairman, treasurer and secretary of the board of directors or board of trustees);

(2) The principal officer and deputy principal officer of the organization (e.g., executive director, deputy director, president, vice president);

(3) The program manager or chief of party for the USG-financed program; and

(4) Any other person with significant responsibilities for administration of the USG-financed activities or resources, such as key personnel as described in Automated Directives System Chapter 302. Key personnel, whether or not they are employees of the prime contractor, must be vetted.

Vetting official means the USAID employee identified in the solicitation or contract as having responsibility for receiving vetting information, responding to questions about information to be included on the Partner Information Form, coordinating with the USAID Office of Security (SEC), and conveying the vetting determination to each offeror, potential subcontractors subject to vetting, and the contracting officer. The vetting official is not part of the contracting office and has no involvement in the source selection process.

704.7003 Policy.

In the interest of national security, USAID may determine that a particular acquisition is subject to vetting. In that case, USAID will require vetting of all key individuals of offerors, first tier subcontractors, and any other class of subcontracts if identified in the solicitation and resulting contract. When USAID conducts partner vetting, it will not award a contract to any offeror who does not pass vetting.

704.7004 Procedures.

704.7004–1 Preaward requirements.

(a) When USAID determines an acquisition to be subject to vetting, the contracting officer determines the appropriate stage of the acquisition cycle to require offerors to submit the completed USAID Partner Information Form, USAID Form 500–13, to the vetting official identified in the solicitation. The contracting officer must specify in the solicitation the stage at which the offerors will be required to submit the USAID Partner Information Form.

(b) For negotiated procurements using (48 CFR) FAR part 15, this stage will typically be when the contracting officer establishes the competitive range (48 CFR 15.306(c)). However, the contracting officer may determine that vetting is more appropriate at a different stage of the source selection process, such as immediately prior to award, and then require only the apparently successful offeror to submit the completed USAID Partner Information Form.

(c) For Indefinite Delivery contracts under (48 CFR) FAR subpart 16.5, vetting will occur prior to award of the basic contract if the contracting officer anticipates placing orders subject to vetting under that contract. Vetting will also occur before USAID places any orders subject to vetting. The contracting officer will notify awardees of the appropriate timing for vetting in the request for task or delivery order proposals. See (48 CFR) AIDAR subpart 716.5 for vetting procedures for task and delivery orders.

(d) For all other acquisitions, including those under (48 CFR) FAR parts 13 and 14, the contracting officer determines the appropriate time to require potential awardee(s) to submit the completed USAID Partner Information Form to the vetting official.

(e) Source selection proceeds separately from vetting. The source selection authority makes the source selection determination separately from the vetting process and without knowledge of vetting-related information other than that the apparently successful offeror has passed or not passed vetting.

(f) The contracting officer may only award to an offeror who has passed vetting.

[77 FR 8170, Feb. 14, 2012, as amended at 79 FR 74988, Dec. 16, 2014]

704.7004–2 Post award requirements.

(a) For those contracts and task orders the Agency has determined are subject to vetting, the contractor must submit the completed USAID Partner Information Form any time it changes:

(1) Key individuals, and

(2) Subcontractors for which vetting is required.

(b) USAID may vet key individuals of the contractor and any required subcontractors periodically during contract performance using the information already submitted on the Form.

[77 FR 8170, Feb. 14, 2012, as amended at 79 FR 74992 Dec. 16, 2014]

704.7004–3 Subcontracts.

(a) When the prime contract is subject to vetting, vetting is required for key individuals of all subcontracts under that contract for which consent

is required under (48 CFR) FAR clause 52.244–2, Subcontracts.

(b) The contracting officer must not consent to a subcontract with any subcontractor subject to vetting until that subcontractor has passed vetting.

(c) Vetting may be required for key individuals of subcontracts at any tier for certain classes of items (supplies and services). The contracting officer must identify these classes of items in the solicitation.

(d) The contractor may instruct prospective subcontractors who are subject to vetting to submit the USAID Partner Information Form to the vetting official as soon as the contractor submits the USAID Partner Information Form for its key individuals.

[77 FR 8170, Feb. 14, 2012, as amended at 79 FR 74988, Dec. 16, 2014]

704.7005 Solicitation provision and contract clause.

(a) The contracting officer will insert the provision at 752.204–70 Partner Vetting Pre–Award Requirements, in all solicitations USAID identifies as subject to vetting.

(b) Except for awards made under FAR part 16, the contracting officer will—

(1) Insert the clause at 752.204–71 Partner Vetting, in all solicitations and contracts USAID identifies as subject to vetting, or

(2) Use the clause with its Alternate I when USAID determines that subcontracts at any tier for certain classes of supplies or services are subject to vetting.

(c) For awards made under FAR part 16, see (48 CFR) AIDAR subpart 716.5.

[77 FR 8170, Feb. 14, 2012, as amended at 79 FR 74992, Dec. 16, 2014]

SUBCHAPTER B—ACQUISITION PLANNING

PART 705—PUBLICIZING CONTRACT ACTIONS

Sec.
705.002 [Reserved]

Subpart 705.1—Dissemination of Information

705.102 Availability of solicitations.

Subpart 705.2—Synopsis of Proposed Contract Actions

705.202 Exceptions.
705.207 [Reserved]

Subpart 705.5—Paid Advertisement

705.502 Authority.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673, 3 CFR, 1979 Comp., p. 435; 40 U.S.C. 474.

705.002 [Reserved]

Subpart 705.1—Dissemination of Information

705.102 Availability of solicitations.

In accordance with FAR 5.102(a)(5)(iii), the Senior Procurement Executive has determined that access through the Governmentwide Point of Entry is not in the Government's interest for solicitations for any contract of $250,000 or less by an overseas contracting activity issued under the authorities in 706.302–70(b)(2) or in accordance with the requirements in FAR part 13. For FAR 5.102(a)(5) exceptions applicable to personal services contracts with individuals, see appendix D, section 5 and appendix J, section 5.

[89 FR 4205, Jan. 23, 2024, as amended at 89 FR 31658, Apr. 25, 2024]

Subpart 705.2—Synopsis of Proposed Contract Actions

705.202 Exceptions.

(a) [Reserved]

(b) *Agency determinations.* The head of the U.S. Agency for International Development has determined after consultation with the Administrator of the Office of Management and Budget's Office of Federal Procurement Policy and the Administrator of the Small Business Administration, that advance notice is not appropriate or reasonable for the following:

(1) Contract actions described in 706.302–70(b)(1) through (3); or

(2) A contract of $250,000 or less by an overseas contracting activity issued in accordance with the requirements in FAR part 13.

[89 FR 4205, Jan. 23, 2024]

705.207 [Reserved]

Subpart 705.5—Paid Advertisement

705.502 Authority.

(a) The M/OAA Director, acting as head of the Agency under the authority of 701.601(a)(1), hereby authorizes USAID contracting officers to place paid advertisements and notices in newspapers and periodicals. Contracting officers shall document the contract file to reflect consideration of the requirements of (48 CFR) FAR 5.101(b)(4).

[64 FR 5006, Feb. 2, 1999, as amended at 64 FR 42042, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

PART 706—COMPETITION REQUIREMENTS

Sec.

Subparts 706.1–706.2 [Reserved]

Subpart 706.3—Other Than Full and Open Competition

706.302–5 [Reserved]
706.302–70 Impairment of foreign aid programs.
706.302–71 [Reserved]

Subpart 706.5—Competition Advocates

706.501 Requirement.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673, 3 CFR, 1979 Comp., p. 435; 40 U.S.C. 474.

Subparts 706.1–706.2 [Reserved]

Subpart 706.3—Other Than Full and Open Competition

706.302–5 [Reserved]

706.302–70 Impairment of foreign aid programs.

(a) *Authority.* (1) The authority is 40 U.S.C. 113.

(2) Full and open competition need not be obtained when it would impair or otherwise have an adverse effect on programs conducted for the purposes of foreign aid, relief, and rehabilitation.

(b) *Application.* This authority may be used for:

(1) Personal services performed abroad by an individual under the authorities of section 636(a)(3) of the Foreign Assistance Act of 1961, as amended;

(2) Supplies or services with a total value of $250,000 or less by an overseas contracting activity;

(3)(i) Supplies or services when the cognizant Assistant Administrator makes a formal written Determination and Findings (D&F)(see FAR subpart 1.7), that compliance with full and open competition procedures to procure the goods or services through one or more contract actions would impair foreign assistance objectives and would be inconsistent with the fulfillment of one or more foreign assistance programs for which the Assistant Administrator is responsible; or

(ii) Supplies or services for countries, regions, or programs for which the Administrator of USAID makes a D&F (see FAR subpart 1.7) that compliance with full and open competition procedures would impair foreign assistance objectives, and would be inconsistent with the fulfillment of foreign assistance programs;

(4) Supplies or services awarded under 715.370–1 or 715.370–2; and

(5) A specific contract for the continued provision of highly-specialized services when an award to another contractor would result in substantial additional costs to the Government or cause unacceptable delays.

(c) *Limitations.* (1) A contract awarded using the authority in paragraph (a) of this section must be supported by a written justification and approval (J&A) meeting the requirements of FAR 6.303 and 6.304, except that a determination made under paragraph (b)(3) of this section will not be subject to the requirement for contracting officer certification or to approvals required in FAR 6.304.

(2) Proposals must be requested from as many potential offerors as is practicable under the circumstances.

(3) When using the authorities in paragraphs (b)(4) and (5) of this section the contracting officer must publicize the advance notice of the proposed contract action as required in FAR 5.201. However, when the authorities at paragraphs (b)(1) through (3) of this section are used, advance notice of proposed contract action is not required in accordance with AIDAR 705.202.

(4) The authority in paragraph (b)(3) of this section shall be used only when no other authority provided in FAR 6.302 or AIDAR 706.302 is suitable. The specific foreign assistance objective that would be impaired must be identified and explained in a written D&F. Prior consultation with the Agency Competition Advocate (see 706.501) is required before executing the written D&F, and this consultation must be reflected in the D&F. In addition, the contracting activity must prepare a J&A as required in paragraph (c)(1) of this section.

(5) Use of the authority in paragraph (b)(5) of this section for proposed follow-on contracts or modifications to extend contracts for the continued provision of highly-specialized services in excess of one year or over $250,000 is subject to the approval of the Agency Competition Advocate. For all other extensions and follow-on contracts relying on the authority in paragraph (b)(5), the contracting officer's certification required in FAR 6.303–2(b)(12) will serve as approval.

[89 FR 4205, Jan. 23, 2024]

706.302–71 [Reserved]

Subpart 706.5—Competition Advocates

706.501 Requirement.

The USAID Administrator delegated the authority to designate the Agency

Competition Advocate and a competition advocate for each agency procuring activity (see 702.170 of this chapter) to the M/OAA Director. The M/OAA Director, under the Administrator's delegation, has designated the M/OAA Deputy Director for Accountability, Compliance, Transparency, and Support as the Agency Competition Advocate and the deputy head of each contracting activity as the competition advocate for each activity. The competition advocate for USAID/W is the Deputy Director for M/OAA Operations. If there is no deputy, the head of the contracting activity is designated the competition advocate for that activity. The competition advocate's duties may not be redelegated, but can be exercised by persons serving as acting deputy (or acting head) of the contracting activity. For definitions of contracting activity and head of the contracting activity, see 702.170 of this chapter.

[79 FR 74992, Dec. 16, 2014]

PART 707—ACQUISITION PLANNING

Subpart 707.1—Acquisition Plans

707.104 General procedures.

Policies, procedures, and internal guidance for acquisition planning are found in ADS 300.

[79 FR 74992, Dec. 16, 2014]

PART 709—CONTRACTOR QUALIFICATIONS

Sec.

Subpart 709.4—Debarment, Suspension and Ineligibility

709.403 Definitions.

Subpart 709.5—Organizational Conflicts of Interest

709.503 Waiver.

709.507–2 Contract clause.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 709.4—Debarment, Suspension and Ineligibility

709.403 Definitions.

Debarring official in USAID is the Assistant Administrator, Bureau for Management, or designee as delegated in Agency policy found in ADS 103—Delegations of Authority.

Suspending official in USAID is the Assistant Administrator, Bureau for Management, or designee as delegated in Agency policy found in ADS 103—Delegations of Authority.

[79 FR 74992, Dec. 16, 2014; 80 FR 12935, Mar. 12, 2015]

Subpart 709.5—Organizational Conflicts of Interest

709.503 Waiver.

For purposes of approving waivers or further delegating the authority to approve waivers pursuant to (48 CFR) FAR 9.503, the M/OAA Director is the agency head (see (48 CFR) AIDAR 701.601(a)(1)). The M/OAA Director hereby delegates the authority to approve waivers pursuant to (48 CFR) FAR 9.503 to the heads of USAID contracting activities, as defined in (48 CFR) AIDAR 702.170.

[64 FR 42042, Aug. 3, 1999, as amended at 72 FR 19670, Apr. 19, 2007; 79 FR 74988, 74992, Dec. 16, 2014]

709.507–2 Contract clause.

(a)–(b) [Reserved]

(c) In order to avoid problems from organizational conflicts of interest that may be discovered after award of a contract, the clause found at 752.209–71 shall be inserted in all contracts whenever the solicitation or resulting contract or both include a provision in accordance with (48 CFR) FAR 9.507–1, or a clause in accordance with (48 CFR) FAR 9.507–2, establishing a restraint on the contractor's eligibility for future contracts.

[58 FR 42255, Aug. 9, 1993, as amended at 64 FR 5006, Feb. 2, 1999]

PART 711—DESCRIBING AGENCY NEEDS

Sec.
711.002–70 Metric system waivers.
711.002–71 Solicitation provisions and contract clauses.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

711.002–70 Metric system waivers.

(a) *Criteria.* The (48 CFR) FAR 11.002(b) requirement to use the metric system of measurement for specifications and quantitative data that are incorporated in or required by USAID contracts may be waived when USAID determines in writing that such usage is impractical or is likely to cause U.S. firms to experience significant inefficiencies or the loss of markets.

(b) *Authorization.* (1) The USAID Metric Executive (as designated in ADS Chapter 323), the contracting officer, and the USAID official who approves the procurement requirement are authorized to waive the metric requirement for one of the above reasons. The USAID Metric Executive is authorized to overrule a decision to grant a waiver, or to nullify a blanket waiver made by another approving official so long as a contractor's rights under an executed contract are not infringed upon.

(2) A blanket waiver for a class of multiple transactions may be issued for a term not to exceed three years.

(3) When a waiver will be based upon the adverse impact on U.S. firms, clearance from the USAID Metric Executive and the Office of Small and Disadvantaged Business Utilization (OSDBU) will be obtained prior to authorization.

(c) *Records and reporting.* (1) The basis for each waiver and any plans to adapt similar requirements to metric specifications in future procurements should be documented in the contract file.

(2) Each procurement activity will maintain a log of the waivers from the metric requirements which are authorized for its procurements. The logs shall list the commodity/service being procured, total dollar value of the procured item(s), waiver date, authorizing official, basis for waiver, and USAID actions that can promote metrication and lessen the need for future waivers.

(3) Within 30 days of the closing of each fiscal year, each USAID/W procurement activity and each Mission will submit a copy of the metric waiver log for the year to the USAID Metric Executive. (Mission logs are to be consolidated in a Mission report for the procurement activity and for the nonprocurement activities maintaining such logs under the USAID Metric Transition Plan.) Repetitive purchases of commercially produced and marketed items and classes of items may be consolidated in reporting procurements that do not exceed $10,000 cumulatively during the reporting period.

[57 FR 23321, June 3, 1992, as amended at 59 FR 33446, June 29, 1994. Redesignated and amended at 61 FR 39091, July 26, 1996. Redesignated and amended at 62 FR 40467, July 29, 1997; 79 FR 74988, 74992, Dec. 16, 2014]

711.002–71 Solicitation provisions and contract clauses.

The contracting officer shall insert the clause at 752.211–70 in all USAID-direct solicitations and contracts.

[57 FR 23321, June 3, 1992. Redesignated and amended at 61 FR 39091, July 26, 1996]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 713—SIMPLIFIED ACQUISITION PROCEDURES

Sec.
713.000 Scope of part.
713.001 Definitions.

Subpart 713.1—Procedures

713.106–370 Partner vetting.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

SOURCE: 61 FR 39091, July 26, 1996, unless otherwise noted.

713.000 Scope of part.

The simplified acquisition threshold applies to the cost of supplies and services, exclusive of the cost of transportation and other accessorial costs if their destination is outside the United States.

713.001 Definitions.

Accessorial costs means the cost of getting supplies or services to their destination in the cooperating country (and the travel costs of returning personnel to the U.S. or other point of hire). It does not include costs such as allowances or differentials related to maintaining personnel at post which are to be considered as part of the base costs within the simplified acquisition threshold.

[61 FR 39091, July 26, 1996. Redesignated at 79 FR 74993, Dec. 16, 2014]

Subpart 713.1—Procedures.

713.106–370 Partner vetting.

If an acquisition is identified as subject to vetting, see (48 CFR) AIDAR 704.70 for the applicable procedures and requirements.

[77 FR 8171, Feb. 14, 2012]

PART 714—SEALED BIDDING

Subpart 714.4—Opening of Bids and Award of Contract

Sec.
714.407–3 Other mistakes disclosed before award.
714.407–4 Mistakes after award.
714.408–170 Partner vetting.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 714.4—Opening of Bids and Award of Contract

714.407–3 Other mistakes disclosed before award.

The M/OAA Director is the designated central authority to make the determinations described in (48 CFR) FAR 14.407–3.

[49 FR 13240, Apr. 3, 1984, as amended at 54 FR 46389, Nov. 3, 1989; 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007. Redesignated and amended at 79 FR 74993, Dec. 16, 2014]

714.407–4 Mistakes after award.

The M/OAA Director is the designated central authority to make the determinations described in (48 CFR) FAR 14.407–4.

[49 FR 13240, Apr. 3, 1984, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007. Redesignated and amended at 79 FR 74993, Dec. 16, 2014]

714.408–170 Partner vetting.

If an acquisition is identified as subject to vetting, see (48 CFR) AIDAR 704.70 for the applicable procedures and requirements.

[77 FR 8171, Feb. 14, 2012]

PART 715—CONTRACTING BY NEGOTIATION

Subpart 715.3—Source Selection

Sec.
715.303 Responsibilities.

715.303–70 Responsibilities of USAID evaluation committees.
715.305 Proposal evaluation.
715.370 Alternative source selection procedures.
715.370–1 Title XII selection procedure—general.
715.370–2 Title XII selection procedure—collaborative assistance.

Subpart 715.6—Unsolicited Proposals

715.602 Policy.
715.604 Agency points of contact.

Subpart 715.70—Partner Vetting

715.70 Partner vetting.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13240, Apr. 3, 1984, unless otherwise noted.

Subpart 715.3—Source Selection

715.303 Responsibilities.

715.303–70 Responsibilities of USAID evaluation committees.

(a) *Establishment and composition of USAID evaluation committees.* A technical evaluation committee shall be established for each proposed procurement. In each case, the committee shall be composed of a chair representing the cognizant technical office, a representative of the contracting office (who shall be a non-voting member of the committee), and representatives from other concerned offices as appropriate.

(b) *Technical evaluation procedures.* (1) The contracting officer will receive all proposals and provide to the chair a listing and copies of the technical proposals and instructions for conducting the evaluation.

(2) The chair will promptly call a meeting of the committee to evaluate the proposals received. The evaluation shall be based on the evaluation factors set forth in the solicitation document.

(3) The chair shall prepare and provide to the contracting officer written documentation summarizing the results of the evaluation of each proposal, including an assessment of past performance information in accordance with (48 CFR) FAR 15.305(a)(2). The documentation shall include narrative justification of the evaluation results.

(4) The contracting officer is responsible for reviewing the documentation justifying the evaluation results to determine that it is adequate and complete. The contracting officer shall return a justification determined to be inadequate to the chair for revision.

(5) No member of the USAID evaluation committee shall hold discussions with any offeror before or during the USAID evaluation committee's proceedings, nor shall any information about the proposals be provided to anyone not on the committee without first obtaining the contracting officer's consent.

[61 FR 39091, July 26, 1996. Redesignated and amended at 64 FR 16648, Apr. 6, 1999; 79 FR 74988, Dec. 16, 2014]

715.305 Proposal evaluation.

(a) [Reserved]

(b) A justification must be written by the contracting officer and placed in the official file to support the decision to reject all proposals and to cancel the procurement.

(c) The contracting officer may authorize release of proposals outside the Government for evaluation—

(1) When an Evaluation Assistance Contract (EAC) is required to provide technical advisory or other services relating to the evaluation of proposals; or

(2) When an individual other than a Government employee, known as a Non-Government Evaluator (NGE), is selected to serve as a member of a USAID technical evaluation committee.

(3) Prior to releasing the proposals outside the Government, the contracting officer must obtain a signed and dated agreement from each NGE and EAC employee that they will safeguard the proposals and information in the proposals and that they perceive no actual or potential conflict of interests. (An example of such agreement is provided in the ADS).

[64 FR 16648, Apr. 6, 1999; 64 FR 25405, May 11, 1999, as amended at 65 FR 36642, June 9, 2000; 79 FR 74993, Dec. 16, 2014]

715.370 Alternative source selection procedures.

The following selection procedures may be used, when appropriate, for activities covered under Title XII of the Foreign Assistance Act of 1961, as amended.

[64 FR 16649, Apr. 6, 1999]

715.370–1 Title XII selection procedure—general.

(a) *General.* The Deputy Administrator has determined, as provided in (48 CFR) AIDAR 706.302–70(b)(3)(ii) that use of this Title XII source selection procedure is necessary so as not to impair or affect USAID's ability to administer Title XII of the Foreign Assistance Act. This determination is reflected in (48 CFR) AIDAR 706.302–70(b)(4). This constitutes authority for other than full and open competition when selecting Title XII institutions to perform Title XII projects.

(b) *Scope of subsection.* This subsection prescribes policies and procedures for the selection of institutions eligible under Title XII of the Foreign Assistance Act of 1961, as amended, to perform activities authorized under Title XII.

(c) *Applicability.* The provisions of this subsection are applicable when the project office certifies that the activity is authorized under Title XII, and determines that use of the Title XII selection procedure is appropriate.

(d) *Solicitation, evaluation, and selection procedures.* (1) Competition shall be sought among eligible Title XII institutions to the maximum practicable extent; this requirement shall be deemed satisfied when a contractor is selected under the procedures of this subsection.

(2) The project office shall—

(i) Prepare selection criteria for evaluation of eligible institutions for use in preparing the source list, determining predominantly qualified sources, and selecting the contractor;

(ii) Prepare an initial list of eligible institutions considered qualified to perform the proposed activity;

(iii) Provide a statement describing qualifications and areas of expertise considered essential, a statement of work, estimate of personnel requirements, special requirements (logistic support, Government furnished property, and so forth) for the contracting officer's use in preparing the request for technical proposal (RFTP).

(iv) Send a memorandum incorporating the certification and determination required by paragraph (c) of this section, together with the information required by paragraphs (d)(2)(i) through (iii) of this section, with the ''Action'' copy of the requisition to the contracting officer, requesting him/her to prepare and distribute the RFTP.

(3) Upon receipt and acceptance of the project officer's request, the contracting officer shall prepare the RFTP. The RFTP shall contain sufficient information to enable an offeror to submit a responsive and complete technical proposal. This includes a definitive statement of work, an estimate of the personnel required, and special provisions (such as logistic support, Government furnished equipment, and so forth), a proposed contract format, and evaluation criteria. No cost or pricing data will be requested or required by the RFTP. The RFTP will be distributed to the eligible institutions recommended by the project office. The RFTP will be synopsized, as required by (48 CFR) FAR 5.201, and will normally allow a minimum of 60 days for preparation and submission of a proposal.

(4) Upon receipt of responses to the RFTP by the contracting officer, an evaluation committee will be established as provided for in 715.303–70.

(5) The evaluation committee will evaluate all proposals in accordance with the criteria set forth in the RFTP, and will prepare a selection memorandum which shall:

(i) State the evaluation criteria;

(ii) List all of the eligible institutions whose proposals were reviewed;

(iii) Report on the ranking and rationale therefor for all proposals;

(iv) Indicate the eligible institution or institutions considered best qualified.

(6) The evaluation committee will submit the selection memorandum to the contracting officer for review and approval.

(7) The contracting officer will either approve the selection memorandum, or

return it to the evaluation committee for reconsideration for specified reasons.

(8) If the selection memorandum is approved, the contracting officer shall obtain cost, pricing, and other necessary data from the recommended institution or institutions and shall conduct negotiations. If a satisfactory contract cannot be obtained, the contracting officer will so advise the evaluation committee. The evaluation committee may then recommend an alternate institution or institutions.

[52 FR 6158, Mar. 2, 1987, as amended at 54 FR 28069, July 5, 1989; 55 FR 6802, Feb. 27, 1990. Redesignated at 64 FR 16648, Apr. 6, 1999, as amended at 79 FR 74988, 74993, Dec. 16, 2014]

715.370–2 Title XII selection procedure—collaborative assistance.

(a) *General.* (48 CFR) AIDAR 706.302–70(b)(4) provides authority for other than full and open competition when selecting Title XII institutions to perform Title XII activities.

(b) *Scope of subsection.* This subsection prescribes policies and procedures for the selection of institutions eligible under Title XII of the Foreign Assistance Act of 1961, as amended, to perform activities authorized under Title XII, where USAID has determined, in accordance with paragraph (c) of this subsection, that use of the collaborative assistance contracting system is appropriate. See (48 CFR) AIDAR appendix F (of this chapter)—Use of Collaborative Assistance Method for Title XII Activities for a more complete definition and discussion of the collaborative assistance method.

(c) *Determinations.* The following findings and determinations must be made prior to initiating any contract actions under the collaborative assistance method:

(1) The cognizant technical office makes a preliminary finding that an activity:

(i) Is authorized by Title XII; and

(ii) Should be classed as collaborative assistance because a continuing collaborative relationship between USAID, the host country, and the contractor is required from design through completion of the activity, and USAID, host country, and contractor participation in a continuing review and evaluation of the activity is essential for its proper execution.

(2) Based upon this preliminary finding, the cognizant technical office shall establish an evaluation panel consisting of a representative of the cognizant technical office as chairman, a representative of the contracting officer, and any other representatives considered appropriate by the chairman to review the proposed activity for its appropriateness under the collaborative assistance method.

(3) If supported by the panel's findings, the chairman will make a formal written determination that the collaborative assistance method is the appropriate contracting method for the Title XII activity in question.

(d) *Evaluation and selection.* (1) Competition shall be sought among eligible Title XII institutions to the maximum practicable extent; this requirement shall be deemed satisfied when a contractor is selected under the procedures of this section.

(2) The evaluation panel shall:

(i) Prepare evaluation and selection criteria;

(ii) Prepare an initial source list of eligible institutions considered qualified to perform the proposed project; and

(iii) Evaluate the list, using the evaluation criteria previously determined, for the purpose of making a written determination of the sources considered most capable of performing the project.

(3) The chairman of the evaluation panel will prepare a memorandum requesting the contracting officer to prepare a request for expressions of interest from qualified sources and setting forth:

(i) The formal determinations required by paragraph (c) of this section;

(ii) The evaluation criteria which have been determined; and

(iii) The recommended source list and the rationale therefor.

(4) The contracting officer will prepare a request for an expression of interest (REI), containing sufficient information to permit an offeror to determine its interest in the project, and to discuss the project with USAID representatives, if appropriate. The REI should include a concise statement of the purpose of the activity, any special

conditions or qualifications considered important, a brief description of the selection procedure and evaluation criteria which will be used, the proposed contract format, and any other information considered appropriate. The REI will be issued to the sources recommended by the panel, and to others, as appropriate; it will be synopsized, as required by (48 CFR) FAR 5.201, and it will normally allow a minimum of 60 days for preparation of an expression of interest. Guidelines for preparation of expressions of interest are contained in attachment 1 to (48 CFR) AIDAR appendix F.

(5) The contracting officer will transmit all expressions of interest to the evaluation panel for evaluation and selection recommendation. The panel may conduct on site evaluations at its discretion, as part of the evaluation process.

(6) The chairman of the evaluation panel will prepare a written selection recommendation with supporting justification, recommending that negotiations be conducted with the prospective contractor(s) selected by the evaluation panel. The selection recommendation shall be transmitted to the contracting officer together with the complete official file on the project which was being maintained by the evaluation panel.

(7) The contracting officer will review the selection recommendation, obtain necessary cost and other data, and proceed to negotiate with the recommended sources.

[52 FR 6159, Mar. 2, 1987, as amended at 54 FR 28069, July 5, 1989; 55 FR 6802, Feb. 27, 1990; 62 FR 40467, July 29, 1997; 62 FR 45334, Aug. 27, 1997; 62 FR 47532, Sept. 9, 1997. Redesignated at 64 FR 16648, Apr. 6, 1999, as amended at 79 FR 74988, 74993, Dec. 16, 2014]

Subpart 715.70—Partner Vetting

715.70 Partner vetting.

If an acquisition is identified as subject to vetting, see (48 CFR) AIDAR 704.70 for the applicable procedures and requirements.

[77 FR 8171, Feb. 14, 2012]

Subpart 715.6—Unsolicited Proposals

715.602 Policy.

(a) USAID encourages the submission of unsolicited proposals that contribute new and innovative ideas that are consistent with and contribute to the accomplishment of the Agency's objectives. Potential offerors should consider the guidance in FAR 15.6 and in AIDAR 715.6 prior to preparing and submitting a formal unsolicited proposal.

(b) Unsolicited proposals will only be considered when they support USAID strategy. USAID Mission programs must be responsive to the needs of the cooperating country; projects are often designed in collaboration with the cooperating country. These factors can limit both the need for, and USAID's ability to use, unsolicited proposals.

(c) The *USAID.gov* website contains information on working with USAID and on individual Mission and Agency-wide strategies and objectives. Prospective offerors are also encouraged to review USAID's Business Forecast web page and consider responding to USAID competitive announcements published on *sam.gov* and *grants.gov*.

[89 FR 4205, Jan. 23, 2024]

715.604 Agency points of contact.

(a) USAID's Industry Liaison, Bureau for Management, Office of Acquisition and Assistance, manages the receipt and evaluation of unsolicited proposals. Unsolicited proposals may be submitted via: *https://www.workwithusaid.gov/unsolicited-submissions*.

(b) Before preparing a detailed unsolicited proposal or submitting proprietary information, a prospective offeror may make preliminary contact with USAID bureaus, field missions, or other operating units to obtain information sources on USAID's strategies and objectives and other information listed in FAR 15.604 and AIDAR 715.602.

[89 FR 4206, Jan. 23, 2024]

PART 716—TYPES OF CONTRACTS

Subpart 716.3—Cost Reimbursement Contracts

Sec.
716.303 Cost-sharing contracts.
716.306 [Reserved]
716.406 Contract clauses.

Subpart 716.5—Indefinite-Delivery Contracts

716.501–270 Partner vetting—indefinite-delivery contracts.
716.505–70 Partner vetting—orders under indefinite delivery contracts.
716.506 Solicitation provision and contract clause.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381) as amended: E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 716.3—Cost Reimbursement Contracts

716.303 Cost-sharing contracts.

(a)–(b) [Reserved]

(c) *Limitations.* In addition to the limitations specified in (48 CFR) FAR 16.301–3, prior approval of the M/OAA Director (see 701.601(a)(1)) is required in order to use a cost-sharing contract with an educational institution.

[54 FR 46390, Nov. 3, 1989, as amended at 64 FR 42042, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007; 79 FR 74988, Dec. 16, 2014]

716.306 [Reserved]

716.406 Contract clauses.

The contracting officer must insert the clause at 752.216–70, Award Fee, in solicitations and contracts when an award-fee contract is contemplated.

[64 FR 5007, Feb. 2, 1999, as amended at 79 FR 74993, Dec. 16, 2014]

Subpart 716.5—Indefinite-Delivery Contracts

SOURCE: 77 FR 8171, Feb. 14, 2012, unless otherwise noted.

716.501–270 Partner vetting—indefinite-delivery contracts.

If a task order or delivery order under an indefinite-delivery contract has the potential to be subject to vetting, then the contract itself will be subject to the applicable procedures and requirements for partner vetting in (48 CFR) AIDAR 704.70.

716.505–70 Partner vetting—orders under indefinite delivery contracts.

(a) The task order contracting officer will specify in the request for task or delivery order proposals whether the order is subject to vetting and when awardees must submit the USAID Partner Information Form.

(b) For orders under multiple award contracts, fair opportunity selection procedures are conducted separately from vetting. The contracting officer for the order must follow the ordering procedures in the contract to select the order awardee without knowledge of vetting-related information, other than that the contractor has passed or not passed vetting.

(c) The contracting officer may only place an order subject to vetting with an awardee that has passed vetting for that order.

716.506 Solicitation provision and contract clause.

(a) As prescribed in 48 CFR 704.7005(a), the contracting officer will insert the provision at 752.204–70 Partner Vetting Pre–Award Requirements, in solicitations for indefinite delivery contracts when USAID anticipates that any orders placed under the contract will be subject to vetting.

(b)(1) The contracting officer will insert the clause at 752.216–71 Partner Vetting, in those solicitations and contracts for indefinite-delivery contracts that USAID identifies as subject to vetting.

(2) The contracting officer will use the clause with its Alternate I when USAID determines that subcontracts at any tier for certain classes of supplies or services are subject to vetting.

PART 717—SPECIAL CONTRACTING METHODS

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 717.70—Pharmaceutical Products

717.770 General.

Section 606(c) of the Foreign Assistance Act bars procurement by the Government of drug and pharmaceutical products manufactured outside the United States if their manufacture involves the use of or is covered by an unexpired U.S. patent which has not been held invalid by an unappealed or unappealable court decision unless the manufacture is expressly authorized by the patent owner. Applicable policies and procedures are set forth in USAID Automated Directive System Chapter 312.

[49 FR 13243, Apr. 3, 1984, as amended at 61 FR 39092, July 26, 1996. Redesignated at 79 FR 74993, Dec. 16, 2014]

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 719—SMALL BUSINESS PROGRAMS

Subpart 719.2—Policies

Sec.
719.270 Small business policies.
719.271 Agency program direction and operation.
719.271–1 General.
719.271–2 The USAID Office of Small and Disadvantaged Business Utilization (OSDBU).
719.271–3 USAID contracting officers.
719.271–4 Heads of contracting activities.
719.271–5 Contracting officer's representatives.
719.271–6 Small business screening procedure.
719.271–7 Reports on procurement actions that are exempted from screening.
719.272 [Reserved]

Subpart 719.273—The U.S. Agency for International Development (USAID) Mentor-Protégé Program

719.273 The U.S. Agency for International Development Mentor-Protégé Program.
719.273–1 Purpose.
719.273–2 Definitions.
719.273–3 Incentives for prime contractor participation.
719.273–4 Eligibility of Mentor and Protégé firms.
719.273–5 Selection of Protégé firms.
719.273–6 Application process.
719.273–7 OSDBU review of application.
719.273–8 Developmental assistance.
719.273–9 Obligations under the Mentor-Protégé Program.
719.273–10 Internal controls.
719.273–11 Solicitation provision and contract clause.

Subpart 719–7—The Small Business Subcontracting Program

719.708 Contract clause.

AUTHORITY: 42 U.S.C. 7254, 40 U.S.C. 486(c), 42 U.S.C. 2201.

SOURCE: 49 FR 13243, Apr. 3, 1984, unless otherwise noted.

Subpart 719.2—Policies

719.270 Small business policies.

(a) In keeping with section 602 of the Foreign Assistance Act of 1961 (22 U.S.C. 2352), as amended, USAID shall, insofar as practicable and to the maximum extent consistent with the accomplishment of the purposes of said Act, assist U.S. small businesses to participate equitably in the furnishing of supplies and services for Foreign Assistance activities.

(b) It is the policy of USAID to:

(1) Fully endorse and carry out the Government's small business program for placing a fair proportion of its purchases and contracts for supplies, construction (including maintenance and repair), research and development, and services (including personal, professional, and technical services) with small business, including minority small business concerns; and

(2) Increase their participation in USAID procurement.

(c) In furtherance of this policy:

(1) Contracting officer's representatives shall make positive efforts (see 719.271–5) to identify potentially qualified small and minority business firms during precontract development of activities and shall, with the responsible contracting officers, assure that such firms are given full opportunity to participate equitably;

(2) Small business set-asides shall be made for all contracts to be executed in USAID/Washington which qualify for small business set-aside action under part 19 of the (48 CFR) FAR; and

(3) Consideration shall be given in appropriate cases to the award of the contract to the Small Business Administration for subcontracting to small business firms pursuant to section 8(a) of the Small Business Act (15 U.S.C. 637(a)).

(d) This program shall be implemented by all USAID/Washington contracting activities in order to attain these policy objectives. In accordance with 719.271, all USAID/Washington direct-procurement requirements which exceed the simplified acquisition threshold shall be screened for small business opportunities by the Office of Small and Disadvantaged Business Utilization (OSDBU) except those exempted by 719.271–6(a).

(e) Where practicable and desirable, small business and minority business

enterprise award goals will be established for the respective USAID/Washington procuring activities to provide incentive for contracting personnel to increase awards to small firms. The goals will be set by OSDBU after consultation with the respective head of the contracting activity (see 702–170).

(f) In the event of a disagreement between OSDBU and the contracting officer concerning: (1) A recommended setaside, or (2) a request for modification or withdrawal of a class or individual set-aside, complete documentation of the case including the reasons for disagreement shall be transmitted within five working days to the head of the contracting activity (see 719.271–6(e)) for a decision. Procurement action shall be suspended pending a decision.

(g) The above suspension shall not apply where the contracting officer:

(1) Certifies in writing, with supporting information, that in order to protect the public interest award must be made without delay;

(2) Promptly provides a copy of said certification to OSDBU; and

(3) Includes a copy of the certification in the contract file.

(h) OSDBU shall be the Small Business Advisor and Minority Business Procurement Policy Manager for all USAID/Washington procuring activities.

(i) The details on the Agency's direction and operation of the small business program are set forth in 719.271.

(j) No decision rendered, or action taken, under the coverage set forth in 719.271 shall preclude the Small Business Administration from appealing directly to the USAID Administrator as provided for in part 19 of the FAR.

[49 FR 13243, Apr. 3, 1984, as amended at 52 FR 21058, June 4, 1987; 56 FR 67224, Dec. 30, 1991; 61 FR 39092, July 26, 1996; 62 FR 40468, July 29, 1997; 79 FR 74988, 74993, Dec. 16, 2014]

719.271 Agency program direction and operation.

719.271–1 General.

The purpose of this section is to prescribe responsibilities and procedures for carrying out the small business program policy set forth in 219.270, and in part 19 of the (48 CFR) FAR. Small business concerns are defined in (48 CFR) FAR subpart 19.1; in addition, small business concerns are concerns organized for profit. Nonprofit organizations are not considered small business concerns. Small disadvantaged business enterprises are defined in (48 CFR) FAR subpart 19.1. Small disadvantaged business enterprises are included in the term ''small business'' when used in this subpart; specific reference to disadvantaged business enterprises is for added emphasis.

[49 FR 13243, Apr. 3, 1984, as amended at 79 FR 74988, 74993, Dec. 16, 2014]

719.271–2 The USAID Office of Small and Disadvantaged Business Utilization (OSDBU).

(a) OSDBU is responsible for administering, implementing, and coordinating the Agency's small business (including minority business enterprises) program.

(b) OSDBU, headed by the Director, OSDBU, who also serves as the Minority Business Procurement Manager, shall be specifically responsible for:

(1) Developing policies, plans, and procedures for a coordinated Agency-wide small business and minority business enterprise procurement program;

(2) Advising and consulting regularly with USAID/Washington procuring activities on all phases of their small business program, including, where practicable and desirable, the establishment of small business and minority business enterprise award goals;

(3) Collaborating with officials of the Small Business Administration (SBA), other Government Agencies, and private organizations on matters affecting the Agency's small business program;

(4) [Reserved]

(5) Cooperating with contracting officers in administering the performance of contractors subject to the Small Business and Minority Business Enterprises Subcontracting Program clauses;

(6) Developing a plan of operation designed to increase the share of contracts awarded to small business concerns, including small minority business enterprises;

(7) Establishing small business class set-aside for types and classes of items of services where appropriate;

(8) Reviewing each procurement requisition to make certain individual or class set-asides are initiated on all suitable USAID/Washington proposed contract actions in excess of the simplified acquisition threshold which are subject to screening (see 719.271–6);

(9) Maintaining a program designed to:

(i) Locate capable small business sources for current and future procurements through GSA and other methods;

(ii) Utilize every source available to determine if an item is obtainable from small business; and

(iii) Develop adequate small business competition on all appropriate procurements;

(10) Taking action to assure that unnecessary qualifications, restrictive specifications, or other features (such as inadequate procurement lead time) of the programming or procurement process, which may prevent small business participation in the competitive process, are modified to permit such participation where an adequate product or service can be obtained;

(11) Recommending that portions of large planned procurements or suitable components of end items or services be purchased separately so small firms may compete;

(12) On proposed non-competitive procurements, recommending to the contracting officer that the procurement be made competitive when, in the opinion of OSDBU, there are small business or minority business enterprises believed competent to furnish the required goods or services, and supplying the contracting officer a list of such firms;

(13) Assisting small business concerns with individual problems;

(14) Promoting increased awareness by the technical staff of the availability of small business firms;

(15) Making available to GSA copies of solicitations when so requested;

(16) Counseling non-responsive or non-responsible small business bidders/offerors to help them participate more effectively in future solicitations; and

(17) Examining bidders lists to make certain small business firms are appropriately identified and adequately represented for both negotiated and advertised procurements.

[49 FR 13243, Apr. 3, 1984, as amended at 52 FR 21058, June 4, 1987; 61 FR 39092, July 26, 1996; 62 FR 40468, July 29, 1997 ; 79 FR 74993, Dec. 16, 2014]

719.271–3 USAID contracting officers.

With respect to procurement activities within their jurisdiction, contracting officers are responsible for:

(a) Being thoroughly familiar with part 19 of the (48 CFR) FAR and this section dealing with the small business program;

(b) Screening abstracts of bids and other award data to determine set-aside potential for future procurements;

(c) Assuring that small business concerns and minority business enterprises are appropriately identified on source lists and abstracts of bids or proposals by an ''S'' and ''M'', respectively, or other appropriate symbol;

(d) Reviewing types and classes of items and services to determine where small business set-asides can be applied;

(e) Recommending that portions of large planned procurements of suitable components of end items or services be purchased separately so small firms may compete;

(f) Making a unilateral determination for total or partial small business set-asides in accordance with subpart 19.5 of the Federal Acquisition Regulations;

(g) Submitting proposed procurement actions for USAID/Washington contracts to OSDBU for screening (see 719.271–6);

(h) Taking action to assure that unnecessary qualifications, restrictive specifications or other features (such as inadequate procurement lead time) of the programming or procurement process which may prevent small business participation in the competitive process are modified to permit such participation where an adequate product or service can be obtained;

(i) Prior to rendering a final decision on a proposed non-competitive procurement action, and as part of his/her findings and determinations, the contracting officer shall consider the recommendations, if any, of SDB together

with the latter's list of additional sources;

(j) As appropriate, referring small business concerns, including small minority business enterprises, to OSDBU for information and advice;

(k) Promoting increased awareness by the technical staff of the availability of small business concerns;

(l) Making available to OSDBU copies of solicitations when requested;

(m) Assisting OSDBU in counseling non-responsive or non-responsible small business bidders/offerors to help them to participate more effectively in future solicitations; and

(n) Including the Small Business and Minority Business Enterprises Subcontracting Program clauses in all contracts where required by part 19 of the (48 CFR) FAR.

[49 FR 13243, Apr. 3, 1984, as amended at 61 FR 39092, July 26, 1996; 62 FR 40468, July 29, 1997; 79 FR 74993, Dec. 16, 2014]

719.271–4 Heads of contracting activities.

In order for the Agency small business program to be effective, the active support of top management is required. The heads of the contracting activities shall be responsible for:

(a) Rendering decisions in cases resulting from non-acceptances by their contracting officers of set-aside recommendations made by OSDBU;

(b) Consulting with OSDBU in establishing small business and minority business enterprise award goals, where practicable and desirable; and

(c) Advising contracting officer's representatives of their responsibilities as set forth in 719.271–5.

[49 FR 13243, Apr. 3, 1984, as amended at 61 FR 39092, July 26, 1996; 79 FR 74988, 74993, 74994, Dec. 16, 2014]

719.271–5 Contracting officer's representatives.

Since the procurement process starts with the establishment of a requirement, the actions of the Contracting officer's representatives can affect the opportunity of small business to participate equitably; therefore, each contracting officer's representative shall, during the formulation of activities which will require contractual implementation:

(a) Consult with OSDBU on the availability and capabilities of small business firms to permit making a tentative set-aside determination where appropriate; and

(b) Provide sufficient procurement lead time in the activity implementation schedule to allow potential small business participation.

[49 FR 13243, Apr. 3, 1984, as amended at 61 FR 39092, July 26, 1996; 79 FR 74988, 74993, Dec. 16, 2014]

719.271–6 Small business screening procedure.

(a) *General.* All USAID/Washington proposed contract actions in excess of the simplified acquisition threshold shall be screened by OSDBU, with the exception of:

(1) Class set-asides and those unilaterally set-aside by contracting officers (719.271–3(f));

(2) Those where the contracting officer certifies in writing that the public exigency will not permit the delay incident to screening (719.271–7(b));

(3) ''Institution building'' contracts (contracts for development of a counterpart capability in the host country) with educational or nonprofit institutions; or collaborative assistance contracts pursuant to (48 CFR) AIDAR 715.370–2; and

(4) [Reserved]

(5) Personal services contract requirements (see 719.270).

(b) *Preparation of Form USAID 1410–14 (the Small Business/Minority Business Enterprise Procurement Review Form).* (1) The contracting officer shall prepare the subject form in an original and 3 copies and forward the original and 2 copies to OSDBU within one working day of receipt by the contracting activity of a procurement requisition.

(2) The contracting officer will attach to his/her transmittal a complete copy of the procurement request and a copy of the recommended source list as furnished by the technical office and supplemented by him/her.

(3) The contracting officer shall complete blocks 2, 3, 4, 5, 9, and 10 (when appropriate) prior to submittal to OSDBU.

(c) *Screening of Form USAID 1410–14 by OSDBU.* (1) OSDBU will screen the contracting officer's recommendations on

set-aside potential, small business subcontracting opportunities, and section 8(a) subcontracting, and furnish him/her with either a written concurrence in his/her recommendations or written counter-recommendations on the original and duplicate copy within five working days from receipt of the form from the contracting officer.

(2) OSDBU will complete Blocks 1, 6, 7, 8, 11, and 12 (when appropriate) prior to returning the screened form to the contracting officer.

(d) *Concurrence or rejection procedure.* (1) The contracting officer shall complete Block 13 upon receipt of the original and duplicate copy of the screened form from OSDBU.

(2) If the contracting officer rejects the OSDBU counter-recommendation, he/she shall return the original and duplicate forms with his/her written reasons for rejection to OSDBU within two working days.

(3) Upon receipt of the contracting officer's rejection, OSDBU may: (i) accept, or (ii) appeal, the rejection. In the case of acceptance of the contracting officer's rejection, OSDBU shall annotate Block 14 when it renders a decision and return the original form to the contracting officer within two working days.

(e) *Appeal procedure.* (1) When informal efforts fail to resolve the set-aside disagreement between the contracting officer and OSDBU, the latter official may appeal the contracting officer's decision to the head of the contracting activity. Such an appeal will be made within five working days after receipt of the contracting officer's rejection.

(2) In the case of an appeal, OSDBU will send the original and duplicate form, with the appeal noted in Block 14, directly to the head of the contracting activity with its written reasons for appealing. The contracting officer will be notified of OSDBU's appeal by means of a copy of the written reasons for appealing.

(3) The head of the contracting activity shall render a decision on the appeal (complete Block 15) within three working days after receipt of same and return the original to OSDBU and the duplicate to the contracting officer.

[49 FR 13243, Apr. 3, 1984, as amended at 52 FR 21058, June 4, 1987; 61 FR 39092, July 26, 1996; 62 FR 40468, July 29, 1997; 64 FR 42042, Aug. 3, 1999; 79 FR 74988, 74993, Dec. 16, 2014; 89 FR 4206, Jan. 23, 2024]

719.271–7 Reports on procurement actions that are exempted from screening.

(a) *Unilateral and class set-asides.* The contracting officer shall prepare Form USAID 1410–14 as stated in 719.271–6, but forward only the duplicate copy with the documentation required by Block 5 of the form to OSDBU. The original will be filed in the contract file.

(1) If, upon review of the material submitted under 719.271–7(a) above, OSDBU concludes that it would be practicable to accomplish all or a portion of the procurement involved under section 8(a) subcontracting, it shall so advise the contracting officer in writing within five days after receipt of such material.

(2) Such advice shall be considered a counter-recommendation and shall be processed in accordance with 719.271–6 (d) and (e).

(b) *Public exigency exemption.* The contracting officer shall prepare Form USAID 1410–14 as stated in 719.271–6, but forward only the duplicate copy with the documentation required by Block 5 of the form to OSDBU. In addition to the documentation called for in 719.271–6, the contracting officer shall furnish a copy of his/her written determination exempting the procurement from screening. The determination shall cite the pertinent facts which led to his/her decision. This exemption is not intended to be used as substitute for good procurement planning and lead-time; OSDBU will report abuses of this exemption to the head of the contracting activity for appropriate action in accordance with 719.271–4(c).

(c) *Institution building contract (IBC) exemption.* The contracting officer shall prepare Form USAID 1410–14 as stated in 719.271–6, but forward only the duplicate copy with the documentation required by Block 5 of the form to OSDBU.

(d) *Personal services contract exemption*. Preparation of Form USAID 1410–14 is not required for personal services contracts.

[49 FR 13243, Apr. 3, 1984, as amended at 79 FR 74993, Dec. 16, 2014]

719.272 [Reserved]

Subpart 719.273—The U.S. Agency for International Development (USAID) Mentor-Protégé Program

SOURCE: 72 FR 32543, June 13, 2007, unless otherwise noted.

719.273 The U.S. Agency for International Development (USAID) Mentor-Protégé Program.

719.273–1 Purpose.

The USAID Mentor-Protégé Program is designed to assist small business, including veteran-owned small business, service-disabled veteran-owned small business, HUBZone, small socially and economically disadvantaged business, and women-owned small business in enhancing their capabilities to perform contracts and sub-contracts for USAID and other Federal agencies. The Mentor-Protégé Program is also designed to improve the performance of USAID contractors and subcontractors by providing developmental assistance to Protégé entities, fostering the establishment of long-term business relationships between small business and prime contractors, and increasing the overall number of small business that receive USAID contract and subcontract awards. A firm's status as a Protégé under a USAID contract shall not have an effect on the firm's eligibility to seek other prime contracts or subcontracts.

719.273–2 Definitions.

Throughout, the term ''small business'' includes all categories of small firms as defined by the Small Business Administration (SBA) on whose behalf the Office of Small and Disadvantaged Business Utilization (OSDBU) is chartered to advocate, including small business, small disadvantaged business, women-owned small business, veteran-owned and service-disabled veteran-owned small business and small business located in HUBZones, as those terms are defined in 13 CFR part 124. The determination of affiliation is a function of the SBA.

(a) A ''Mentor'' is a prime contractor that elects to promote and develop small business subcontractors by providing developmental assistance designed to enhance the business success of the Protégé.

(b) ''Program'' refers to the USAID Mentor-Protégé Program as described in this Chapter.

(c) ''Protégé'' means a small business, small disadvantaged business, women-owned small business, HUBZone small business, veteran-owned small business or service-disabled veteran owned small business that is the recipient of developmental assistance pursuant to a Mentor-Protégé Agreement.

719.273–3 Incentives for prime contractor participation.

(a) Under the Small Business Act, 15 U.S.C. 637(d)(4)(E), USAID is authorized to provide appropriate incentives to encourage subcontracting opportunities for small business consistent with the efficient and economical performance of the contract. This authority is limited to negotiated procurements. (48 CFR) FAR 19.202–1 provides additional guidance.

(b) Costs incurred by a Mentor to provide developmental assistance, as described in 719.273–8 to fulfill the terms of their agreement(s) with a Protégé firm(s), are not reimbursable as a direct cost under a USAID contract. If USAID is the mentor's responsible audit agency under (48 CFR) FAR 42.703–1, USAID will consider these costs in determining indirect cost rates. If USAID is not the responsible audit agency, mentors are encouraged to enter into an advance agreement with their responsible audit agency on the treatment of such costs when determining indirect cost rates.

(c) In addition to subparagraph (b) above, contracting officers may give Mentors evaluation credit under (48 CFR) FAR 15.101–1 considerations for subcontracts awarded pursuant to their Mentor-Protégé Agreements and their subcontracting plans. Therefore:

(1) Contracting officers may evaluate subcontracting plans containing Mentor-Protégé arrangements more favorably than subcontracting plans without Mentor-Protégé Agreements.

(2) Contracting officers may assess the prime contractor's compliance with the subcontracting plans submitted in previous contracts as a factor in evaluating past performance under (48 CFR) FAR 15.305(a)(2)(v) and determining contractor responsibility (48 CFR) 19.705–5(a)(1).

(d) OSDBU Mentoring Award. A nonmonetary award will be presented annually to the Mentoring firm providing the most effective developmental support of a Protégé. The Mentor-Protégé Program Manager will recommend an award winner to the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU).

(e) OSDBU Mentor-Protégé Annual Conference. At the conclusion of each year in the Mentor-Protégé Program, Mentor firms will be invited to brief contracting officers, program leaders, office directors and other guests on Program progress.

[49 FR 13243, Apr. 3, 1984, as amended at 79 FR 74988, Dec. 16, 2014]

719.273–4 Eligibility of Mentor and Protégé firms.

Eligible business entities approved as Mentors may enter into agreements (hereafter referred to as ''Mentor-Protégé Agreement'' or ''Agreement'' and explained in section 719.273–6) with eligible Protégés. Mentors provide appropriate developmental assistance to enhance the capabilities of Protégés to perform as contractors and/or subcontractors. Eligible small business entities capable of providing developmental assistance may be approved as Mentors. Protégés may participate in the Program in pursuit of a prime contract or as subcontractors under the Mentor's prime contract with the USAID, but are not required to be a subcontractor to a USAID prime contractor or be a USAID prime contractor. Notwithstanding eligibility requirements in this section, USAID reserves the right to limit the number of participants in the Program in order to insure its effective management of the Mentor-Protégé Program.

(a) *Eligibility*. A Mentor:

(1) May be either a large or small business entity;

(2) Must be eligible for award of Government contracts;

(3) Must be able to provide developmental assistance that will enhance the ability of Protégés to perform as prime contractors or subcontractors; and

(4) Will be encouraged to enter into arrangements with entities with which it has established business relationships.

(b) *Eligibility*. A Protégé:

(1) Must be a small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone, small socially and economically disadvantaged business, and women-owned small business);

(2) Must meet the size standard corresponding to the NAICS code that the Mentor prime contractor believes best describes the product or service being acquired by the subcontract; and

(3) Eligible for award of Government contracts.

(c) Protégés may have multiple Mentors. Protégés participating in Mentor-Protégé programs in addition to USAID's Program should maintain a system for preparing separate reports of Mentoring activity so that results of the USAID Program can be reported separately from any other agency program.

(d) A Protégé firm shall self-certify to a Mentor firm that it meets the requirements set forth in paragraph (b) of this section and possess related certifications granted by the Small Business Administration (e.g., HUBZone, 8(a), etc.). Mentors may rely in good faith on written representations by potential Protégés that they meet the specified eligibility requirements. HUBZone and small disadvantaged business status eligibility and documentation requirements are determined according to 13 CFR part 124.

[49 FR 13243, Apr. 3, 1984, as amended at 79 FR 74988, Dec. 16, 2014]

719.273–5 Selection of Protégé firms.

(a) Mentor firms will be solely responsible for selecting Protégé firms. Mentors are encouraged to select from

a broad base of small business including small disadvantaged business, women-owned small business, veteran-owned small business, service-disabled veteran-owned small business, and HUBZone firms whose core competencies support USAID's mission.

(b) Mentors may have multiple Protégés. However, to preserve the integrity of the Program and assure the quality of developmental assistance provided to Protégés, USAID reserves the right to limit the total number of Protégés participating under each Mentor firm for the Mentor-Protégé Program.

(c) The selection of Protégé firms by Mentor firms may not be protested, except that any protest regarding the size or eligibility status of an entity selected by a Mentor shall be handled in accordance with the Federal Acquisition Regulation (FAR) and the Small Business Administration regulations.

719.273–6 Application process.

Entities interested in becoming a Mentor firm must apply in writing to the USAID Office of Small and Disadvantaged Business Utilization (OSDBU) by submitting form AID 321–1 (OMB Control number 0412–0574 approved on 5/22/2007). The application shall contain the Mentor-Protégé Agreement and shall be evaluated for approval. Evaluations will consider the nature and extent of technical and managerial support as well as any proposed financial assistance in the form of equity investment, loans, joint-venture, and traditional subcontracting support. The Mentor-Protégé Agreement must contain:

(a) Names, addresses, phone numbers, and e-mail addresses (if available) of Mentor and Protégé firm(s) and a point of contact for both Mentor and Protégé;

(b) A description of the developmental assistance that will be provided by the Mentor to the Protégé, including a description of the work or product contracted for (if any), a schedule for providing assistance, and criteria for evaluation of the Protégé's developmental success;

(c) A listing of the number and types of subcontracts to be awarded to the Protégé;

(d) Duration of the Agreement, including rights and responsibilities of both parties (Mentor and Protégé);

(e) Termination procedures, including procedures for the parties' voluntary withdrawal from the Program. The Agreement shall require the Mentor or the Protégé to notify the other firm in writing at least 30 days in advance of its intent to voluntarily terminate the Agreement;

(f) Procedures requiring the parties to notify OSDBU immediately upon receipt of termination notice from the other party;

(g) A plan for accomplishing the work or product contracted for should the Agreement be terminated; and

(h) Other terms and conditions, as appropriate.

719.273–7 OSDBU review of application.

(a) OSDBU will review the information to establish the Mentor and Protégé eligibility and to ensure that the information that is in section 719.273–6 is included. If the application relates to a specific contract, then OSDBU will consult with the responsible contracting officer on the adequacy of the proposed Agreement, as appropriate. OSDBU will complete its review no later than 30 calendar days after receipt of the application or after consultation with the contracting officer, whichever is later. Application for and enrollment into the Program are free and open to the public.

(b) After OSDBU completes its review and provides written approval, the Mentor may execute the Agreement and implement the developmental assistance as provided under the Agreement. OSDBU will provide a copy of the Mentor-Protégé Agreement to the USAID contracting officer for any USAID contracts affected by the Agreement.

(c) The Agreement defines the relationship between the Mentor and Protégé firms only. The Agreement itself does not create any privity of contract or contractual relationship between the Mentor and USAID nor the Protégé and USAID.

(d) If the application is disapproved, the Mentor may provide additional information for reconsideration. OSDBU

will complete review of any supplemental material no later than 30 days after its receipt. Upon finding deficiencies that USAID considers correctable, OSDBU will notify the Mentor and Protégé and request correction of deficiencies to be provided within 15 days.

719.273–8 Developmental assistance.

The forms of developmental assistance a Mentor can provide to a Protégé include and are not limited to the following:

(a) Guidance relating to—

(1) Financial management;

(2) Organizational management;

(3) Overall business management/planning;

(4) Business development; and

(5) Technical assistance.

(b) Loans;

(c) Rent-free use of facilities and/or equipment;

(d) Property;

(e) Temporary assignment of personnel to a Protégé for training; and

(f) Any other types of permissible, mutually beneficial assistance.

719.273–9 Obligations under the Mentor-Protégé Program.

(a) A Mentor or Protégé may voluntarily withdraw from the Program. However, in no event shall such withdrawal impact the contractual requirements under any prime contract.

(b) Mentor and Protégé entities shall submit to the USAID Office of Small and Disadvantaged Business Utilization (OSDBU) annual reports on progress under the Mentor-Protégé Agreement. USAID will evaluate annual reports by considering the following:

(1) Specific actions taken by the Mentor during the evaluation period to increase the participation of their Protégé(s) as suppliers to the Federal Government and to commercial entities;

(2) Specific actions taken by the Mentor during the evaluation period to develop technical and administrative expertise of a Protégé as defined in the Agreement;

(3) The extent to which the Protégé has met the developmental objectives in the Agreement;

(4) The extent to which the Mentor's participation in the Mentor-Protégé Program impacted the Protégé'(s) ability to receive contract(s) and subcontract(s) from private firms and Federal agencies other than USAID; and, if deemed necessary;

(5) Input from the Protégé on the nature of the developmental assistance provided by the Mentor.

(c) OSDBU will submit annual reports to the relevant contracting officer regarding participating prime contractor(s)' performance in the Program.

(d) Mentor and Protégé firms shall submit an evaluation to OSDBU at the conclusion of the mutually agreed upon Program period, the conclusion of the contract, or the voluntary withdrawal by either party from the Program, whichever comes first.

719.273–10 Internal controls.

(a) OSDBU will oversee the Program and will work in concert with the Mentor-Protégé Program Manager and relevant contracting officers to achieve Program objectives. OSDBU will establish internal controls as checks and balances applicable to the Program. These controls will include:

(1) Reviewing and evaluating Mentor applications for validity of the provided information;

(2) Reviewing annual progress reports submitted by Mentors and Protégés on Protégé development to measure Protégé progress against the plan submitted in the approved Agreement;

(3) Reviewing and evaluating financial reports and invoices submitted by the Mentor to verify that USAID is not charged by the Mentor for providing developmental assistance to the Protégé; and

(4) Limiting the number of participants in the Mentor-Protégé Program within a reporting period, in order to insure the effective management of the Program.

(b) USAID may rescind approval of an existing Mentor-Protégé Agreement if it determines that such action is in USAID's best interest. The rescission shall be in writing and sent to the Mentor and Protégé after approval by the Director of OSDBU. Rescission of an Agreement does not change the terms

of any subcontract between the Mentor and the Protégé.

719.273–11 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at (48 CFR) AIDAR 752.219–70 in all unrestricted solicitations exceeding $550,000 ($1,000,000 for construction) that offer subcontracting opportunities.

(b) The contracting officer shall insert the clause at (48 CFR) AIDAR 752.219–71 in all contracts where the prime contractor has signed a Mentor-Protégé Agreement with USAID.

[72 FR 32543, June 13, 2007, as amended at 79 FR 74988, Dec. 16, 2014]

Subpart 719–7—The Small Business Subcontracting Program

719.708 Contract clause.

The Foreign Assistance Act calls for USAID to give U.S. Small Businesses an opportunity to provide supplies and services for foreign assistance projects. To help USAID meet this obligation, the contracting officer must insert the clause at (48 CFR) AIDAR 752.219–8 in all solicitations and contracts that contain the (48 CFR) FAR clause at 52.219–8, Utilization of Small Business Concerns.

[79 FR 74994, Dec. 16, 2014]

PART 722—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

Subpart 722.1—Basic Labor Policies

Sec.
722.103 Overtime.
722.103–1 Definitions.
722.103–2 Policy.
722.103–3 [Reserved]
722.103–4 Approvals.
722.170 Employment of third country nationals (TCN's) and cooperating country nationals (CCN's).

Subpart 722.8—Equal Employment Opportuntity

722.805–70 Procedures.
722.810 Solicitation provisions and contract clauses.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13246, Apr. 3, 1984, unless otherwise noted.

Subpart 722.1—Basic Labor Policies

722.103 Overtime.

722.103–1 Definitions.

Compensatory time off means leave equal to overtime worked, which, unless otherwise authorized in a contract or approved by a contracting officer, must be taken not later than the end of the calendar month following that in which the overtime is worked.

722.103–2 Policy.

(a) Most contracts covered by this regulation call for the performance of professional or technical services overseas on a cost-reimbursement basis. The compensation for employees performing such services is normally fixed on a monthly or annual basis, and the contracts usually state minimum work week hours. It is not expected that these employees will receive additional pay, overtime or shift premiums, or compensatory time off.

(b) When the contracting officer determines it is in the best interests of the Government, specific provision may be made in contracts to permit such benefits for non-technical and non-professional employees serving overseas, subject to approvals to be required in the contract.

[49 FR 13246, Apr. 3, 1984. Redesignated at 61 FR 39092, July 26, 1996]

722.103–3 [Reserved]

722.103–4 Approvals.

The contracting officer may make the determinations referred to in (48 CFR) FAR 22.103–4.

[49 FR 13246, Apr. 3, 1984. Redesignated at 61 FR 39092, July 26, 1996; 79 FR 74988, Dec. 16, 2014]

722.170 Employment of third country nationals (TCN's) and cooperating country nationals (CCN's).

(a) *General.* It is USAID policy that cooperating country nationals (CCNs) and third country nationals (TCNs),

who are hired abroad for work in a cooperating country under USAID-direct contracts, generally be extended the same benefits, and be subject to the same restrictions as TCNs and CCNs employed by the USAID Mission. Exceptions to this policy may be granted either by the Mission Director or the Assistant Administrator having program responsibility for the project. (TCN's and CCN's who are hired to work in the United States shall be extended benefits and subject to restrictions on the same basis as U.S. citizens who work in the United States.)

(b) *Compensation.* Compensation, including merit or promotion increases paid to TCN's and CCN's may not, without the approval of the Mission Director or the Assistant Administrator having program responsibility for the project, exceed the prevailing compensation paid to personnel performing comparable work in the cooperating country as determined by the USAID Mission. Unless otherwise authorized by the Mission Director or the Assistant Administrator having program responsibility for the project, the compensation of such TCN and CCN employees shall be paid in the currency of the cooperating country.

(c) *Allowances and differentials.* TCN's and CCN's, hired abroad for work in a cooperating country, are not eligible for allowances or differentials under USAID-direct contracts, unless authorized by the Mission Director or the Assistant Administrator having program responsibility for the project.

(d) *Country and security clearances.* The contractor shall insure that the necessary clearances, including security clearances, if required, have been obtained for TCN and CCN employees in accordance with any such requirements set forth in the contract or required by the USAID Mission, prior to the TCN or CCN starting work under the contract.

(e) *Physical fitness.* Contractors are required to insure that prospective TCN and CCN employees are examined prior to employment to determine whether the prospective employee meets the minimum physical requirements of the position and is free from any contagious disease.

(f) *Workweek, holidays, and leave.* The workweek, holidays, and leave for TCN and CCN employees shall be the same as for all other employees of the contractor, under the terms of the contract; however, TCN and CCN employees are not eligible for home leave or military leave unless authorized by the Mission Director or the Assistant Administrator having program responsibility for the project.

(g) *Travel and transportation for TCN's and CCN's.* Travel and transportation shall be provided TCN and CCN employees on the same basis as for all other employees of the contractor, under the terms of the contract.

(h) *Household effects and motor vehicles.* USAID will not provide household effects to TCN and CCN employees; such employees may ship their household effects and motor vehicles to their place of employment on the same basis as for all other employees of the contractor, under the terms of the contract unless they are residents of the cooperating country.

[49 FR 13246, Apr. 3, 1984, as amended at 79 FR 74994, Dec. 16, 2014]

Subpart 722.8—Equal Employment Opportunity

722.805–70 Procedures.

(a) The procedures in this section apply, as appropriate, for all contracts excluding construction, which shall be handled in accordance with (48 CFR) FAR 22.804–1. Contracting officers are responsible for ensuring that the requirements of (48 CFR) FAR 22.8 and related clauses are met before awarding any contracts or consenting to subcontracts subject to these requirements.

(b) *Representations and certifications.* The first step in ensuring compliance with these requirements is to obtain all necessary representations and certifications (Reps and Certs) as required by (48 CFR) FAR 22.810 and FAR 4.1202. When applicable, the contracting officer must review the Reps and Certs to determine whether they have been completed and signed as required, and are acceptable.

(c) *OFCCP's National Preaward Registry.* If the Reps and Certs are complete, signed, and deemed acceptable, and the contracting officer has no reason to doubt their accuracy, the contracting officer must then consult the OFCCP's National Preaward Registry at the internet website in 48 CFR 22.805(a)(4) (i) to see if the offeror is listed.

(1) If the conditions stated in (48 CFR) FAR 22.805(a) (4) are met (including the contract file documentation requirement in paragraph (a)(4)(iii)), then the contracting officer does not need to take any further action in verifying the offeror's compliance with the requirements of this subpart and (48 CFR) FAR 22.8.

(2) If the offeror does not appear in the National Preaward Registry, and the estimated amount of the contract or subcontract is expected to be under $10 million then the contracting officer may rely on the Reps and Certs as sufficient verification of the offeror's compliance.

(3) If the offeror does not appear in the National Preaward Registry and the estimated amount of the contract or subcontract is $10 million or more, then the contracting officer must request a preaward clearance from the appropriate OFCCP regional office, in accordance with 48 CFR 22.805(a). If the initial contact with OFCCP is by telephone, the contracting officer and OFCCP are to mutually determine what information is to be included in the written verification request. The contracting officer may need to provide the following information in addition to the items listed in (48 CFR) FAR 22.805(a)(5), if so requested by the OFCCP regional office:

(i) Name, title, address, and telephone number of a contract person for the prospective contractor;

(ii) A description of the type of organization (university, nonprofit, etc.) and its ownership (private, foreign, state, etc.).

(iii) Names and addresses of the organizations in a joint venture (if any).

(iv) Type of procurement (new contract—RFP or IFB, amendment, etc.) and the period of the contract.

(v) Copy of approved Reps and Certs.

(d) In the event that OFCCP reports that the offeror is not in compliance, negotiations with the offeror shall be terminated.

(e) *Documentation for the contract file.* Every contract file must contain completed and signed Reps and Certs. The file must clearly show that these documents have been reviewed and accepted by the contracting officer. If the Reps and Certs were revised to make them acceptable (see paragraph (b) of this section), the file must also document what changes were required and why, and verify that the changes were made. The contracting officer shall also document the OFCCP National Preaward Registry review (see paragraph (c)(1) of this section), and, if the Registry does not include the offeror:

(1) For contracts or modifications over $10,000 but less than $10 million, the file must contain a statement from the contracting officer that the contractor is considered in compliance with EEO requirements, and giving the basis for this statement (see paragraph (c)(2) of this section). This statement may be in a separate memorandum to the file or in the memorandum of negotiation.

(2) For contracts or modifications of $10 million or more, the file must document all communications with OFCCP regarding the offeror's compliance. Such documentation includes copies of any written correspondence and a record of telephone conversations, specifying the name, address, and telephone number of the person contacted, a summary of the information presented, and any advice given by OFCCP.

(f) *Documentation in the event of noncompliance.* In the event OFCCP determines that a prospective contractor is not in compliance, a copy of OFCCP's written determination, and a summary of resultant action taken (termination of negotiations, notification of offeror and contracting officer's representative, negotiation with next offeror in competitive range, resolicitation, etc.) will be placed in the contract file for any contract which may result, together with other records related to

unsuccessful offers, and retained for at least six months following award.

[64 FR 5007, Feb. 2, 1999; 64 FR 18481, Apr. 14, 1999, as amended at 79 FR 74988, 74994, Dec. 16, 2014]

722.810 Solicitation provisions and contract clauses.

(a) The contracting officer must insert the clause at 752.222–70, USAID Disability Policy in section I of all solicitations and resulting contracts.

(b) The contracting officer must insert the clause at 752.222–71, Nondiscrimination in section I of all solicitations and resulting contracts

[81 FR 48716, July 26, 2016]

PART 724—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13248, Apr. 3, 1984, unless otherwise noted.

Subpart 724.2—Freedom of Information Act

724.202 Policy.

The U.S. Agency for International Development's policies concerning implementation of the Freedom of Information Act are codified in 22 CFR part 212 (USAID Regulation 12).

PART 725—FOREIGN ACQUISITION

Subpart 725.1—Buy American Act—Supplies

Sec.
725.170 Exceptions for Foreign Assistance Act functions.

Subpart 725.4—Trade Agreements

725.401 Exceptions.

Subpart 725.70—Source, Origin, and Nationality

725.701 General.
725.702 Designation of authorized geographic code.
725.703 Source, origin and nationality requirements—Contract clause.
725.704 Geographic source waivers.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13248, Apr. 3, 1984, unless otherwise noted.

Subpart 725.1—Buy American Act—Supplies

725.170 Exceptions for Foreign Assistance Act functions.

(a) In addition to the exception stated in FAR 25.103 for purchases of foreign end products for use outside the United States, Executive Order 11223, dated May 12, 1965, provides an exception for assistance functions performed under the authority of the Foreign Assistance Act.

(b) USAID regulation at 22 CFR part 228 contains generally more prescriptive geographic procurement requirements under the Foreign Assistance Act than those under the Buy American Act. As a general rule, the requirements in 22 CFR part 228 will be used in USAID program-funded awards. For operating expense-funded procurements for supplies for use in the United States, USAID applies the Buy American Act requirements.

[89 FR 4206, Jan. 23, 2024]

Subpart 725.4—Trade Agreements

725.401 Exceptions.

FAR subpart 25.4 establishes procedures for purchases of supplies under the Trade Agreements Act of 1979 (including the World Trade Organization's Government Procurement Agreement) and the 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 United States and Mexico) (Pub. L. 116–113) (19 U.S.C. chapter 29 (sections 4501–4732)). Consistent with these agreements, USAID operating expense-funded administrative procurements for supplies for use in the United States are subject to the procedures in FAR part 25, unless otherwise excepted in FAR subpart 25.4. USAID program-funded contracts for

the purpose of providing foreign assistance are not subject to the procedures set forth in FAR subpart 25.4

[89 FR 4206, Jan. 23, 2024]

Subpart 725.70—Source and Nationality

SOURCE: 79 FR 74994, Dec. 16, 2014, unless otherwise noted.

725.701 General.

USAID's source and nationality requirements for program-funded contracts and subcontracts are set forth in 22 CFR part 228, Rules on Procurement of Commodities and Services Financed by USAID. 22 CFR part 228 is supplemented by the policies and procedures in ADS Chapters 310 and 312.

725.702 Designation of authorized geographic code.

(a) Unless another geographic code is specified in the Schedule of the contract, in accordance with 22 CFR part 228, the authorized code for all Agency contracts is Geographic Code 937, which is the U.S., the cooperating/recipient country, and developing countries other than advanced developing countries, and excluding prohibited sources.

(b) The list of developing countries is available in ADS Chapter 310.

725.703 Source and Nationality requirements—Contract clause.

Insert the clause at 752.225–70, Source and Nationality Requirements in all USAID program-funded solicitations and contracts for goods or services, unless source and nationality requirements do not apply as set forth at 22 CFR 228.02.

725.704 Geographic Code waivers.

(a) Authority to approve waivers of source, nationality, and transportation services requirements, pursuant to 22 CFR part 228, subpart D, is set forth in ADS Chapters 103 and 310.

(b) If a Geographic Code other than Code 937 is authorized by a waiver, the contracting officer must insert the authorized geographic code approved in the waiver, in the Schedule of the contract as required in 725.702. In addition, the contracting officer must place a copy of the approved geographic code waiver in the official contract file.

PART 726—OTHER SOCIOECONOMIC PROGRAMS

Subpart 726.70 [Reserved]

Subpart 726.71—Trade and Investment Activities and the ''Impact on U.S. Jobs'' and ''Workers' Rights

Sec.

726.7101 Trade and Investment Activities and the ''Impact on U.S. Jobs'' and ''Workers' Rights.''

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O.12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 55 FR 8470, Mar. 8, 1990, unless otherwise noted.

Subpart 726.70 [Reserved]

Subpart 726.71—Trade and Investment Activities and the ''Impact on U.S. Jobs'' and ''Workers' Rights

726.7101 Trade and Investment Activities and the "Impact on U.S. Jobs" and "Workers' Rights."

(a) *Policy*. USAID policy and required procedures in ADS Chapter 225 (Program Principles for Trade and Investment Activities and the ''Impact on U.S. Jobs'' and ''Workers' Rights'') implement statutory prohibitions on obligation and expenditure of appropriated funds. ADS Chapter 225 requires Agency operating units to analyze a project or activity to ensure compliance with U.S. foreign policy objectives as stated in Section 601 of the Foreign Assistance Act (FAA) of 1961, as amended; the U.S. Government's trade and development objectives set forth in trade legislation; and related policy documents. If the analysis concludes that the project or activity meets the criteria for what the ADS chapter describes as ''gray-area activities'' or if the contract statement of work has the potential to evolve into what the chapter defines as a prohibited activity, then the planner must include in the

procurement request language appropriately tailored to the specific circumstances for the contract statement of work.

(b) *Special contract requirement.* The contracting officer must insert in Section H of the uniform contract format a clause substantially the same as the clause in 752.226–70 when informed by the requesting operating unit that the statement of work or statement of objectives includes gray-area activities or investment-related activities where specific activities are not identified at the time of obligation but could be for investment-related activities, as described in ADS Chapter 225.

[88 FR 39191, June 15, 2023]

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 727—PATENTS, DATA, AND COPYRIGHTS

Subpart 727.3—Patent Rights under Government Contracts

Sec.
727.303 Contract clause.

Subpart 727.4—Rights in Data and Copyrights

727.404 Basic rights in data clause.
727.409 Solicitation provisions and contract clauses.

Subpart 727.70—Digital Information Planning, Collection, and Submission Requirements

727.7000 Scope of subpart
727.7001 Definitions
727.7002 Policy
727.7003 Contract clause.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

SOURCE: 72 FR 53163, Sept. 18, 2007, unless otherwise noted.

Subpart 727.3—Patent Rights under Government Contracts

727.303 Contract clause.

Contracting officers must insert the clause at 752.227–70, Patent Reporting Procedures, in all solicitations and contracts that contain the clause at (48 CFR) FAR 52.227–11, Patent Rights—Ownership by the Contractor.

[79 FR 74994, Dec. 16, 2014]

Subpart 727.4—Rights in Data and Copyrights

727.404 Basic rights in data clause.

(a) through (f) [Reserved]

(g) When the contract includes a requirement for the contractor to assign copyright to the Government or another party, the contracting officer must insert (48 CFR) 752.227–14 and/or include an express limitation or restriction in the contract. USAID contracting officers will assert such a right in limited circumstances in accordance with the principles as stated in (48 CFR) 27.402.

[72 FR 53163, Sept. 18, 2007, as amended at 79 FR 74988, 74994, Dec. 16, 2014]

727.409 Solicitation provisions and contract clauses.

(a) When the contracting officer inserts (48 CFR) FAR 52.227–14, and if the release or publication of data first produced in the performance of the contract may be sensitive to U.S. Government relations with the cooperating country, the contracting officer must use the clause at (48 CFR) AIDAR 752.227–14.

(b) through (m) [Reserved]

(n) The prescriptions for provisions and clauses in (48 CFR) FAR 27.409 apply to all USAID contracts regardless of place of performance.

[72 FR 53163, Sept. 18, 2007, as amended at 79 FR 74988, 74995, Dec. 16, 2014]

Subpart 727.70—Digital Information Planning, Collection, and Submission Requirements

SOURCE: 89 FR 37960, May 6, 2024, unless otherwise noted.

727.7000 Scope of subpart.

(a) This part prescribes the policies, procedures, and a contract clause pertaining to data and digital information management. It implements the following requirements:

(1) Digital Accountability and Transparency (DATA) Act of 2014;

(2) Foundations for Evidence-Based Policymaking Act (''Evidence Act'') of 2018;

(3) 21st Century Integrated Digital Experience Act (21st Century IDEA Act);

(4) Foreign Aid Transparency and Accountability (FATAA) Act of 2016;

(5) Geospatial Data Act of 2018;

(6) OMB Circular A–130.

(b) [Reserved]

727.7001 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.

Data asset is a collection of data elements or data sets that may be grouped together.

Data inventory is the first component of a Data Management Plan (DMP). The data inventory is a list of high-value data assets that the contractor anticipates producing during the period of award performance.

Data management plan (DMP) is a tool that guides the identification of anticipated data assets and outlines tasks needed to manage these assets across a full data lifecycle.

Data set is an organized collection of structured data, including data contained in spreadsheets, whether presented in tabular or non-tabular form. For example, a data set may represent a single spreadsheet, an extensible mark-up language (XML) file, a geospatial data file, or an organized collection of these. A data set does not include unstructured data, such as email or instant messages, PDF files, PowerPoint presentations, word processing documents, images, audio files, or collaboration software.

Digital means the coding scheme generally used in computer technology to represent data.

Digital data means quantitative and qualitative programmatic measurements that are entered directly into a computer. Examples include numeric targets established during activity design or implementation; baseline, midline, or final measurements created or obtained via field assessments; surveys or interviews; performance monitoring indicators as specified in the Contractor's approved Activity Monitoring, Evaluation, and Learning (AMELP) (see 752.242–71); evaluation results; or perception metrics collected from beneficiaries on the quality and relevance of International Disaster Assistance and Development Assistance.

Digital information is a subset of data and means:

(1) Digital text;

(2) Digital data;

(3) Digital objects; and

(4) Metadata created or obtained with USAID funding supported by this award that are represented, stored, or transmitted in such a way that they are available to a computer program.

Digital method is a means of using computer technology to gather, process, analyze, transmit, store, or otherwise use data and other forms of information.

Digital object includes digital or computer files that are available to a computer program. Examples include digital word processing or PDF documents or forms related to activity design, assessment reports, periodic progress and performance reports, academic research documents, publication manuscripts, evaluations, technical documentation and reports, and other reports, articles and papers prepared by the contractor, whether published or not. Other examples include data sets, spreadsheets, presentations, publication-quality images, audio and video files, communication materials, information products, extensible mark-up language (XML) files, and software, scripts, source code, and algorithms that can be processed by a computer program.

Digital text includes text-based descriptions of programmatic efforts that are entered directly into a computer, rather than submitted as a digital object.

727.7002 Policy.

(a) It is the policy of USAID to manage data as a strategic asset to inform the planning, design, implementation, monitoring, and evaluation of the Agency's foreign assistance programs. To achieve this, it is also USAID's policy to manage data and digital information across a full life cycle. This life cycle includes the following stages: Govern, Plan, Acquire, Process, Analyze, Curate, and Publish/Share. For more information about the USAID Development Data policy, see ADS Chapter 579 at *https://www.usaid.gov/about-us/agency-policy/series-500/579*. For more information about USAID's Program Cycle policy, see ADS Chapter 201 at

https://www.usaid.gov/about-us/agency-policy/series-200/201.

(b) In furtherance of this policy, USAID requires that contractors:

(1) Engage in digital information planning, including creating a Data Management Plan (DMP) to identify and plan for the management of data assets that will be produced, furnished, acquired, or collected in a USAID-funded activity.

(2) Use only digital methods and USAID-approved standards, to the extent practicable, to produce, furnish, acquire, or collect information necessary to implement the contract requirements.

(3) Provide documentation of informed consent the contractor receives when obtaining information on individuals.

(4) Submit to USAID digital information produced, furnished, acquired, or collected in performance of a USAID contract at the finest level of granularity employed during contract implementation.

(c) As specified in ADS Chapter 579, USAID implements appropriate controls to restrict data access in a way that balances the potential benefits with any underlying risks to its beneficiaries and contractors.

727.7003 Contract clause.

(a) Insert the clause 752.227–71 in Section H of solicitations and contracts fully or partially funded with program funds exceeding the simplified acquisition threshold. The contracting officer may insert this clause in other USAID contracts if the contracting officer, in consultation with the requiring office, determines that doing so is in the best interest of the Agency.

(b) Insert the clause at 752.227–71, with its Alternate I when the anticipated contract:

(1) Does not collect data;

(2) Implements emergency food assistance under the Food for Peace Act or section 491 of the Foreign Assistance Act of 1961, including for the procurement, transportation, storage, handling and/or distribution of such assistance;

(3) Implements international disaster assistance under section 491 of the Foreign Assistance Act of 1961 or other authorities administered by the Bureau for Humanitarian Assistance; or

(4) Implements activities managed by the Bureau for Conflict Prevention and Stabilization's Office of Transition Initiatives, or is fully or partially funded with the Complex Crises Fund.

PART 728—BONDS AND INSURANCE

Subpart 728.1—Bonds

Sec.

728.105–1 Advance payment bonds.

Subpart 728.3—Insurance

728.305–70 Overseas worker's compensation and war-hazard insurance—waivers and USAID insurance coverage.
728.307–2 Liability.
728.307–70 Medical Evacuation (MEDEVAC) Services (MAR 1993).
728.309 Contract clause for worker's compensation insurance.
728.313 Contract clauses for insurance of transportation or transportation-related services.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13249, Apr. 3, 1984, unless otherwise noted.

Subpart 728.1—Bonds

728.105–1 Advance payment bonds.

(a) Generally, advance payment bonds will not be required in connection with USAID contracts containing an advance payment provision. In lieu thereof, contracting officers will follow procedures set forth in (48 CFR) FAR 32.409–3.

(b) Whenever a contracting officer considers that an advance payment bond is necessary, the contracting officer will:

(1) Establish a bond penalty that will adequately protect interests of the Government;

(2) Use the USAID Advance Payment Bond format;

(3) Place bond with a surety currently approved by the U.S. Treasury Department according to the latest Treasury Department Circular 570; and

(4) Stipulate that the cost of the bond shall not exceed a rate of $7.50 per

$1,000 per annum based on the penalty of the bond, without the prior written approval of the Bureau for Management, Office of Acquisition and Assistance, Policy Division (M/OAA/P).

(c) Where the surety's obligation under an advance payment bond covers all advances made to the contractor during the term of the contract, no release should be issued to the surety until all advances made and to be made under the contract have been fully liquidated in accordance with the provisions of the contract, such as no-pay vouchers, reports of expenditures, or by refund. Where the surety's obligation under the bond is limited to advances made during a specified period of time, no release should be issued to the surety until all advances made and to be made during the specified period have been liquidated as aforesaid.

[49 FR 13249, Apr. 3, 1984, as amended at 50 FR 50302, Dec. 10, 1985; 55 FR 6802, Feb. 27, 1990; 56 FR 67224, Dec. 30, 1991; 59 FR 33446, June 29, 1994; 72 FR 19670, Apr. 19, 2007; 79 FR 74988, 74995, Dec. 16, 2014]

Subpart 728.3—Insurance

728.305–70 Overseas worker's compensation and war-hazard insurance—waivers and USAID insurance coverage.

(a) Upon the recommendation of the USAID Administrator, the Secretary of Labor may waive the applicability of the Defense Base Act (DBA) with respect to any contract, subcontract, or subordinate contract, work location, or classification of employees. Either the contractor or USAID can request a waiver from coverage. Such a waiver can apply to any employees who are not U.S. citizens, not residents of, or not hired in the United States. Waivers requested by the contractor are submitted to the contracting officer for approval and further submission to the Department of Labor, which grants the waiver. Application for a waiver is submitted on Labor Department Form BEC 565. USAID has a number of blanket waivers already in effect for certain countries that are applicable to its direct contracts with contractors performing in such countries. Where such waivers are granted from coverage under the DBA, the waiver is conditioned on providing other worker's compensation coverage to employees to which the waiver applies. Usually this takes the form of securing worker's compensation coverage of the country where work will be performed or of the country of the employee's nationality, whichever offers greater benefits. The Department of Labor has granted partial blanket waivers of DBA coverage applicable to USAID-financed contracts performed in certain countries, subject to two conditions:

(1) Employees hired in the United States by the contractor, and citizens or residents of the United States are to be provided DBA insurance coverage;

(2) Waived employees (i.e., employees who are neither U.S. citizens nor U.S. resident aliens, and who were hired outside the United States) will be provided worker's compensation benefits as required by the laws of the country in which they are working or the laws of their native country, whichever offers greater benefits. Information as to whether a DBA Waiver has been obtained by USAID for a particular country may be obtained from the cognizant USAID contracting officer.

(b) To assist contractors in securing insurance at minimal rates for the workmen's compensation insurance required under the DBA, and to facilitate meeting insurance requirements for such coverage, USAID, after open and competitive negotiation, has entered into a contract with an insurance carrier to provide such coverage at a specified rate. The terms of this contract require the insurance carrier to provide coverage, and the contractor to make payments to and handle its claims with that insurance carrier. Contracting officers are responsible for explaining and advising contractors of the details of securing such insurance.

[49 FR 13249, Apr. 3, 1984, as amended at 52 FR 4144, Feb. 10, 1987. Redesignated at 53 FR 50630, Dec. 16, 1988, and amended at 54 FR 16122, Apr. 21, 1989; 56 FR 67224, Dec. 30, 1991]

728.307–2 Liability.

(a)–(b) [Reserved]

(c) *Automobile liability*. In order to ensure that private automobiles used by contractor employees stationed overseas under an USAID contract are

properly insured, USAID has established minimum required coverages as a supplement to the (48 CFR) FAR clause at 52.228–7. This supplemental coverage is specified in (48 CFR) AIDAR 752.228–7, and is to be used in all USAID-direct contracts involving performance overseas.

[53 FR 50630, Dec. 16, 1988, as amended at 79 FR 74988, Dec. 16, 2014]

728.307–70 Medical Evacuation (MEDEVAC) Services (MAR 1993).

The contracting officer must insert the clause at 752.228–70 in all contracts which require performance by contractor employees overseas.

[59 FR 33446, June 29, 1994, as amended at 79 FR 74995, Dec. 16, 2014]

728.309 Contract clause for worker's compensation insurance.

(a) Because of the volume of projects performed overseas resulting in contracts which require worker's compensation insurance, USAID has contracted with an insurance carrier to provide the required insurance for all USAID contractors. It is therefore necessary to supplement the (48 CFR) FAR clause at 52.228–3 with the additional coverage specified in (48 CFR) AIDAR 752.228–3. The coverage specified in (48 CFR) AIDAR 752.228–3 shall be used in addition to the coverage specified in (48 CFR) FAR 52.228–3 in all USAID-direct contracts involving performance overseas.

[53 FR 50630, Dec. 16, 1988, as amended at 79 FR 74988, Dec. 16, 2014]

728.313 Contract clauses for insurance of transportation or transportation-related services.

(a) USAID is required by law to include language in all its direct contracts and subcontracts ensuring that all U.S. marine insurance companies have a fair opportunity to bid for marine insurance when such insurance is necessary or appropriate under the contract. USAID has therefore established a supplementary preface to the clause at (48 CFR) FAR 52.228–9. This supplementary preface is set forth in (48 CFR) AIDAR 752.228–9, and is required for use in any USAID-direct contract where marine insurance is necessary or appropriate.

[53 FR 50630, Dec. 16, 1988, as amended at 79 FR 74988, Dec. 16, 2014]

PART 729—TAXES

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; and 3 CFR 1979 Comp., p. 435.

SOURCE: 81 FR 48716, July 26, 2016, unless otherwise noted.

Subpart 729.4—Contract Clauses

729.402–70 Foreign contracts.

(a) The annual Department of State, Foreign Operations, and Related Programs Appropriations Act (SFOAA) requires USAID to take certain steps to prevent countries from imposing taxes, including value added tax (VAT) and customs duties, on U.S. foreign assistance, or if imposed, requires the countries to reimburse the assessed taxes or duties. The SFOAA also requires certain reporting to Congress on host country taxation. Because countries imposing such taxes assess them directly on contractors, USAID requires contractors to report annually on whether taxes have been imposed and, if so, whether the foreign government reimbursed the taxes.

(b) The contracting officer must insert the clause at §752.229–71, Reporting of Foreign Taxes, in solicitations and resulting contracts when:

(1) A contract is fully or partially funded with funds appropriated under titles III through VI of an SFOAA making appropriations for the Department of State, foreign operations, and related programs, and

(2) The contract is to be performed wholly or partly in a foreign country.

[88 FR 39191, June 15, 2023]

PART 731—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 731.1—Applicability

Sec.

731.109 Advance agreements.

Subpart 731.2—Contracts With Commercial Organizations

731.205–6 Compensation for personal services.
731.205–43 Trade, business, technical and professional activity costs—USAID conference approval requirements.
731.205–46 Travel costs.
731.205–70 Overseas recruitment incentive.
731.205–71 Salary supplements for Host Government employees.

Subpart 731.3—Contracts With Educational Institutions

731.370 Predetermined fixed rates for indirect costs.
731.371 Compensation for personal services.
731.372 Fringe benefits.
731.373 Overseas recruitment incentive.
731.374 Conference approval requirements.

Subpart 731.7—Contracts With Nonprofit Organizations

731.770 Cost principles.
731.771 [Reserved]
731.772 Compensation for personal services.
731.773 Independent research and development costs.
731.774 Overseas recruitment incentive.
731.775 Conference approval requirements.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; and 3 CFR 1979 Comp., p. 435.

SOURCE: 49 FR 13250, Apr. 3, 1984, unless otherwise noted.

Subpart 731.1—Applicability

731.109 Advance agreements.

Advance agreements on selected costs may be negotiated with USAID contractors by the Bureau for Management, Office of Acquisition and Assistance, Cost Audit Support Division, Overhead and Special Cost and Contract Close-Out Branch (M/OAA/CAS/OCC). Such advance understandings will be applicable to all USAID contracts with that contractor.

[49 FR 13250, Apr. 3, 1984, as amended at 50 FR 50302, Dec. 10, 1985; 51 FR 20651, June 6, 1986; 72 FR 19670, Apr. 19, 2007; 79 FR 74995, Dec. 16, 2014]

Subpart 731.2—Contracts With Commercial Organizations

731.205–6 Compensation for personal services.

(a) *General.* When establishing the workweek for employees overseas the contractor will take local and USAID Mission practice into account and will insure that the workweek is compatible with that of those USAID Mission and Cooperating Country employees with whom the contractor will be working.

(b) *Salaries and wages.* It is USAID policy that if an employee's base salary plus overseas recruitment incentive, if any (see (48 CFR) AIDAR 731.205–70) exceeds the USAID Contractor Salary Threshold (USAID CST), as stated in USAID's Automated Directives System (ADS) Chapter 302 USAID Direct Contracting (available at *http://www.usaid.gov/policy/ads/300/302.pdf*), it will be allowable only if approved in writing by the contracting officer. The contracting officer shall only provide such approval after internal Agency procedures for review/approval of salaries in excess of the USAID CST in ADS 302 have been followed. USAID policies on compensation of third country national or cooperating country national employees are set forth in (48 CFR) AIDAR 722.170.

(d)–(l) [Reserved]

(m) *Fringe benefits.* USAID's policies on certain fringe benefits related to overseas service, including but not limited to leave, holidays, differentials and allowances, etc. are set forth in the appropriate contract clauses in (48 CFR) AIDAR subpart 752.70.

[57 FR 5235, Feb. 13, 1992, as amended at 60 FR 11913, Mar. 3, 1995; 62 FR 40468, July 29, 1997; 64 FR 5008, Feb. 2, 1999; 72 FR 19669, Apr. 19, 2007; 79 FR 74988, Dec. 16, 2014]

731.205–43 Trade, business, technical and professional activity costs—USAID conference approval requirements.

(a) *Definitions.* As used in this section—

Conference means a seminar, meeting, retreat, symposium, workshop, training activity or other such event that is funded in whole or in part by USAID.

Net conference expense means the total conference expenses excluding: any fees or revenue received by the Agency through the conference, costs to ensure the safety of attending governmental officials, and salary of USAID employees and USAID personal services contractors.

Personal Services Contractor (PSC) means any individual who is awarded a personal services contract in accordance with AIDAR appendix D or J of this chapter.

Temporary duty (TDY) travel means official travel at least fifty (50) miles from both the traveler's home and duty station for a period exceeding twelve (12) hours.

USAID employee means a USAID direct-hire employee or a direct-hire Federal employee from another U.S. government agency detailed to USAID.

(b) *Prior approval.* USAID policy requires contractors to obtain contracting officer approval of the following, unless an exception in paragraph (c) of the clause at 752.231–72 applies:

(1) A conference funded in whole, or in part, by USAID when ten (10) or more USAID employees or personal services contractors are required to travel on temporary duty status to attend the conference; or

(2) A conference funded in whole, or in part, by USAID when the net conference expense funded by USAID is expected to exceed $100,000, regardless of the number of USAID employees or USAID personal services contractors who will participate in the conference.

(c) *Allowability of cost.* Costs associated with a conference that meets the criteria above, incurred without USAID prior written approval, are unallowable.

(d) *Solicitation provision and contract clause.* Contracting officers must insert the clause at 752.231–72 in all USAID-funded solicitations and contracts anticipated to include a requirement for a USAID-funded conference.

[88 FR 39192, June 15, 2023]

731.205–46 Travel costs.

It is USAID policy to require prior written approval of international travel by the contracting officer, or the contracting officer's representative (COR) if delegated in the Contracting Officer's Representative Designation Letter. See (48 CFR) AIDAR 752.7032 for specific requirements and procedures.

[79 FR 74995, Dec. 16, 2014]

731.205–70 Overseas recruitment incentive.

NOTE: The term *employee* as used in this section means an employee who is a U.S. citizen or a U.S. resident alien.)

(a) If a contractor employee serving overseas under a contract does not qualify for the exemption for overseas income provided under section 911 of the U.S. Internal Revenue Code (26 U.S.C. 911), such employee is eligible to receive an overseas recruitment incentive (ORI), to the extent the ORI: Is authorized by the contractor's normal policy and practice; is deemed necessary by the contractor to recruit and retain qualified employees for overseas services; and does not exceed 10% of the base salary of the employee from date of arrival at overseas post to begin assignment to date of departure from post at the end of assignment. ORI is to be paid as a single payment at the end of the employee tour of duty overseas. The contractor shall take all reasonable and prudent steps to ensure that ORI is not paid to any employee who has received the IRS section 911 exemption.

(b) In the event that an employee subsequently receives a section 911 exclusion for any part of the base salary upon which this supplement has been paid, such supplement or appropriate portion thereof shall be reimbursed by the contractor to USAID with interest. The interest shall be calculated at the average U.S. Treasury rate in effect for the period that the contractor or his employee had the funds. Neither the contractor's nor the subcontractor's inability to collect refunds from eligible employees shall be used as a basis to excuse subsequent refunds by the contractor to USAID.

[57 FR 5236, Feb. 13, 1992]

731.205–71 Salary supplements for Host Government employees.

(a) *Definitions.* (1) A Host Government (HG) employee is a person paid by the HG, occupying an established position,

either temporary or permanent, part-time or full-time, within a HG institution.

(2) An HG institution is an organization in which the government owns at least a fifty percent share or receives at least fifty percent of its financial support from the government.

(b) *General.* Salary supplement occurs when payments are made that augment an HG employee's base salary or premiums, overtime, extra payments, incentive payment and allowances for which the HG employee would qualify under HG rules or practices for the performance of his/hers regular duties or work performed during his/hers regular office hours. Per diem, invitational travel, honoraria and payment for work carried out outside of normal working hours are not considered to be salary supplements subject to the provisions in USAID policy referenced in paragraph (c) of this section.

(c) Salary supplements are eligible for USAID financing only when authorized in accordance with USAID policy established in the cable State 119780 dated April 15, 1988 in ADS Chapter 302. If salary supplements have been authorized in a particular case, the contracting officer shall provide written approval to the contractor in order for such costs to be eligible. Any specific requirements or limitations shall be specified in the approval.

(d) Contracting officers shall insert the Clause at 752.231–71 in all contracts in which there is a possibility of the need of HG employees. It should also be inserted in all subsequent subcontracts.

[64 FR 16649, Apr. 6, 1999, as amended at 79 FR 74988, 74995, Dec. 16, 2014]

Subpart 731.3—Contracts With Educational Institutions

731.370 Predetermined fixed rates for indirect costs.

Section 635(k) of the Foreign Assistance Act of 1961, as amended, authorizes USAID to use predetermined fixed rates in determining the indirect costs applicable under contracts with educational institutions.

731.371 Compensation for personal services.

(a) *General.* When establishing the workweek for employees overseas the contractor will take local and USAID Mission practice into account and will ensure that the workweek is compatible with that of those USAID Mission and Cooperating Country employees with whom the contractor will be working.

(b) *Salaries and wages.* (1) The policies set forth in (48 CFR) AIDAR 731.205–6(b) are also applicable to contracts with a nonprofit organization.

(2) In considering consulting income as a factor when determining allowable salary for service under a contract:

(i) For faculty members working under annual appointments, salary for service under the contract may include the employee's on-campus salary plus ''consulting income'' (that is, income from employment other than the employee's regular on-campus appointment, excluding business or other activities not connected with the employee's profession) earned during the year preceding employment under the contract.

(ii) For faculty members working under academic year appointments, salary for service under the contract may include the employee's on-campus academic year salary plus ''consulting income'' as defined above earned during the year proceeding employment under the contract, or salary for service under the contract may be derived by annualizing the academic year salary (in which case ''consulting income'' may not be included).

(3) USAID policies and compensation of third country national or cooperating country national employees are set forth in (48 CFR) AIDAR 722.170.

[57 FR 5236, Feb. 13, 1992, as amended at 60 FR 11913, Mar. 3, 1995; 62 FR 40469, July 29, 1997; 64 FR 5008, Feb. 2, 1999; 72 FR 19669, Apr. 19, 2007; 79 FR 74988, Dec. 16, 2014]

731.372 Fringe benefits.

USAID's policies on certain fringe benefits related to overseas service, including but not limited to leave, holidays, differentials and allowances, etc.

are set forth in the appropriate contract clauses in (48 CFR) AIDAR 752.70.

[57 FR 5236, Feb. 13, 1992, as amended at 79 FR 74988, Dec. 16, 2014]

731.373 Overseas recruitment incentive.

USAID's policies regarding overseas recruitment incentives are set forth in (48 CFR) AIDAR 731.205–70. These policies are also applicable to contracts with an educational institution.

[57 FR 5236, Feb. 13, 1992, as amended at 79 FR 74988, Dec. 16, 2014]

731.374 Conference approval requirements.

USAID's policies regarding conference approval requirements are set forth in (48 CFR) AIDAR 731.205–43. These policies are also applicable to contracts with educational institutions.

[88 FR 39192, June 15, 2023]

Subpart 731.7—Contracts With Nonprofit Organizations

731.770 Cost principles.

(a) The Bureau for Management, Office of Acquisition and Assistance, Cost Audit Support Division, Overhead and Special Cost and Contract Close-Out Branch (M/OAA/CAS/OCC) provides assistance to the M/OAA Director regarding the application of 2 CFR part 200, subpart E. M/OAA/CAS/OCC is responsible for liaising with other cognizant agencies; authorizing exemptions to subpart E coverage for a nonprofit organization pursuant to 2 CFR 200.401(c); and providing advice and assistance in applying the cost principles.

(b) Prior approval, as used in 2 CFR part 200, means securing the awarding agency's advance written permission to incur costs. Where an item of cost requiring prior approval is included in the award budget, approval of the budget constitutes prior approval of that cost, unless otherwise specified. Accordingly, contract budgets must include one of the following statements:

(1) ''Inclusion of any cost in the line item budget of this award does not constitute prior approval of cost items pursuant to 2 CFR part 200''; or

(2) ''In accordance with 2 CFR part 200, approval is granted to incur costs for (name specific item or items requiring prior written approval) which are included in the budget of this award.''

[89 FR 4206, Jan. 23, 2024]

731.771 [Reserved]

731.772 Compensation for personal services.

The policies set for in (48 CFR) AIDAR 731.205–6 are also applicable to contracts with a nonprofit organization.

[57 FR 5236, Feb. 13, 1992, as amended at 79 FR 74988, Dec. 16, 2014]

731.773 Independent research and development costs.

The cost principle at FAR 31.205–18 applies to independent research and development costs.

[89 FR 4206, Jan. 23, 2024]

731.774 Overseas recruitment incentive.

USAID's policies regarding overseas recruitment incentives are set forth in (48 CFR) AIDAR 731.205–70. These policies are also applicable to contracts with a nonprofit organization.

[57 FR 5236, Feb. 13, 1992, as amended at 79 FR 74988, Dec. 16, 2014]

731.775 Conference approval requirements.

USAID's policies regarding conference approval requirements are set forth in (48 CFR) AIDAR 731.205–43. These policies are also applicable to contracts with nonprofit organizations.

[88 FR 39192, June 15, 2023]

PART 732—CONTRACT FINANCING

Subpart 732.4—Advance Payments for Non-Commercial Items

Sec.

732.401 Statutory authority.
732.402 General.
732.403 Applicability.
732.406–70 Agency-issued letters of credit.
732.406–71 Applicability for use of a Letter of Credit (LOC).
732.406–72 Establishing an LOC.
732.406–73 LOC contract clause.
732.406–74 Revocation of the LOC.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 732.4—Advance Payments for Non-Commercial Items

SOURCE: 56 FR 67225, Dec. 30, 1991, unless otherwise noted.

732.401 Statutory authority.

(a) Sections 635 (b) of the Foreign Assistance Act and Executive Order 11223, May 12, 1965, 30 FR 6635, permit the making of advance payments with respect to functions authorized by the Foreign Assistance Act. Advance payments may also be made under section 305 of the Federal Property and Administrative Services Act of 1949, which provides authority, not otherwise available to USAID, to take a paramount lien.

(b) The Act of August 28, 1968, Public Law 85–804 does not apply to USAID.

[56 FR 67225, Dec. 30, 1991, as amended at 62 FR 40469, July 29, 1997]

732.402 General.

(a)–(d) [Reserved]

(e)(1) U.S. Dollar advances to for-profit organizations for any award, including advances for disbursement to grantees, must be processed and approved in accordance with ADS Chapter 636.

(2) All local currency advances to for-profit organizations for any award require the approval of the head of the contracting activity, with concurrence of the Mission Controller.

[79 FR 74995, Dec. 16, 2014]

732.403 Applicability.

References to nonprofit contracts with nonprofit educational or research institutions for experimental, research and development work include nonprofit contracts with nonprofit institutions for: (a) technical assistance services provided to or for another country or countries, and (b) projects which concern studies, demonstrations and similar activities related to economic growth or the solution of social problems of developing countries.

732.406–70 Agency-issued letters of credit.

This subsection provides guidance on use of USAID issued letters of credit (LOC) for advance payments.

732.406–71 Applicability for use of a Letter of Credit (LOC).

An LOC must be used when:

(a) The contracting officer has determined that an advance payment is necessary and appropriate in accordance with this subpart and the requirements found in (48 CFR) FAR 32.4;

(b) USAID has, or expects to have, a continuing relationship of at least one year with the organization, and the annual amount required for advance financing will be at least $50,000; and

(c) The advance payment is approved in accordance with (48 CFR) AIDAR 732.402(e). Additionally, the advance payments made by LOC under for fee or profit contracts, must be approved by the Procurement Executive.

[79 FR 74995, Dec. 16, 2014]

732.406–72 Establishing an LOC.

(a) While the contract will provide for the use of an LOC when it is applicable under 732.406–71, the LOC is a separate agreement between the contractor and USAID. The terms and conditions of the LOC are contained in the LOC instructions issued by USAID and the general operating requirements are those imposed by the USAID LOC servicing agent. LOCs for both USAID/Washington and Mission-executed awards are established by the Bureau for Management, Office of the Chief Financial Officer, Cash Management and Payment Division (M/CFO/CMP) through the Agency LOC servicing agent.

(b) To establish a new LOC account, the contractor must submit to USAID the documentation specified in (48 CFR) AIDAR Clause 752.232–70(b).

[79 FR 74995, Dec. 16, 2014]

732.406–73 LOC contract clause.

(a) If payment is to be provided by LOC, the contract must contain the clause in 752.232–70.

(b) Contracting officers must ensure that an appropriate (48 CFR) FAR payment clause is also inserted in the contract, in the event that the LOC is revoked pursuant to 732.406–74.

[79 FR 74995, Dec. 16, 2014]

732.406–74 Revocation of the LOC.

If during the term of the contract M/CFO/CMP believes that the LOC should be revoked, M/CFO/CMP may, after consultation with the cognizant contracting officer(s) and GC, revoke the LOC by written notification to the contractor. A copy of any such revocation notice will immediately be provided to the cognizant contracting officer(s).

[79 FR 74995, Dec. 16, 2014]

PART 733—PROTESTS, DISPUTES, AND APPEALS

Subpart 733.1—Protests

Sec.

733.101 Definitions.
733.103–70 Protests to the agency.
733.103–71 Filing of protest.
733.103–72 Responsibilities.
733.103–73 Protests excluded from Agency consideration.

Subpart 733.27—USAID Procedures for Disputes and Appeals

733.270 Designation of Civilian Board of Contract Appeals (CBCA) to hear and determine appeals under USAID contracts.

AUTHORITY: Sec. 621. Pub. L. 87–195, 73 Stat. 445 (22 U.S.C. 2381), as amended: E.O. 12163, Sept. 29, 1979, 44 FR 56673, 3 CFR, 1979 Comp. p. 435.

Subpart 733.1—Protests

SOURCE: 61 FR 39094, July 26, 1996, unless otherwise noted.

733.101 Definitions.

(a) All ''days'' referred to in this subpart are deemed to be ''calendar days'', in accordance with (48 CFR) FAR 33.101. In the case of USAID overseas offices with non-Saturday/Sunday weekend schedules, the official post weekend applies in lieu of Saturday and Sunday.

(b) All other terms defined in (48 CFR) FAR 33.101 are used herein with the same meaning.

[61 FR 39094, July 26, 1996, as amended at 64 FR 42042, Aug. 3, 1999; 79 FR 74988, Dec. 16, 2014]

733.103–70 Protests to the agency.

USAID follows the agency protest procedures in (48 CFR) FAR 33.103, as supplemented by this section.

[61 FR 39094, July 26, 1996, as amended at 79 FR 74988, Dec. 16, 2014]

733.103–71 Filing of protest.

(a) Protests must be in writing and addressed to the contracting officer for consideration by the M/OAA Director.

(b) A protest shall include, in addition to the information required in (48 CFR) FAR 33.103(d)(2), the name of the issuing Mission or office.

(c) Material submitted by a protester will not be withheld from any interested party outside the Government or from any Government agency if the M/OAA Director decides to release such material, except to the extent that the withholding of such information is permitted or required by law or regulation.

[61 FR 39094, July 26, 1996; 61 FR 51235, Oct. 1, 1996, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007; 79 FR 74988, Dec. 16, 2014]

733.103–72 Responsibilities.

(a) *M/OAA Director*. The decision regarding an agency protest shall be made by the M/OAA Director within 30 days from the date a proper protest is filed unless the M/OAA Director determines that a longer period is necessary to resolve the protest, and so notifies the protester in writing. The M/OAA Director shall make his or her decision after personally reviewing and considering all aspects of the case as presented in the protest itself and in any documentation provided by the contracting officer, and after obtaining input and clearance from the Office of the General Counsel's Division for Litigation and Enforcement (GC/LE). The decision shall be in writing and constitutes the final decision of the Agency.

(b) *Contracting officer.* The contracting officer is responsible for requesting an extension of the time for acceptance of offers as described in (48 CFR) FAR 33.103(f)(2).

[61 FR 39094, July 26, 1996; 61 FR 51235, Oct. 1, 1996, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007; 79 FR 74988, 74996, Dec. 16, 2014]

733.103–73 Protests excluded from Agency consideration.

(a) *Contract administration.* Disputes between a contractor and USAID are resolved pursuant to the disputes clause of the contract and the Contract Disputes Act of 1978.

(b) *Small business size standards and standard industrial classification.* Challenges of established size standards or the size status of particular firms, and challenges of the selected standard industrial classification are for review solely by the Small Business Administration.

(c) *Procurement under Section 8(a) of the Small Business Act.* Contracts are let under Section 8(a) of the Small Business Act to the Small Business Administration solely at the discretion of the contracting officer, and are not subject to review.

(d) *Protests filed in the Government Accountability Office (GAO).* Protests filed with the GAO will not be reviewed.

(e) *Procurements funded by USAID to which USAID is not a party.* No protest of a procurement funded by USAID shall be reviewed unless USAID is a party to the acquisition agreement.

(f) *Subcontractor protests.* Subcontractor protests will not be considered.

(g) *Judicial proceedings.* Protests will not be considered when the matter involved is the subject of litigation before a court of competent jurisdiction or when the matter involved has been decided on the merits by a court of competent jurisdiction.

(h) *Determinations of responsibility by the contracting officer.* A determination by the contracting officer that a bidder or offeror is or is not capable of performing a contract will not be reviewed by the M/OAA Director.

(i) *Small Business Certificate of Competency Program.* Any referral made to the Small Business Administration pursuant to section 8(b)(7) of the Small Business Act, or any issuance of, or refusal to issue, a certificate of competency under that section will not be reviewed by the M/OAA Director.

[61 FR 39094, July 26, 1996, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007; 79 FR 74988, 74996, Dec. 16, 2014]

Subpart 733.27—USAID Procedures for Disputes and Appeals

733.270 Designation of Civilian Board of Contract Appeals (CBCA) to hear and determine appeals under USAID contracts.

(a) The Civilian Board of Contract Appeals (CBCA) was established by section 847 of the National Defense Authorization Act for Fiscal Year 2006 to hear and decide contract disputes between Government contractors and executive civilian agencies under the provisions of the Contract Disputes Act of 1978, 41 U.S.C. 7101–7109, and regulations and rules issued under that statute. The CBCA is USAID's board for hearing and deciding appeals to contracting officer decisions.

(b) USAID must follow CBCA Rules of Procedure (see *www.cbca.gsa.gov*).

(c) The Office of the General Counsel's Division of Litigation and Enforcement (GC/LE) will assure representation of the interests of the Government in proceedings before the CBCA.

(d) All officers and employees of USAID must cooperate with the CBCA and GC/LE in the processing of appeals so as to assure their speedy and just determination.

[79 FR 74996, Dec. 16, 2014]

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 734—MAJOR SYSTEM ACQUISITION

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673, 3 CFR, 1979 Comp., p. 435.

734.002–70 USAID policy.

In order for an USAID acquisition to be considered a major system acquisition it must meet the criteria of OMB Circular A–109 and FAR part 34, and must have an estimated value of $15 million or more during the first year of the contract. All major systems acquisition must be approved in advance by the M/OAA Director.

[55 FR 39976, Oct. 1, 1990, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

PART 736—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 736.5—Contract Clauses

Sec.
736.570 Disability standards in construction contracts.

Subpart 736.6—Architect-Engineer Services

736.602–2 Evaluation boards.
736.602–3 Evaluation board functions.
736.602–4 Selection authority.
736.602–5 Short selection process for procurements not to exceed the simplified acquisition threshold.
736.603 [Reserved]
736.605 Government cost estimate for architect-engineer work.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13254, Apr. 3, 1984, unless otherwise noted.

Subpart 736.5—Contract Clauses

736.570 Disability standards in construction contracts.

Contracting officers must insert the clause at 752.236–70, Standards for Accessibility for the Disabled in USAID Construction Contracts, in all solicitations and contracts for construction or renovations made using program funds.

[79 FR 74996, Dec. 16, 2014]

Subpart 736.6—Architect-Engineer Services

736.602–2 Evaluation boards.

(a)–(b) [Reserved]

(c) Each evaluation board will include a representative of the contracting officer and, as appropriate, the cognizant bureau.

[54 FR 46391, Nov. 3, 1989, as amended at 79 FR 74988, Dec. 16, 2014]

736.602–3 Evaluation board functions.

Agency architect-engineer evaluation boards shall perform the following functions:

(a) Prepare a selection memorandum recommending no less than three firms which are considered most highly qualified to perform the required services for submission to the head of the contracting activity for his/her approval. This selection memorandum shall include the information specified in 736.602–3(c).

(b) In evaluating architect-engineer firms, the architect-engineer evaluation board shall apply the following criteria, other criteria established by Agency regulations, and any criteria set forth in the public notice on a particular contract:

(1) Specialized experience of the firm (including each member of joint venture or association) with the type of service required;

(2) Capacity of the firm to perform the work (including any specialized services) within the time limitations;

(3) Past record of performance on contracts with USAID or other Government agencies and private industry with respect to such factors as control of costs, quality of work, and ability to meet schedules, to the extent such information is available;

(4) Ability to assign an adequate number of qualified key personnel from

the organization, including a competent supervising representative having considerable experience in responsible positions on work of a similar nature;

(5) The portions of the work the architect-engineer is able to perform with its own forces when required;

(6) Ability of the architect-engineer to furnish or to obtain required materials and equipment;

(7) If the geographical or topographical aspects of the project are deemed vital, familiarity with the locality where the project is situated;

(8) Financial capacity;

(9) Responsibility of the architect-engineer under standards provided in (48 CFR) FAR subpart 9.1. No contract may be awarded to a contractor that does not meet these standards;

(10) Volume of work previously awarded to the firm by the Agency, with the object of effecting an equitable distribution of architect-engineer contracts among qualified firms. Each architect-engineer evaluation board shall give favorable consideration, to the fullest extent practicable to the most highly qualified firms that have not had prior experience on Government projects (including small business firms and firms owned by the socially and/or economically deprived).

(c) The evaluation board shall prepare a selection memorandum for the approval of the head of the contracting activity. The selection memorandum will be signed by the board chairman and cleared by each board member. The selection memorandum shall include the following information:

(1) A listing by name of all firms reviewed by the board;

(2) A listing of the evaluation criteria applied;

(3) An analysis of the selection showing the rationale for the board's recommendation;

(4) The board's recommendation of the three most highly qualified firms, in order of preference;

(5) An independent Government cost estimate. The evaluation board shall require the project engineer to develop an independent Government estimate of the cost of the required architect-engineer services. Consideration shall be given to the estimated value of the services to be rendered, the scope, complexity, and the nature of the project and the estimated costs expected to be generated by the work. The independent Government estimate shall be revised as required during negotiations to correct noted deficiencies and reflect changes in or clarification of, the scope of the work to be performed by the architect-engineer. A cost estimate based on the application of percentage factors to cost estimates of the various segments of the work involved, e.g., construction project, may be developed for comparison purposes, but such a cost estimate shall not be used as a substitute for the independent Government estimate.

[49 FR 13254, Apr. 3, 1984, as amended at 79 FR 74988, Dec. 16, 2014]

736.602–4 Selection authority.

(a) The head of the contracting activity or his/her authorized designee shall review the selection memorandum and shall either approve it or return it to the board for reconsideration for specified reasons.

(b) Approval of the selection memorandum by the head of the contracting activity or his/her authorized designee shall serve as authorization for the contracting office to commence negotiation.

736.602–5 Short selection process for procurements not to exceed the simplified acquisition threshold.

References to (48 CFR) FAR 36.602–3 and 36.602–4 contained in (48 CFR) FAR 36.602–5 shall be construed as references to 736.602–3 and 736.602–4 of this subpart.

[49 FR 13254, Apr. 3, 1984, as amended at 61 FR 39095, July 26, 1996; 79 FR 74988, Dec. 16, 2014]

736.603 [Reserved]

736.605 Government cost estimate for architect-engineer work.

See 736.602–3(c)(5).

PART 737 [RESERVED]

PART 739—ACQUISITION OF INFORMATION TECHNOLOGY

Sec.
739.000 Scope of part.
739.001 [Reserved]
739.002 Definitions.

Subpart 739.1—General.

739.106 Contract clauses.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; and 3 CFR, 1979 Comp., p. 435.

SOURCE: 89 FR 19758, Mar. 20, 2024, unless otherwise noted.

§ 739.000 Scope of part.

This part prescribes acquisition policies and procedures for use in acquiring—

(a) Information technology, as defined in this part, consistent with the Federal Information Technology Acquisition Reform Act (FITARA).

(b) Information and communication technology (ICT), as defined in FAR 2.101.

§ 739.001 [Reserved]

§ 739.002 Definitions.

As used in this part—

Information Technology (IT) means

(1) Any services or equipment, or interconnected system(s) or subsystem(s) of equipment, that are 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; where

(2) Such services or equipment are ''used by an agency'' if used by the agency directly or if used by a contractor under a contract with the agency that requires either use of the services or equipment or requires use of the services or equipment to a significant extent in the performance of a service or the furnishing of a product.

(3) 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 provisioned services such as cloud computing and support services that support any point of the lifecycle of the equipment or service), and related resources.

(4) The term ''information technology'' does not include any equipment that is acquired by a contractor incidental to a contract that does not require use of the equipment.

Subpart 739.1—General.

§ 739.106 Contract clauses.

(a) [Reserved]

(b) Contracting officers must insert the clause at 752.239–70, Information Technology Authorization, in all solicitations and contracts.

(c) Contracting officers must insert the clause at 752.239–71, Information and Communication Technology Accessibility, in solicitations and contracts that include acquisition of information and communication technology (ICT) supplies and/or services for use by Federal employees or members of the public.

(d) Contracting officers must insert the clause at 752.239–72, USAID-Financed Project Websites, in solicitations and contracts fully or partially funded with program funds.

[89 FR 19758, Mar. 20, 2024]

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 742—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Subpart 742.7—Indirect Cost Rates

Sec.

742.770 Negotiated indirect cost rate agreement.

Subpart 742.11—Production, Surveillance, and Reporting

742.1170 Performance monitoring and progress reporting.
742.1170–1 General.
742.1170–2 Applicability.
742.1170–3 Policy.
742.1170–4 Progress reporting requirements and contract clause.
742.1170–5 Activity Monitoring, Evaluation, and Learning Plan requirement and contract clause.

Subpart 742.15—Contractor Performance Information

742.1501 [Reserved]
742.1502 Policy.
742.1503 Procedures.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

Subpart 742.7—Indirect Cost Rates

742.770 Negotiated indirect cost rate agreement.

When USAID is the cognizant Federal agency pursuant to FAR 42.003, USAID may enter into a Negotiated Indirect Cost Rate Agreement with the contractor to establish billing rates and final indirect cost rates in accordance with FAR 42.703. The Negotiated Indirect Cost Rate Agreement is incorporated into the contract pursuant to FAR 42.703–1(b). Application of the Negotiated Indirect Cost Rate Agreement, including any adjustments thereto, will be subject to any monetary or indirect rate ceiling, obligation, limitation of cost provision, and specific cost allowance or disallowance provided for in each contract between the parties.

[89 FR 4206, Jan. 23, 2024]

Subpart 742.11—Production, Surveillance, and Reporting

SOURCE: 72 FR 53163, Sept. 18, 2007, unless otherwise noted.

742.1170 Performance monitoring and progress reporting.

742.1170–1 General.

Performance monitoring is a function of contract administration used to determine contractor progress towards achieving the goals and objectives of the contract and to identify any factors that may delay or prevent the accomplishment of those goals and objectives. Performance monitoring requires USAID personnel, particularly the contracting officer's representative, to maintain adequate knowledge of the contractor's activities and progress in order to ensure that USAID's objectives, as stated in the contract's Statement of Work, will be achieved.

[72 FR 53163, Sept. 18, 2007, as amended at 79 FR 74988, Dec. 16, 2014]

742.1170–2 Applicability.

(a) This section applies to USAID non-personal, professional/technical services contracts exceeding the simplified acquisition threshold, but may be applied to other USAID contracts, if the contracting officer and requiring office determine that doing so is in the best interests of the Agency. The contracting officer must ensure that this determination is documented in the contract file. This section does not apply to personal services contracts.

(b) The underlying principles of (48 CFR) FAR subpart 42.11 apply to USAID contracts and are inherent to this section. However, not all of the specific requirements and terminology in (48 CFR) FAR subpart 42.11 are compatible with the types of technical assistance contracts usually awarded by USAID. Therefore, this section 742.1170 applies when the requirements of (48 CFR) FAR subpart 42.11 do not meet USAID requirements or are otherwise not appropriate.

(c) The progress reports discussed in this section are separate from the performance evaluation reports prepared in accordance with (48 CFR) FAR subpart 42.15 and internal Agency procedures, although they may be used by USAID personnel or their authorized representatives when evaluating the contractor's performance. Furthermore, the policies, procedures, and limitations of this section do not apply to technical reports, studies, papers, etc., the acquisition of which may be part of or even the sole purpose of the contract.

[72 FR 53163, Sept. 18, 2007, as amended at 79 FR 74996, Dec. 16, 2014]

742.1170–3 Policy.

(a) The contractor is responsible for timely contract performance. Performance monitoring by USAID does not obviate this responsibility.

(b) The requiring office, particularly the contracting officer's representative and the contracting officer, will determine how to monitor the contractor's performance to protect the Government's interests, by considering:

(1) The contract requirements for reporting progress;

(2) The contract requirements for an activity monitoring, evaluation, and learning plan, as applicable;

(3) The contract performance schedule;

(4) The contractor's implementation plan or workplan;

(5) The contractor's history of contract performance;

(6) The contractor's experience with the services or supplies being provided under the contract;

(7) The contractor's financial capability;

(8) Any other factors the requiring office, particularly the contracting officer's representative and the contracting officer, considers appropriate and necessary to adequately monitor contractor performance (for example, the day-to-day working proximity of the contracting officer's representative or contracting officer to the contractor's place of performance).

(c) In monitoring contractor performance, the requiring office (particularly the contracting officer's representative and contracting officer) must utilize any of the contractor's existing systems or processes for monitoring progress, provided that doing so is not contrary to the terms of the contract. The requiring officer or contracting officer's representative must not require anything from the contractor that is outside the scope or terms of the contract or may result in claims of waivers, of changes, or of other contract modifications. Further, progress reports shall not require information already available from other sources.

[72 FR 53163, Sept. 18, 2007, as amended at 79 FR 74988, Dec. 16, 2014; 89 FR 37961, May 6, 2024]

742.1170–4 Progress reporting requirements and contract clause.

(a) When the requiring office needs information on contract performance status on a regular basis, the contracting officer may require the contractor to submit periodic progress reports, tailored to address specific contract requirements but limited to only that information essential to USAID's needs in monitoring the contractor's progress.

(b) Because the contracting officer's representative is the individual most familiar with the contractor's performance, the contractor must submit the progress reports directly to the cognizant technical officer. The contracting officer's representative must review the reports and advise the contracting officer, in writing, of any recommended action, including any action needed to address potential or actual delays in performance. The contracting officer's representative must so advise the contracting officer in sufficient time, typically thirty days, for him or her to take any action that the contracting officer determines is appropriate. The requirements of this paragraph do not relieve the contractor of notification requirements identified elsewhere in the contract.

(c) The contracting officer must insert the clause at 752.242–70, Periodic Progress Reports, in solicitations and contracts that require progress reporting, as specified in this section. The

contracting officer must include specific reporting instructions in the Schedule.

[72 FR 53163, Sept. 18, 2007, as amended at 79 FR 74988, Dec. 16, 2014]

742.1170–5 Activity Monitoring, Evaluation, and Learning Plan requirement and contract clause.

(a) When the requiring office needs information on how the contractor expects to monitor implementation performance and context, conduct or collaborate on an evaluation, and generate evidence to inform learning and adaptive management, the contracting officer may require the contractor to submit an Activity Monitoring, Evaluation, and Learning Plan (AMELP) tailored to specific contract requirements. For more information on monitoring, evaluation, and learning during the design and implementation of activities, see ADS Chapter 201 at *https://www.usaid.gov/about-us/agency-policy/series-200/201*.

(b) Unless instructed otherwise in writing by the requiring office, the contracting officer must insert the clause at 752.242–71 in section F of solicitations and contracts exceeding the simplified acquisition threshold, except as specified in paragraph (c) of this section. The contracting officer may insert this clause in other USAID contracts if the contracting officer, in consultation with the requiring office, determines that an Activity Monitoring, Evaluation, and Learning Plan is necessary, as provided in paragraph (a) of this section.

(c) The clause is not required to be included in contracts for:

(1) Supplies and services that USAID acquires for its own direct use or benefit;

(2) Emergency food assistance under the Food for Peace Act or section 491 of the Foreign Assistance Act of 1961, including for the procurement, transportation, storage, handling and/or distribution of such assistance;

(3) International disaster assistance under section 491 of the Foreign Assistance Act of 1961 or other authorities administered by the Bureau for Humanitarian Assistance; or

(4) Activities managed by the Bureau for Conflict Prevention and Stabilization's Office of Transition Initiatives, or fully or partially funded with the Complex Crises Fund.

[89 FR 37961, May 2, 2024]

Subpart 742.15—Contractor Performance Information

SOURCE: 65 FR 36642, June 9, 2000, unless otherwise noted.

742.1501 [Reserved]

742.1502 Policy.

(a) [Reserved]

(b) Performance for personal services contracts awarded under (48 CFR) AIDAR appendices D and J shall not be evaluated under the contractor performance reporting procedures prescribed in (48 CFR) FAR subpart 42.15.

[65 FR 36642, June 9, 2000; 65 FR 39470, June 26, 2000, as amended at 79 FR 74988, 74996, Dec. 16, 2014]

742.1503 Procedures.

(a) [Reserved]

(b) Personal services contractors shall be recognized as Government personnel for the purposes of the restriction on access to contractor performance information in (48 CFR) FAR 42.1503.

[72 FR 53163, Sept. 18, 2007, as amended at 79 FR 74996, Dec. 16, 2014]

PART 744—SUBCONTRACTING POLICIES AND PROCEDURES

SOURCE: 77 FR 8171, Feb. 14, 2012, unless otherwise noted.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

Subpart 744.2—Consent to Subcontracts

744.202–170 Partner vetting.

If an acquisition is identified as subject to partner vetting, see (48 CFR) AIDAR 704.70 for the applicable procedures and requirements.

PART 745—GOVERNMENT PROPERTY

AUTHORITY: Sec. 621, Pub. L. 787–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

Subpart 745.1—General

745.107 Contract clauses.

(a) The contracting officer must insert the clause at (48 CFR) AIDAR 752.245–71 in all contracts under which the contractor will acquire property for use overseas and the contract funds were obligated under a Development Objective Agreement (DOAG) (or similar bilateral obligating agreement) with the cooperating country.

(b) The contracting officer must insert the applicable clause as required in (48 CFR) FAR 45.107 and (48 CFR) AIDAR 752.245–70 in all contracts under which the contractor will acquire property with funds not already obligated under a DOAG (or similar bilateral obligating agreement) with the cooperating country.

[79 FR 74996, Dec. 16, 2014]

PART 747—TRANSPORTATION

AUTHORITY: Sec. 621, Pub. L. 98–195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

Subpart 747.5—Ocean Transportation by U.S.-Flag Vessels

747.507 Contract clauses.

Contracting officer must insert the clause at 752.247–70 in solicitations and contracts solely for ocean transportation services, and in solicitations and contracts for goods and ocean transportation services when the ocean transportation will be fixed at the time the contract is awarded. Contracting officer must use (48 CFR) FAR 52.247–64 as prescribed in (48 CFR) FAR 47.507(a) in other situations.

[64 FR 5008, Feb. 2, 1999, as amended at 79 FR 74996, Dec. 16, 2014]

PART 749—TERMINATION OF CONTRACTS

Subpart 749.1—General Principles

Sec.

749.100 Scope of subpart.
749.111 Review of proposed settlements.
749.111–70 Termination settlement review boards.
749.111–71 Required review and approval.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13256, Apr. 3, 1984, unless otherwise noted.

Subpart 749.1—General Principles

749.100 Scope of subpart.

The Foreign Aid and Related Agencies Appropriation Act, 1963, and subsequent appropriation Acts, have imposed the following requirement:

None of the funds appropriated or made available pursuant to this Act for carrying out the Foreign Assistance Act of 1961, as amended, may be used for making payments on any contract for procurement to which the United States is a party entered into after the date of enactment of this Act which does not contain a provision authorizing the termination of such contract for the convenience of the United States.

See, for example, section 110 of the Foreign Assistance and Related Agencies Appropriation Act, 1965.

749.111 Review of proposed settlements.

749.111–70 Termination settlement review boards.

(a) The USAID Settlement Review Board shall be composed of the following members or their delegates (except as provided under 749.111–71(b)):

(1) M/OAA Director;

(2) Controller;

(3) General Counsel.

(b) The M/OAA Director or his/her delegate shall be designated as chairman of the board. Delegate members of the board shall have broad business and contracting experience and shall be senior USAID officials. Each member

or his/her delegate must be in attendance in order to conduct business, and the board shall act by majority vote. No individual shall serve as a member of a board for the review of a proposed settlement if he/she has theretofore reviewed, approved or disapproved or recommended approval, disapproval or other action with respect to any substantive element of such settlement proposal.

(c) The chairman shall appoint a nonvoting recorder who shall be responsible for receiving cases, scheduling and recording the proceedings at meetings, maintaining a log of all cases received by him/her for the board, and other duties as assigned by the board.

[49 FR 13256, Apr. 3, 1984, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

749.111–71 Required review and approval.

(a) *When required.* The USAID Settlement Review Board shall receive and approve all USAID/W and Mission proposed settlements or determinations if:

(1) The amount of settlement, by agreement or determination, involves $100,000 or more;

(2) The settlement or determination is limited to adjustment of the fee of a cost-reimbursement contract or subcontract and: (i) In the case of complete termination, the fee, as adjusted, with respect to the terminated portion of the contract or subcontract is $100,000 or more; or (ii) in the case of a partial termination, the fee, as adjusted, with respect to the terminated portion of the contract or subcontract is $100,000 or more;

(3) The head of the contracting activity concerned determines that a review of a specific case or class of cases is desirable; or

(4) The contracting officer, in his/her discretion, desires review by the board.

(b) *Level of review.* Proposed settlements in excess of $5 million shall be reviewed and approved by a board consisting of the M/OAA Director, the General Counsel, and the Controller, without power of redelegation.

(c) *Submission of information.* The contracting officer shall submit to the board a statement of the proposed settlement agreement or determination, supported by such detailed information as is required for an adequate review. This information should normally include copies of: (1) The contractor's or subcontractor's settlement proposal, (2) the audit report, (3) the property disposal report and any required approvals in connection therewith, and (4) the contracting officer's memorandum explaining the settlement. The board may, in its discretion, require the submission of additional information.

[49 FR 13256, Apr. 3, 1984, as amended at 57 FR 5236, Feb. 13, 1992; 59 FR 33446, June 29, 1994; 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007]

PART 750—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

Sec.

750.000 Scope of part.

Subpart 750.70 [Reserved]

Subpart 750.71—Extraordinary Contractual Actions To Protect Foreign Policy Interests of the United States

750.7100 Scope of subpart.
750.7101 Authority.
750.7102 General policy.
750.7103 [Reserved].
750.7104 Types of actions.
750.7105 Approving authority.
750.7106 Standards for deciding cases.
750.7106–1 General.
750.7106–2 Amendments without consideration.
750.7106–3 Mistakes.
750.7106–4 Informal commitments.
750.7107 Limitations upon exercise of authority.
750.7108 Contractual requirements.
750.7109 Submission of requests by contractors.
750.7109–1 Filing requests.
750.7109–2 Form of requests by contractors.
750.7109–3 Facts and evidence.
750.7110–750.7110–6 [Reserved]

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13257, Apr. 3, 1984, unless otherwise noted.

750.000 Scope of part.

USAID is not among the agencies named in the SAFETY Act or authorized by the President under Public Law 85–804 to take actions under the SAFETY Act.

[89 FR 4207, Jan. 23, 2024]

Subpart 750.70 [Reserved]

Subpart 750.71—Extraordinary Contractual Actions To Protect Foreign Policy Interests of the United States

750.7100 Scope of subpart.

This subpart specifies the standards and the procedures relating to requests for extraordinary contractual actions under Executive Order 11223.

[89 FR 4207, Jan. 23, 2024]

750.7101 Authority.

Under section 633 of the Foreign Assistance Act of 1961, 75 Stat. 454 (22 U.S.C. 2933), as amended; Executive Order 11223, dated May 12, 1965, as amended; and Executive Order 12163, dated September 29, 1979, as amended, the Administrator of the U.S. Agency for International Development has authority to provide extraordinary contractual relief.

[89 FR 4207, Jan. 23, 2024]

750.7102 General policy.

Extra-contractual claims arising from foreign assistance contracts will be processed similarly to claims for extraordinary relief under FAR part 50, and in consideration of the circumstances and authorities granted by the Foreign Assistance Act.

[89 FR 4207, Jan. 23, 2024]

750.7103 [Reserved]

750.7104 Types of actions.

The types of actions that may be taken pursuant to the direction of the approving authority under the Executive Order 11223 are: contractual adjustments such as amendments without consideration, correction of mistakes, and formalization of informal commitments.

[89 FR 4207, Jan. 23, 2024]

750.7105 Approving authority.

All authority to approve actions under this subpart is delegated to the M/OAA Director. The cognizant contracting officer will take appropriate contractual action pursuant to the decision of the M/OAA Director.

[89 FR 4207, Jan. 23, 2024]

750.7106 Standards for deciding cases.

750.7106–1 General.

The mere fact that losses occur under a contract is not, by itself, a sufficient basis for the exercise of the authority conferred by Executive Order 11223. Whether, in a particular case, an action will protect the foreign policy interests of the United States is fact specific. Examples of the types of cases where action may be proper are set forth in 750.7106–2 through 750.7106–4. Even if all of the factors contained in any of the examples are present, other factors or considerations in a particular case may warrant denial of the request. These examples are not intended to exclude other cases where the approving authority determines that the circumstances warrant action.

[49 FR 13257, Apr. 3, 1984, as amended at 89 FR 4207, Jan. 23, 2024]

750.7106–2 Amendments without consideration.

(a) Where an actual or threatened loss under a foreign assistance contract, however caused, will impair the productive ability of a contractor whose continued performance of any foreign assistance contract or whose continued operation as a source of supply is found to be essential to protect the foreign policy interests of the United States, the contract may be adjusted to the extent necessary to avoid such impairment to the contractor's productive ability.

(b) Where a contractor suffers a loss (not merely a diminution of anticipated profits) on a foreign assistance contract as a result of Government action, the character of the Government

action will generally determine whether any adjustment in the contract will be made and its extent. Where the Government action is directed primarily at the contractor and is taken by the Government in its capacity as the other contracting party, the contract may be adjusted if fairness so requires; thus where such Government action, although not creating any liability on its part, increases the cost of performance, considerations of fairness may make appropriate some adjustment in the contract.

[49 FR 13257, Apr. 3, 1984, as amended at 89 FR 4207, Jan. 23, 2024]

750.7106–3 Mistakes.

(a) A contract may be amended or modified to correct or mitigate the effect of a mistake, including in the following situations:

(1) A mistake or ambiguity in the contract that results from the failure to clearly express the agreement as understood by both parties;

(2) A mistake on the part of the contractor which is so obvious that it was or should have been apparent to the contracting officer; and

(3) A mutual mistake as to a material fact.

(b) Amending contracts to correct mistakes with the least possible delay normally will protect the foreign policy interests of the United States by expediting the program and by giving contractors proper assurance that such mistakes will be corrected expeditiously and fairly. An action that can be accomplished by administrative modification or resolved using the procedures in FAR subpart 33.2 should not be resolved using the authority and procedures of this subpart.

[89 FR 4207, Jan. 23, 2024]

750.7106–4 Informal commitments.

Informal commitments may be formalized under certain circumstances to permit payment to persons who have taken action without a formal contract; for example, where any person, pursuant to written or oral instructions from an officer or official of the Agency and relying in good faith upon the apparent authority of the officer or official to issue such instructions, has arranged to furnish or has furnished property or services to the agency and/or to a foreign assistance contractor or subcontractor without formal contractual coverage for such property or services. Formalization of commitments under such circumstances normally will protect the foreign policy interests of the United States by assuring persons that they will be treated fairly and paid expeditiously.

750.7107 Limitations upon exercise of authority.

(a) Executive Order 11223 does not provide authority for:

(1) The award of a cost-plus-a-percentage-of-cost contract;

(2) The payment of profit or fees in excess of applicable limitations; or

(3) The waiver of any requirement to post a bid, payment, performance, or other bond required by law.

(b)(1) Executive Order 11223 does not authorize the issuance of a modification, unless:

(i) With respect to cases falling within Section 4 of Executive Order 11223, the approving authority determines that the action is necessary to protect the foreign policy interests of the United States; and

(ii) No other legal authority authorizes issuance of such modification.

(2) A modification under paragraph (b)(1) of this section must be within the limits of the amounts appropriated and the statutory contract authorization as referenced in FAR 50.102–3.

(c) No contract shall be modified unless the contractor submits a request prior to all obligations (including final payment) under the contract having been discharged.

(d) An informal commitment must not be formalized unless:

(1) The contractor submits a written request for payment within six months after furnishing, or arranging to furnish, supplies or services in reliance upon the commitment;

(2) USAID has received the services satisfactorily performed, or has accepted property furnished in reliance on the commitment;

(3) The USAID employee alleged to have made the informal commitment

has affirmatively acknowledged responsibility for making the informal commitment in question; and

(4) USAID has taken appropriate action to prevent recurrence.

[89 FR 4207, Jan. 23, 2024]

750.7108 Contractual requirements.

Every contract modified pursuant to this subpart shall contain:

(a) A citation of the Act and Executive Order 11223;

(b) A brief statement of the circumstances justifying the action; and

(c) With respect to cases falling within section 4 of Executive Order 11223, a statement that the action is necessary to protect the foreign policy interests of the United States.

[89 FR 4208, Jan. 23, 2024]

750.7109 Submission of requests by contractors.

750.7109–1 Filing requests.

A contractor seeking an adjustment under the standards set forth in 750.7106 may file a request with the cognizant contracting officer.

[89 FR 4208, Jan. 23, 2024]

750.7109–2 Form of requests by contractors.

The contractor's request shall normally consist of a letter to the contracting officer providing the information specified in (48 CFR) FAR 50.103–3.

[49 FR 13257, Apr. 3, 1984, as amended at 79 FR 74996, Dec. 16, 2014]

750.7109–3 Facts and evidence.

The contracting officer or the approving authority may, where necessary, require the contractor to furnish facts and evidence supporting the request, as described in FAR 50.103–4.

[89 FR 4208, Jan. 23, 2024]

750.7110–750.7110–6 [Reserved]

SUBCHAPTER H—CLAUSES AND FORMS

PART 752—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 752.1—Instructions for Using Provisions and Clauses

Sec.

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752.107 AIDAR provisions and clauses prescribed in this subpart.

Subpart 752.2—Texts of Provisions and Clauses

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752.227–14 Rights in Data—general.
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752.236–70 Standards for accessibility for the disabled in USAID construction contracts.
752.239–70 Information Technology Authorization.
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752.242–70 Periodic progress reports.
752.242–71 Activity Monitoring, Evaluation, and Learning Plan.
752.245–70 Government property—USAID reporting requirements.
752.245–71 Title to and care of property.
752.247–70 Preference for privately owned U.S.-flag commercial vessels.
752.252–1 AIDAR solicitation provisions incorporated by reference
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Subpart 752.70—Texts of USAID Contract Clauses

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752.7006 Notices.
752.7007 Personnel compensation.
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752.7010 Conversion of U.S. dollars to local currency.
752.7011 Orientation and language training.
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752.7014 Notice of changes in travel regulations.
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752.7016–752.7024 [Reserved]
752.7025 Approvals.
752.7026 [Reserved]
752.7027 Personnel.
752.7028 Differentials and Allowances.
752.7029 Post privileges.
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752.7032 International travel approval and notification requirements.
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752.7034 Acknowledgement and disclaimer.

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752.7036 USAID Implementing Partner Notices (IPN) portal for acquisition.
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752.7038 Nondiscrimination against End-Users of Supplies or Services.

Subpart 752.3–70—USAID Clause Matrices [Reserved]

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435.

SOURCE: 49 FR 13259, Apr. 3, 1984, unless otherwise noted.

Subpart 752.1—Instructions for Using Provisions and Clauses

SOURCE: 79 FR 74997, Dec. 16, 2014, unless otherwise noted.

752.102 Incorporating provisions and clauses.

(a) As authorized by FAR 52.102, FAR and AIDAR provisions and clauses should be incorporated by reference in solicitations and contracts to the maximum practical extent, except as provided in paragraph (b) of this section. For provisions that require fill-ins or input by the contracting officer, the paragraph that contains the fill-in information must be included directly below the title of the provision or clause.

(b) If applicable, the following AIDAR provisions and clauses must be incorporated in full text in all solicitations and awards:

No. AIDAR (48 CFR chapter 7)	Title	Date
752.225–4	Buy American Act—Trade Agreements	July 1997.
752.232–70	Letter of Credit Advance Payment	Mar 2015.
752.245–70	Government property—USAID reporting requirements	July 1997.
752.7003	Documentation for payment	Nov 1998.

(c) Contracting activities may choose to incorporate provisions in full text, when:

(1) A new clause or significant revisions to an existing clause is issued less than six months prior to issuance of a solicitation or a contract award;

(2) Listing a clause in full text will ensure compliance with the contract terms and conditions;

(3) Inclusion of clauses in full text is more practical under the local conditions (*e.g.*, situations where doing so will assist small local entities, the prospective contractors may have limited Internet access, etc.).

(d) If a solicitation or contract contains one or more FAR provisions or clauses incorporated by reference, the contracting officer must insert the following Internet address: *http://www.acquisition.gov/comp/far/index.html* in FAR clause 52.252–1, Solicitation Provisions Incorporated by Reference or 52.252–2, Clauses Incorporated by Reference.

752.107 AIDAR provisions and clauses prescribed in this subpart.

(a) The contracting officer must insert the provision at 752.252–1, Solicitation Provisions Incorporated by Reference, in solicitations in order to incorporate AIDAR provisions by reference.

(b) The contracting officer must insert the clause at 752.252–2, AIDAR Clauses Incorporated by Reference, in solicitations and contracts in order incorporate AIDAR clauses by reference.

(c) The contracting officer must insert the provision at 752.252–70, Provisions and Clauses to be Completed by the Offeror, in full text in solicitations or contract containing FAR or AIDAR provision(s) or clause(s) that must be completed by offerors or prospective contractors and submitted with the quotation or offer.

Subpart 752.2—Texts of Provisions and Clauses

752.200 Scope of subpart.

None of the clauses specified in this subpart are for use in USAID personal services contracts. For personal services contract clauses, see (48 CFR) AIDAR Appendix D—Direct USAID Contracts with U.S. Citizens or U.S. Residents for Personal Services Abroad and (48 CFR) AIDAR Appendix J—Direct USAID Contracts with Cooperating Country Nationals and with Third Country Nationals for Personal Services Abroad.

[49 FR 13259, Apr. 3, 1984, as amended at 51 FR 11450, Apr. 3, 1986; 51 FR 12706, Apr. 15, 1986; 57 FR 5236, Feb. 13, 1992; 62 FR 40469, July 29, 1997; 79 FR 74988, Dec. 16, 2014]

752.202–1 Definitions.

(a) As prescribed in 702.270 and in (48 CFR) FAR Subpart 2.2, USAID contracts use the Definitions clause in (48 CFR) FAR 52.202–1 and its Alternate I, as appropriate, and the following additional definitions.

(b) *Alternate 70.* For use in all USAID contracts. Use in addition to the clause in FAR 52.202–1.

USAID DEFINITIONS CLAUSE—GENERAL SUPPLEMENT FOR USE IN ALL USAID CONTRACTS (JAN 1990)

(a) *USAID* shall mean the U.S. Agency for International Development.

(b) *Administrator* shall mean the Administrator or the Deputy Administrator of USAID.

(c) When this contract is with an educational institution Campus Coordinator shall mean the representative of the Contractor at the Contractor's home institution, who shall be responsible for coordinating the activities carried out under the contract.

(d) When this contract is with an educational institution *Campus Personnel* shall mean representatives of the Contractor performing services under the contract at the Contractor's home institution and shall include the Campus Coordinator.

(e) *Consultant* shall mean any especially well qualified person who is engaged, on a temporary or intermittent basis to advise the Contractor and who is not an officer or employee of the Contractor who performs other duties for the Contractor.

(f) *Contractor employee* shall mean an employee of the Contractor assigned to work under this contract.

(g) *Cooperating Country or Countries* shall mean the foreign country or countries in or for which services are to be rendered hereunder.

(h) *Cooperating Government* shall mean the government of the Cooperating Country.

(i) *Federal Acquisition Regulations (FAR),* when referred to herein shall include U.S. Agency for International Development Acquisition Regulations (AIDAR).

(j) *Government* shall mean the United States Government.

(k) *Mission* shall mean the United States AID Mission to, or principal USAID office in, the Cooperating Country.

(l) *Mission Director* shall mean the principal officer in the Mission in the Cooperating Country, or his/her designated representative.

(c) [Reserved]

(d) *Alternate 72.* For use in all USAID contracts which involve any performance overseas. Use in addition to the clauses in (48 CFR) FAR 52.202–1 and in 752.202–1(b) of this chapter.

USAID DEFINITIONS CLAUSE—SUPPLEMENT FOR USAID CONTRACTS INVOLVING PERFORMANCE OVERSEAS (JUN 2009)

(a) *Contractor's Chief of Party* shall mean the representative of the Contractor in the Cooperating Country who shall be responsible for supervision of the performance of all duties undertaken by the Contractor in the Cooperating Country.

(b) *Cooperating Country National (CCN) employee* means an individual who meets the citizenship requirements of the CCN definition in (48 CFR) AIDAR 702.170 and is hired while residing outside the United States for work in a cooperating country.

(c) *Dependents* shall mean:

(1) Spouse;

(2) Children (including step and adopted children) who are unmarried and under 21 years of age or, regardless of age, are incapable of self support.

(3) Parents (including step and legally adoptive parents), of the employee or of the spouse, when such parents are at least 51 percent dependent on the employee for support; and

(4) Sisters and brothers (including step or adoptive sisters or brothers) of the employee, or of the spouse, when such sisters and brothers are at least 51 percent dependent on the employee for support, unmarried and under 21 years of age, or regardless of age, are incapable of self support.

(d) *Local currency* shall mean the currency of the Cooperating Country.

(e) *Regular employee* shall mean a Contractor employee appointed to serve one year or more in the Cooperating Country.

(f) *Short-term employee* shall mean a Contractor employee appointed to serve less than one year in the Cooperating Country.

(g) *Third Country National (TCN) employee* means an individual who meets the citizenship requirements of the TCN definition in (48 CFR) AIDAR 702.170 and is hired while residing outside the United States for work in a Cooperating Country.

[49 FR 13259, Apr. 3, 1984, as amended at 52 FR 4145, Feb. 10, 1987; 52 FR 38098, Oct. 14, 1987; 55 FR 6802, Feb. 27, 1990; 64 FR 42042, Aug. 3, 1999; 79 FR 74988, 74997, Dec. 16, 2014; 89 FR 4208, Jan. 23, 2024]

752.204–2 Security requirements.

As prescribed in (48 CFR) AIDAR 704.404(a), when the clause in (48 CFR) FAR 52.204–2 is used in USAID contracts, paragraph (a) of the clause is revised as follows:

SECURITY REQUIREMENTS (FEB 1999)

Pursuant to the Foreign Affairs Manual, 12 FAM 540 (*http://www.state.gov/documents/organization/88404.pdf*), USAID applies the safeguards applicable to ''Confidential'' information to administratively controlled information designated as ''Sensitive But Unclassified''. Therefore, when the clause in (48 CFR) FAR 52.204–2 is used in USAID contracts, pursuant to 704.404(a), paragraph (a) of the clause is revised as follows:

(a) This clause applies to the extent that this contract involves access to classified ('Confidential', 'Secret', or 'Top Secret'), or administratively controlled ('Sensitive But Unclassified') information.

(End of clause)

[79 FR 74997, Dec. 16, 2014, as amended at 89 FR 4209, Jan. 23, 2024]

752.204–70 Partner vetting pre-award requirements.

As prescribed in (48 CFR) AIDAR 704.7005(a), insert the following provision in all solicitations subject to vetting:

PARTNER VETTING PRE-AWARD REQUIREMENTS (FEB 2012)

(a) USAID has determined that any contract resulting from this solicitation is subject to vetting. Terms used in this provision are defined in paragraph (b) of the (48 CFR) AIDAR clause at 752.204–71 Partner Vetting, of this solicitation. An offeror that has not passed vetting is ineligible for award.

(b) The following are the vetting procedures for this solicitation:

(1) Prospective offerors review the attached USAID Partner Information Form, USAID Form 500–13, and submit any questions about the USAID Partner Information Form or these procedures to the contracting officer by the deadline for questions in the solicitation.

(2) The contracting officer notifies the offeror when to submit the USAID Partner Information Form. For this solicitation, USAID will vet at [*insert in the provision the applicable stage of the source selection process at which the contracting officer will notify the offeror(s) who must be vetted*]. Within the timeframe set by the contracting officer in the notification, the offeror must complete and submit the information on the USAID Partner Information Form in accordance with instructions from the vetting official named in paragraph (d) of the (48 CFR) AIDAR clause at 752.204–71 Partner Vetting, of this solicitation.

NOTE: Offerors who submit using non-secure methods of transmission do so at their own risk.

(3) The offerors must notify proposed subcontractors of this requirement when the subcontractors are subject to vetting.

(c) Source selection proceeds separately from vetting. Vetting is conducted independently from any discussions the contracting officer may have with an offeror. The offeror and any subcontractor subject to vetting must not provide vetting information to other than the vetting official. The offeror and any subcontractor subject to vetting will communicate only with the vetting official regarding their vetting submission(s) and not with any other USAID or USG personnel, including the contracting officer or his/her representatives. Exchanges between the Government and an offeror about vetting information submitted by the offeror or any proposed subcontractor are clarifications in accordance with (48 CFR) FAR 15.306(a) (48 CFR 15.306(a)). The contracting officer designates the vetting official as the only individual authorized to clarify the offeror's and proposed subcontractor's vetting information.

(d)(1) The vetting official notifies the offeror that it:

(i) Has passed vetting,

(ii) Has not passed vetting, or

(iii) Must provide additional information, and resubmit the USAID Partner Information Form with the additional information within the number of days the vetting official specified in the notification.

(2) The vetting official will include in the notification any information that USAID's Office of Security (SEC) determines releasable. In its determination, SEC will take into consideration the classification or sensitivity of the information, the need to protect sources and methods, or status of ongoing law enforcement and intelligence community investigations or operations.

(e) *Reconsideration.* (1) Within 7 calendar days after the date of the vetting official's notification, an offeror that has not passed vetting may request in writing to the vetting official that the Agency reconsider the vetting determination. The request should include any written explanation, legal documentation and any other relevant written material for reconsideration.

(2) Within 7 calendar days after the vetting official receives the request for reconsideration, the Agency will determine whether the offeror's additional information warrants a revised decision.

(3) The Agency's determination of whether reconsideration is warranted is final.

(f) *Revisions to vetting information.* (1) Offerors who change key individuals, whether the offeror has previously passed vetting or not, must submit a revised USAID Partner Information Form to the vetting official. This includes changes to key personnel resulting from revisions to the technical proposal.

(2) The vetting official will follow the vetting process in paragraph (d) of this clause for any revision of the offeror's Form.

(g) *Award.* At the time of award, the contracting officer will confirm with the vetting official that the apparently successful offeror has passed vetting. The contracting officer may award only to an apparently successful offeror that has passed vetting.

(End of clause)

[77 FR 8171, Feb. 14, 2012, as amended at 79 FR 74988, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.204–71 Partner vetting.

As prescribed in (48 CFR) AIDAR 704.7005(b)(1) and 716.506(a), insert the following clause in all contracts subject to vetting:

PARTNER VETTING (FEB 2012)

(a) The contractor must comply with the vetting requirements for key individuals under this contract.

(b) Definitions. As used in this provision—

Key individual means:

(i) Principal officers of the organization's governing body (e.g., chairman, vice chairman, treasurer and secretary of the board of directors or board of trustees);

(ii) The principal officer and deputy principal officer of the organization (*e.g.*, executive director, deputy director, president, vice president);

(iii) The program manager or chief of party for the USG-financed program; and

(iv) Any other person with significant responsibilities for administration of the USG-financed activities or resources, such as key personnel as described in Automated Directives System Chapter 302. Key personnel, whether or not they are employees of the prime contractor, must be vetted.

Vetting official means the USAID employee identified in paragraph (d) of this clause as having responsibility for receiving vetting information, responding to questions about information to be included on the USAID Partner Information Form, USAID Form 500–13, coordinating with the USAID Office of Security, and conveying the vetting determination to each offeror, potential subcontractors subject to vetting, and to the contracting officer. The vetting official is not part of the contracting office and has no involvement in the source selection process.

(c) The Contractor must submit a USAID Partner Information Form, USAID Form 500–13, to the vetting official identified below during the contract when the Contractor replaces key individuals with individuals who have not been previously vetting for this contract. Note: USAID will not approve any key personnel who have not passed vetting.

(d) The designated vetting official is:

Vetting official:

Address:

Email: _____ (for inquiries only)

(e)(1) The vetting official will notify the Contractor that it—

(i) Has passed vetting,

(ii) Has not passed vetting, or

(iii) Must provide additional information, and resubmit the USAID Partner Information Form with the additional information within the number of days the vetting official specifies.

(2) The vetting official will include in the notification any information that USAID's Office of Security (SEC) determines releasable. In its determination, SEC will take into consideration the classification or sensitivity of the information, the need to protect sources and methods, or status of ongoing law enforcement and intelligence community investigations or operations.

(f) *Reconsideration.* (1) Within 7 calendar days after the date of the vetting official's notification, the contractor or prospective subcontractor that has not passed vetting may request in writing to the vetting official that the Agency reconsider the vetting determination. The request should include any written explanation, legal documentation and any other relevant written material for reconsideration.

(2) Within 7 calendar days after the vetting official receives the request for reconsideration, the Agency will determine whether the contractor's additional information warrants a revised decision.

(3) The Agency's determination of whether reconsideration is warranted is final.

(g) A notification that the Contractor has passed vetting does not constitute any other approval under this contract.

(h) When the contractor anticipates awarding a subcontract for which consent is required under (48 CFR) FAR clause 52.244–2, Subcontracts, the subcontract is subject to vetting. The prospective subcontractor must submit a USAID Partner Information Form, USAID Form 500–13, to the vetting official identified in paragraph (d) of this clause. The contracting officer must not consent to award of a subcontract to any organization that has not passed vetting when required.

(i) The contractor agrees to incorporate the substance of paragraphs (a) through (g) of this clause in all subcontracts under this contract.

(End of clause)

Alternate I (FEB 2012). As prescribed in 704.7005(b)(2), substitute paragraphs (h) and (i) below for paragraphs (h) and (i) of the basic clause:

(h)(1) When the contractor anticipates awarding a subcontract for which consent is required under (48 CFR) FAR clause 52.244–2, Subcontracts, the subcontract is subject to vetting. The prospective subcontractor must submit a USAID Partner Information Form, USAID Form 500–13, to the vetting official identified in paragraph (d) of this clause. The contracting officer must not consent to award of a subcontract to any organization that has not passed vetting when required.

(2) In addition, prospective subcontractors at any tier providing the following classes of items (supplies and services):

_____

_____

_____

must pass vetting. Contractors must not place subcontracts for these classes of items until they receive confirmation from the vetting official that the prospective subcontractor has passed vetting.

(i) The contractor agrees to incorporate the substance of this clause in all subcontracts under this contract.

[77 FR 8171, Feb. 14, 2012, as amended at 79 FR 74988, Dec. 16, 2014]

752.204–72 Access to USAID Facilities and USAID's Information Systems.

As prescribed in AIDAR 704.1303, insert the following clause in Section I of solicitations and contracts:

ACCESS TO USAID FACILITIES AND USAID'S INFORMATION SYSTEMS (MAY 2024)

(a) The Contractor must ensure that individuals engaged in the performance of this award as employees or volunteers of the Contractor, or as subcontractors or subcontractor employees at any tier, comply with all applicable personal identity verification (PIV) and Homeland Security Presidential Directive–12 (HSPD–12) procedures, including those summarized below, and any subsequent USAID or Government-wide procedures and policies related to PIV or HSPD–12.

(b) An individual engaged in the performance of this award may obtain access to USAID facilities or logical access to USAID's information systems only when and to the extent necessary to carry out this award. USAID issues various types of credentials to users who require physical access to Agency facilities and/or logical access to Agency information systems, in accordance with USAID's Automated Directives System (ADS) 542, available at *https://www.usaid.gov/about-us/agency-policy/series-500/542*.

(c) (1) No later than five (5) business days after award, unless the Contracting Officer authorizes a longer time period, the Contractor must provide to the Contracting Officer's Representative a complete list of individuals that require access to USAID facilities or information systems under this contract.

(2) Before an individual may obtain a USAID credential (new or replacement) authorizing the individual routine access to USAID facilities, or logical access to USAID's information systems, the individual must physically present two forms of identity source documents in original form to the Enrollment Office personnel when undergoing processing. To obtain a PIV card, one identity source document must be a valid Federal or State Government-issued picture ID from the I–9 list available at *https://www.uscis.gov/i-9-central/form-i-9-acceptable-documents*. For other types of credentials the Contractor can obtain the list of acceptable forms from the Contracting Officer's Representative. Submission of these documents, as well as documentation of any applicable security background investigation, is mandatory in order for the individual to receive a credential granting facilities and/or logical access.

(d) (1) No later than the 5th day of each month, the Contractor must provide the Contracting Officer's Representative with the following:

(i) a list of individuals with access who were separated in the past sixty (60) calendar days, and

(ii) a list of individuals hired in the past sixty (60) calendar days who require access under this contract.

(2) This information must be submitted even if no separations or hiring occurred during the past sixty (60) calendar days.

(3) Failure to comply with the requirements in paragraph (d)(1) may result in the suspension of all facilities and/or logical access associated with this contract.

(e) The Contractor must ensure that individuals do not share logical access to USAID information systems and sensitive information.

(f) USAID may suspend or terminate the access to any systems and/or facilities in the event of any violation, abuse, or misuse. The suspension or termination may last until the situation has been corrected or no longer exists.

(g) The Contractor must notify the Contracting Officer's Representative and the USAID Service Desk (*CIO-HELPDESK@usaid.gov* or 202–712–1234) at least five (5) business days prior to the removal of any individuals with credentials from the contract. For unplanned terminations, the Contractor must immediately notify the Contracting Officer's Representative and the USAID Service Desk. Unless otherwise instructed by the Contracting Officer, the Contractor must return all credentials and remote authentication tokens to the Contracting Officer's Representative prior to departure of the individual or upon completion or termination of the contract, whichever occurs first.

(h) The Contractor must insert this clause, including this paragraph (h), in any subcontracts that require the subcontractor or a subcontractor employee to have routine physical access to USAID facilities or logical access to USAID's information systems. The Contractor is responsible for providing the Contracting Officer's Representative with the information required under paragraphs (c)(1) and (d)(1) of this clause for any applicable subcontractor or subcontractor employee.

(End of clause)

[89 FR 19758, Mar. 20, 2024; 89 FR 4209, Jan. 23, 2024]

752.209–71 Organizational conflicts of interest discovered after award.

As prescribed in 709.507–2, insert the following clause in any solicitation containing a provision in accordance with (48 CFR) FAR 9.507–1, or a clause in accordance with (48 CFR) FAR 9.507–2, establishing a restraint on the contractor's eligibility for future contracts.

ORGANIZATIONAL CONFLICTS OF INTEREST DISCOVERED AFTER AWARD (JUN 1993)

(a) The Contractor agrees that, if after award it discovers either an actual or potential organizational conflict of interest with respect to this contract, it shall make an immediate and full disclosure in writing to the contracting officer which shall include a description of the action(s) which the Contractor has taken or proposes to take to avoid, eliminate or neutralize the conflict.

(b) The contracting officer shall provide the contractor with written instructions concerning the conflict. USAID reserves the right to terminate the contract if such action is determined to be in the best interest of the Government.

(End of clause)

[58 FR 42255, Aug. 9, 1993, as amended at 64 FR 5008, Feb. 2, 1999; 79 FR 74988, 74998, Dec. 16, 2014]

752.211–70 Language and measurement.

The following clause shall be used in all USAID-direct contracts.

LANGUAGE AND MEASUREMENT (JUN 1992)

(a) The English language shall be used in all written communications between the parties under this contract with respect to services to be rendered and with respect to all documents prepared by the contractor except as otherwise provided in the contract or as authorized by the contracting officer.

(b) Wherever measurements are required or authorized, they shall be made, computed, and recorded in metric system units of measurement, unless otherwise authorized by USAID in writing when it has found that such usage is impractical or is likely to cause U.S. firms to experience significant inefficiencies or the loss of markets. Where the metric system is not the predominant standard for a particular application, measurements may be expressed in both the metric and the traditional equivalent units, provided the metric units are listed first.

(End of clause)

[57 FR 23321, June 3, 1992. Redesignated at 61 FR 39095, July 26, 1996]

752.216–70 Award fee.

As prescribed in 716.406, insert the following clause in solicitations and contracts in which an award-fee contract is contemplated.

AWARD FEE (MAY 1997)

(a) The Government shall pay the Contractor for performing this contract such base fee and such additional fee as may be awarded, as provided in the Schedule.

(b) Payment of the base fee and award fee shall be made as specified in the Schedule; provided, that after payment of 85 percent of the base fee and potential award fee, the contracting officer may withhold further payment of the base fee and award fee 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 15 percent of the total base fee and potential award fee or $100,000, whichever is less. The contracting officer shall release 75 percent of all fee withholds under this contract after receipt of the 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)

[64 FR 5008, Feb. 2, 1999, as amended at 79 FR 74988, 74998, Dec. 16, 2014]

752.216–71 Partner vetting in indefinite delivery contracts.

As prescribed in (48 CFR) AIDAR 716.506(b)(1), insert the following clause in all indefinite-delivery contracts subject to vetting:

PARTNER VETTING IN INDEFINITE DELIVERY CONTRACTS (FEB 2012)

(a) The contractor must comply with the vetting requirements for key individuals under this contract and in any orders that are identified as subject to vetting.

(b) Definitions. As used in this provision—

Key individual means:

(i) Principal officers of the organization's governing body (e.g., chairman, vice chairman, treasurer and secretary of the board of directors or board of trustees);

(ii) The principal officer and deputy principal officer of the organization (e.g., executive director, deputy director, president, vice president);

(iii) The program manager or chief of party for the USG-financed program; and

(iv) Any other person with significant responsibilities for administration of the USG-financed activities or resources, such as key personnel as described in Automated Directives System Chapter 302. Key personnel, whether or not they are employees of the prime contractor, must be vetted.

Vetting official means the USAID employee identified in paragraph (d) of this clause as having responsibility for receiving vetting information, responding to questions about information to be included on the USAID Partner Information Form, USAID Form 500–13, coordinating with the USAID Office of Security, and conveying the vetting determination to each contractor, potential subcontractors subject to vetting, and to the cognizant contracting officer. The vetting official is not part of the contracting office and has no involvement in the source selection process.

(c) The contractor must submit a USAID Partner Information Form, USAID Form 500–13 to the designated vetting official:

(1) when the contractor replaces key individuals under the basic contract with individuals who have not been previously vetted.

(2) when the contractor replaces key individuals under an order subject to vetting with individuals who have not been previously vetted. For changes to any key individuals associated with both the basic contract and any orders subject to vetting, the contractor must submit updated vetting forms to each designated vetting official. Note: USAID will not approve any key personnel who have not passed vetting.

(d)(1) The designated vetting official for the basic contract is:

Vetting official:

Address:

Email: _____ (for inquiries only)

(2) Each order subject to vetting will identify the vetting official for that order. The contractor must submit vetting information specific to an order to the vetting official identified in that order.

(e)(1) The vetting official will notify the contractor that it—

(i) Has passed vetting,

(ii) Has not passed vetting, or

(iii) Must provide additional information, and resubmit the USAID Partner Information Form with the additional information within the number of days the vetting official specifies.

(2) The vetting official will include in the notification any information that USAID's Office of Security (SEC) determines releasable. In its determination, SEC will take into consideration the classification or sensitivity of the information, the need to protect sources and methods, or status of ongoing law enforcement and intelligence community investigations or operations.

(f) *Reconsideration.* (1) Within 7 calendar days after the date of the vetting official's notification, the contractor or prospective subcontractor that has not passed vetting may request in writing to the vetting official that the Agency reconsider the vetting determination. The request should include any written explanation, legal documentation and any other relevant written material for reconsideration.

(2) Within 7 calendar days after the vetting official receives the request for reconsideration, the Agency will determine whether the contractor's additional information warrants a revised decision.

(3) The Agency's determination of whether reconsideration is warranted is final.

(g) A notification that the contractor has passed vetting does not constitute any other approval under this contract.

(h) The request for task or delivery order proposals will identify whether the order is subject to vetting. The following are the procedures for vetting orders under this contract. Note that the term ''awardee'' as used below refers to a contractor under multiple-award indefinite-delivery contracts, consistent with the use of the term in (48 CFR) FAR 16.505(b):

(1) The contracting officer will notify the awardees when to complete and submit the USAID Partner Information Form to the vetting official named in the request for order proposals. Note: Awardees who submit using non-secure methods of transmission do so at their own risk.

(2) The awardee must notify proposed subcontractors of this requirement when the subcontractors are subject to vetting.

(3) The fair opportunity process proceeds separately from vetting. Vetting is conducted independently from any discussions the contracting officer may have with an awardee. The awardee and any subcontractor subject to vetting must not provide vetting information to other than the vetting official identified in the request for order proposal. The awardee and any subcontractor subject to vetting will communicate only with the vetting official regarding their vetting submission(s) and not with any other USAID or USG personnel, including the contracting officer or his/her representatives.

(4)(i) The vetting official notifies the awardee that it:

(A) Has passed vetting,

(B) Has not passed vetting, or

(C) Must provide additional information, and resubmit the USAID Partner Information Form with the additional information within the number of days the vetting official specified in the notification.

(ii) The vetting official will include in the notification any information that USAID's Office of Security (SEC) determines releasable. In its determination, SEC will take into consideration the classification or sensitivity of the information, the need to protect sources and methods, or status of ongoing law enforcement and intelligence community investigations or operations.

(5) *Reconsideration.* (i) Within 7 calendar days after the date of the vetting official's notification, an awardee that has not passed vetting may request in writing to the vetting official that the Agency reconsider the vetting determination. The request should include any written explanation, legal documentation and any other relevant written material for reconsideration.

(ii) Within 7 calendar days after the vetting official receives the request for reconsideration, the Agency will determine whether the contractor's additional information warrants a revised decision.

(iii) The Agency's determination of whether reconsideration is warranted is final.

(6) *Revisions to vetting information.* (i) Before the order is awarded, any awardee who changes key individuals, whether it has previously passed vetting or not, must submit a revised USAID Partner Information Form to the vetting official. This includes changes to key personnel resulting from revisions to the technical proposal.

(ii) The order vetting official will follow the vetting process in paragraph (e) of this clause for any revision of the awardee's Form.

(7) *Award of order.* The contracting officer may award an order subject to vetting only to an apparently successful awardee that has passed vetting for that order.

(i) When the contractor anticipates awarding a subcontract for which consent is required under (48 CFR) FAR clause 52.244–2, Subcontracts, the subcontract is subject to vetting. The prospective subcontractor must submit a USAID Partner Information Form, USAID Form 500–13, to the designated vetting official. The contracting officer must not consent to award of a subcontract to any organization that has not passed vetting when required.

(j) The contractor agrees to incorporate the substance of paragraphs (a) through (g) of this clause in all subcontracts under this contract.

(End of clause)

Alternate I (FEB 2012). As prescribed in 716.506(b), substitute paragraphs (i) and (j) below for paragraphs (i) and (j) of the basic clause:

(i)(1) When the contractor anticipates awarding a subcontract for which consent is required under (48 CFR) FAR clause 52.244–2, Subcontracts, the subcontract is subject to vetting. The prospective subcontractor must submit a USAID Partner Information Form, USAID Form 500–13, to the designated vetting official. The contracting officer must

not consent to award of a subcontract to any organization that has not passed vetting when required.

(2) In addition, prospective subcontractors at any tier providing the following classes of items (supplies and services):

must pass vetting. Contractors must not place subcontracts for these classes of items until they receive confirmation from the vetting official that the prospective subcontractor has passed vetting.

(j) The contractor agrees to incorporate the substance of this clause in all subcontracts under this contract.

[77 FR 8172, Feb. 14, 2012, as amended at 79 FR 74988, Dec. 16, 2014]

752.219–8 Utilization of small business concerns and small disadvantaged business concerns.

As prescribed in (48 CFR) AIDAR 719.708, insert the following clause in solicitations and contracts that contain the clause at 52.219–8, Utilization of Small Business Concerns:

UTILIZATION OF SMALL BUSINESS CONCERNS AND SMALL DISADVANTAGED BUSINESS CONCERNS (MAR 2015)

In addition to the FAR clause at 52.219–8, Utilization of Small Business Concerns, the contractor must comply with the following USAID small business provision: To permit USAID, in accordance with the small business provisions of the Foreign Assistance Act, to give small business firms an opportunity to participate in supplying equipment supplies and services financed under this contract, the contractor must, to the maximum extent possible, provide the following information to the U.S. Agency for International Development(USAID), Office of Small and Disadvantaged Business Utilization (OSDBU), 1300 Pennsylvania Ave. NW., SA–44, Room 848, Washington, DC 20523, at least 45 days prior to placing any order in excess of the simplified acquisition threshold except where a shorter time is requested of, and granted by OSDBU:

(1) Brief general description and quantity of commodities or services;

(2) Closing date for receiving quotations or bids; and

(3) Address where invitations or specifications may be obtained.

(End of clause)

[79 FR 74998, Dec. 16, 2014, as amended at 89 FR 4209, Jan. 23, 2024]

752.219–70 USAID Mentor-Protégé Program.

As prescribed in 719.273–11(a), insert the following provision:

USAID MENTOR-PROTÉGÉ PROGRAM (JUL 2007)

(a) Large and small business are encouraged to participate in the USAID Mentor-Protégé Program (the ''Program''). Mentor firms provide eligible small business Protégés with developmental assistance to enhance their business capabilities and ability to obtain Federal contracts.

(b) Mentor firms are large prime contractors or eligible small business capable of providing developmental assistance. Protégé firms are small business as defined in 13 CFR parts 121, 124, and 126.

(c) Developmental assistance is technical, managerial, financial, and other mutually beneficial assistance that aids Protégés. The costs for developmental assistance are not chargeable to the contract.

(d) Firms interested in participating in the Program are encouraged to contact the USAID Mentor-Protégé Program Manager (202–712–1500) for more information.

(End of provision)

[72 FR 32546, June 13, 2007, as amended at 79 FR 74998, Dec. 16, 2014]

752.219–71 Mentor requirements and evaluation.

As prescribed in (48 CFR) AIDAR 719.273–11(b), insert the following clause:

MENTOR REQUIREMENTS AND EVALUATION (JUL 2007)

(a) Mentor and Protégé firms shall submit an evaluation of the overall experience in the Program to OSDBU at the conclusion of the mutually agreed upon Program period, the conclusion of the contract, or the voluntary withdrawal by either party from the Program, whichever occurs first. At the conclusion of each year in the Mentor-Protégé Program, the Mentor and Protégé will formally brief the USAID Mentor-Protégé Program Manager regarding Program accomplishments under their Mentor-Protégé Agreement.

(b) Mentor or Protégé shall notify OSDBU in writing, at least 30 calendar days in advance of the effective date of the firm's withdrawal from the Program.

(End of clause)

[72 FR 32546, June 13, 2007, as amended at 79 FR 74988, 74998, Dec. 16, 2014]

752.222–70 USAID disability policy.

As prescribed in 722.810, the contracting officer must insert the following clause in Section H of all solicitations and resulting awards.

USAID DISABILITY POLICY (DEC 2004)

(a) The objectives of the USAID Disability Policy are:

(1) To enhance the attainment of United States foreign assistance program goals by promoting the participation and equalization of opportunities of individuals with disabilities in USAID policy, country and sector strategies, activity designs and implementation;

(2) To increase awareness of issues of people with disabilities both within USAID programs and in host countries;

(3) To engage other U.S. Government agencies, host country counterparts, governments, implementing organizations and other donors in fostering a climate of nondiscrimination against people with disabilities; and

(4) To support international advocacy for people with disabilities. The full text of USAID's policy can be found at the following Web site: *http://pdf.usaid.gov/pdf_docs/PDABQ631.pdf*.

(b) USAID therefore requires that the contractor not discriminate against people with disabilities in the implementation of USAID programs and that it make every effort to comply with the objectives of the USAID Disability Policy in performing this contract. To that end and within the scope of the contract, the contractor's actions must demonstrate a comprehensive and consistent approach for including men, women, and children with disabilities.

(End of clause)

[79 FR 74998, Dec. 16, 2014, as amended at 89 FR 4209, Jan. 23, 2024]

752.222–71 Nondiscrimination.

As prescribed in 722.810(b), insert the following clause in section I of all solicitations and resulting contracts.

NONDISCRIMINATION (MAY 2024)

FAR part 22 and the clauses prescribed in that part prohibit contractors performing in or recruiting from the U.S. from engaging in certain discriminatory practices. USAID is committed to achieving and maintaining a diverse and representative workforce and a workplace free of discrimination. Based on law, Executive Order, and Agency policy, USAID prohibits discrimination in its own workplace on the basis of race, color, religion, sex (including pregnancy, sexual orientation, gender identity, or transgender status), national origin, age (40 or older), physical or mental disability, genetic information, marital or parental status, veteran status, membership in an employee organization, political affiliation, or involvement in protected equal employment opportunity (EEO) activity. USAID does not tolerate any type of discrimination (in any form, including harassment) of any employee or applicant for employment on any of the above-described bases.

Contractors are required to comply with the nondiscrimination requirements of the FAR. In addition, the Agency strongly encourages all its contractors (at all tiers) to develop and enforce nondiscrimination policies consistent with USAID's approach to workplace nondiscrimination as described in this clause, subject to applicable law.

(End of clause)

[89 FR 4208, Jan. 23, 2024]

752.225–5 Buy American Act-Trade Agreements Act.

The clauses prescribed by FAR 25.1101 are not generally included in USAID contracts when more stringent source requirements are stated in the contract or when inclusion is not appropriate under FAR 25.403, or AIDAR 725.403. (See Executive Order 11223, dated May 12, 1965.) The clause setting forth USAID's source restrictions is provided in 752.225–70.

[89 FR 4208, Jan. 23, 2024]

752.225–70 Source and nationality requirements.

As prescribed in 725.704, insert the following clause:

SOURCE AND NATIONALITY REQUIREMENTS (FEB 2012)

(a) Except as may be specifically approved by the contracting officer, the contractor must procure all commodities (*e.g.*, equipment, materials, vehicles, supplies) and services (including commodity transportation services) in accordance with the requirements at 22 CFR part 228 ''Rules on Procurement of Commodities and Services Financed by USAID.'' The authorized source for procurement is Geographic Code 937 unless otherwise specified in the schedule of this contract. Guidance on eligibility of specific goods or services may be obtained from the contracting officer.

(b) *Ineligible goods and services.* The contractor must not procure any of the following goods or services under this contract:

(1) Military equipment;
(2) Surveillance equipment;
(3) Commodities and services for support of police and other law enforcement activities;
(4) Abortion equipment and services;
(5) Luxury goods and gambling equipment; or
(6) Weather modification equipment.

(c) *Restricted goods.* The contractor must obtain prior written approval of the contracting officer or comply with required procedures under an applicable waiver as provided by the contracting officer when procuring any of the following goods or services:
(1) Agricultural commodities;
(2) Motor vehicles;
(3) Pharmaceuticals and contraceptive items;
(4) Pesticides;
(5) Fertilizer;
(6) Used equipment; or
(7) U.S. Government-owned excess property.

If USAID determines that the contractor has procured any of these specific restricted goods under this contract without the prior written authorization of the contracting officer or fails to comply with required procedures under an applicable waiver as provided by the contracting officer, and has received payment for such purposes, the contracting officer may require the contractor to refund the entire amount of the purchase.

(End of clause)

[79 FR 74998, Dec. 16, 2014, as amended at 89 FR 4209, Jan. 23, 2024]

752.226–1—752.226–3 [Reserved]

752.226–70 Trade and Investment Activities and the "Impact on U.S. Jobs" and "Workers' Rights."

As prescribed in 48 CFR 726.7101(b), insert a clause substantially as follows:

TRADE AND INVESTMENT ACTIVITIES AND THE ''IMPACT ON U.S. JOBS'' AND ''WORKERS' RIGHTS'' (JUL 2023)

(a) Except as specifically set forth in this contract or otherwise authorized by USAID in writing, no funds or other support provided under this contract may be used for any activity that: provides financial incentives and other assistance for U.S. companies to relocate operations abroad if it is likely to result in the loss of U.S. jobs; contributes to violations of internationally recognized workers' rights defined in 19 U.S.C. 2467(4); or provides financial incentives for entities located outside the United States to relocate or transfer jobs from the United States to other countries or provide financial incentives that would adversely affect the labor force in the United States.

(b) In the event the Contractor is requested to provide services in any of the above areas or requires clarification from USAID as to whether an activity would be consistent with the limitation set forth above, the Contractor must notify the Contracting Officer and provide a detailed description of the expected impact of the proposed activity. The Contractor must not proceed with the activity until advised by USAID in writing that it may do so.

(c) The Contractor must ensure that its employees and subcontractors providing trade and investment support services are made aware of the restrictions set forth in this clause and must include this clause in all subcontracts.

(End of clause)

[88 FR 39192, June 18, 2023]

752.227–14 Rights in Data—general.

As prescribed in 727.409(a), insert the following clause:

RIGHTS IN DATA—GENERAL (OCT 2007)

The following paragraph (d) replaces paragraph (d) of (48 CFR) FAR 52.227–14 Rights in Data—General.

(d) *Release, publication and use of data.* (1) For all data first produced or specifically used by the Contractor in the performance of this contract in the United States, its territories, or Puerto Rico, the Contractor shall have the right to use, release to others, reproduce, distribute, or publish such data, except to the extent such data may be subject to the Federal export control or national security laws or regulations, or unless otherwise provided in this paragraph of this clause or expressly set forth in this contract [see paragraph (d)(3) for limitations on contracts performed outside of the US].

(2) The Contractor agrees that to the extent it receives or is given access to data necessary for the performance of this contract which contain restrictive markings, the Contractor shall treat the data in accordance with such markings unless otherwise specifically authorized in writing by the contracting officer.

(3) For all data first produced or specifically used by the Contractor in the overseas performance of this contract, the Contractor shall not release, reproduce, distribute, or publish such data without the written permission of the contracting officer. The Government also may require the contractor to assign copyright to the Government or another party as circumstances warrant or as specifically stated elsewhere in the contract.

(End of clause)

[72 FR 53164, Sept. 18, 2007, as amended at 79 FR 74988, Dec. 16, 2014; 89 FR 4208, Jan. 23, 2024]

752.227–70 Patent reporting procedures.

As prescribed in (48 CFR) AIDAR 727.303, insert the following clause in all solicitations and contracts that contain the clause at (48 CFR) FAR 52.227–11.

PATENT REPORTING PROCEDURES (AUG 1999)

(a) *Reporting inventions.* In accordance with 37 CFR part 401, each USAID-funded research recipient must disclose each subject invention to USAID as required in (48 CFR) FAR 52.227–11(c). Such reports must be made via the National Institutes of Health (NIH) EDISON Patent Reporting and Tracking system. NIH created EDISON to help assist research recipients to comply with the Bayh-Dole Act and report in a timely manner all patentable inventions arising out of Federally-sponsored research programs. The EDISON system uses Web technology to allow research recipients to report and monitor their invention reports, with the assurance that proprietary data is securely stored. The Web site for EDISON (*http://www.iedison.gov*) provides users with an invention reporting test site, as well as applicable instructions for complying with Government regulations, and increases the potential for successful commercialization of the inventions by helping to ensure that all reporting requirements are met and that ownership rights are clearly established.

(b) Reports on utilization of subject inventions as required under (48 CFR) FAR 52.227–11(f) must be provided to the USAID contracting officer's technical representative annually, and the last report under an agreement must be provided within 90 days of the expiration of the agreement.

(End of clause)

[79 FR 74999, Dec. 16, 2014, as amended at 89 FR 4209, Jan. 23, 2024]

752.227–71. Planning, Collection, and Submission of Digital Information to USAID.

As prescribed in AIDAR 727.7003, insert the following clause in Section H of solicitations and contracts:

PLANNING, COLLECTION, AND SUBMISSION OF DIGITAL INFORMATION TO USAID (JUN 2024)

(a) *Definitions.* As used in this clause—

Computer is a fixed or mobile device that accepts digital data and manipulates the information based on a program or sequence of instructions for how data is to be processed.

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.

Data asset is a collection of data elements or data sets that may be grouped together.

Data inventory is the first component of a Data Management Plan (DMP). The data inventory is a list of high-value data assets that the contractor anticipates producing during the period of award performance.

Data management plan (DMP) is a tool that guides the identification of anticipated data assets and outlines tasks needed to manage these assets across a full data lifecycle.

Data set is an organized collection of structured data, including data contained in spreadsheets, whether presented in tabular or non-tabular form. For example, a data set may represent a single spreadsheet, an extensible mark-up language (XML) file, a geospatial data file, or an organized collection of these. A data set does not include unstructured data, such as email or instant messages, PDF files, PowerPoint presentations, word processing documents, images, audio files, or collaboration software.

Digital means the coding scheme generally used in computer technology to represent data.

Digital data means quantitative and qualitative programmatic measurements that are entered directly into a computer. Examples include numeric targets established during activity design or implementation; baseline, mid-line, or final measurements created or obtained via field assessments; surveys or interviews; performance monitoring indicators as specified in the Contractor's approved AMELP; evaluation results; or perception metrics collected from beneficiaries on the quality and relevance of International Disaster Assistance and Development Assistance.

Digital information is a subset of data and means:

(i) Digital text;

(ii) Digital data;

(iii) Digital objects; and

(iv) Metadata created or obtained with USAID funding regarding international development or humanitarian assistance activities supported by this award that are represented, stored, or transmitted in such a way that they are available to a computer program.

Digital method is a means of using computer technology to gather, process, analyze,

transmit, store, or otherwise use data and other forms of information.

Digital object includes digital or computer files that are available to a computer program. Examples include digital word processing or PDF documents or forms related to activity design, assessment reports, periodic progress and performance reports, academic research documents, publication manuscripts, evaluations, technical documentation and reports, and other reports, articles and papers prepared by the Contractor under this contract, whether published or not. Other examples include data sets, spreadsheets, presentations, publication-quality images, audio and video files, communication materials, information products, extensible mark-up language (XML) files, and software, scripts, source code, and algorithms that can be processed by a computer program.

Digital repository refers to information systems that ingest, store, manage, preserve, and provide access to digital content.

Digital text includes text-based descriptions of programmatic efforts that are entered directly into a computer, rather than submitted as a digital object.

Draft digital information refers to digital information that, in the professional opinion of the Contractor, does not adhere to the information quality standards such that it presents preliminary, unverified, incomplete, or deliberative findings, claims, analysis, or results that may lead the consumer of such material to draw erroneous conclusions.

Granularity refers to the extent to which digital content or objects provide access to detailed, distinct data points. Coarse granularity generally means that distinct data points reflect larger, representational units or have been joined together or aggregated, thus providing less detail. A fine level of granularity generally means that distinct data points reflect smaller, individualized units that have not been aggregated, thus providing a higher level of detail. For example, a data set containing a list of every activity conducted by week would generally exhibit a finer level of granularity than a data set listing the various categories of activities conducted by month. The degree of granularity can be relative to the contents of a specific data set and can be geographic, temporal, or across other dimensions.

Information quality standards means the elements of utility, objectivity, and integrity collectively.

Integrity is an element of the information quality standards that means information has been protected from unauthorized access or revision, to ensure that the information is not compromised through corruption or falsification.

Machine readable means data in a format that can be easily processed by a computer without human intervention while ensuring that no semantic meaning is lost.

Metadata includes structural or descriptive information about digital data or digital objects such as content, format, source, rights, accuracy, provenance, frequency, periodicity, granularity, publisher or responsible party, contact information, method of collection, and other descriptions.

Objectivity is an element of the information quality standards that means whether information is accurate, reliable, and unbiased as a matter of presentation and substance.

Personally identifiable information (PII) 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.] PII can include both direct identifiers (such as name, health identification numbers, etc.), and indirect identifiers (geographic location, age) that when linked with other information can result in the identification of an individual.

Publication object is a digital object that has been accepted for publication prior to the end date of this contract and whose content is based on or includes any other digital information created or obtained in performance of this contract. In the research community, a publication object is often synonymous with a quality research manuscript that has been accepted by an academic journal for publication. However, publication objects can also consist of other digital objects (*e.g.*, photos, videos, etc.) published via news media, the internet, or other venues.

Quality digital information means digital information that, in the professional opinion of the Contractor, adheres to the information quality standards and presents reasonably sound and substantiated findings, claims, analysis, or results regarding activities.

Registered with the USAID Digital Front Door (DFD) means: that—

(i) The Contractor entered all mandatory information required to obtain access to the DFD.

(ii) The Contractor agrees to abide by the DFD terms and conditions of use.

(iii) The Government has validated the Contractor's registration by providing access to the DFD.

USAID Digital Front Door (DFD), located at *dfd.usaid.gov* is a website where the Contractor transacts business with USAID, such as submitting digital information.

Utility is an element of the information quality standards that means whether information is useful to its intended users, including the general public, and for its intended purpose.

(b) *Digital information planning requirements.* The Contractor must engage in digital information planning to ensure compliance with the collection and submission of all digital information, as required under this award.

(c) *Data Management Plan (DMP)*—(1) *What is required.* The Contractor must prepare and maintain a Data Management Plan (DMP) that reflects the digital information planning requirements outlined in paragraph (b) of this clause.

(2) *What to submit.* The DMP must be appropriate to the programmatic scope and context of the contract, and to the nature and complexity of the data to be collected or acquired in the course of the contract. The DMP must address, at a minimum, the following:

(i) Data inventory; and

(ii) If requested in writing by the Contracting Officer,

(A) Protocols for data collection, management and storage;

(B) Protocols for maintaining adequate safeguards that include the privacy and security of digital information collected under the award;

(C) Documentation that ensures other users can understand and use the data;

(D) Protocols for preserving digital information and facilitating access by other stakeholders; and

(E) Terms of use on data usage, publication, curation, or other dissemination plans.

(3) *When to submit.* The Contractor must develop and submit, at a minimum, the data inventory component of the DMP to the contracting officer for approval within ninety (90) days after contract award, unless the contracting officer establishes a different time period. The Contractor must submit the remaining components of the DMP to the contracting officer for approval, as soon as they become available. The contractor must not begin digital information collection prior to approval of the data inventory and submission of any remaining components of the DMP unless authorized in writing by the contracting officer.

(4) *When to revise.* The Contractor must revise the DMP as necessary throughout the period of performance of this contract. Any revisions to the plan must be approved by the contracting officer or contracting officer's representative as delegated.

(d) *Digital information production and collection requirements.* (1) The Contractor must:

(i) Use only digital methods to the extent practicable to produce, furnish, acquire, or collect information in performance of this contract. If the Contractor is unable to consistently collect data using digital methods, the Contractor must obtain the contracting officer or delegated contracting officer's representative's approval for any alternative collection method.

(ii) Collect digital information at the finest level of granularity that enables the Contractor to comply with the terms of this contract.

(2) To the extent practicable, the Contractor must limit the collection of PII to only that which is necessary to comply with the requirements of the contract.

(e) *Registration requirements.* The Contractor must:

(1) Be registered with the USAID Digital Front Door (DFD) within ninety (90) days after award of this contract; and

(2) Maintain access to the DFD during the period of performance of this contract.

(f) *Submission requirements*—(1) *What to submit.* Unless an exemption in paragraph (f)(4) of this section applies, the Contractor must:

(i) Submit digital information created or obtained in performance of this contract to USAID at the finest level of granularity at which it was collected.

(ii) Submit digital information in nonproprietary formats and digital data and data sets in machine readable formats. The Contractor may also submit proprietary formats in addition to a nonproprietary format.

(iii) Submit a copy of any usage license agreement that the Contractor obtained from any third party who granted usage rights for the digital information.

(iv) Submit a copy of any photo or media release template that the Contractor used to obtain permission from any third party for the use of the photo or media.

(v) When the contract includes AIDAR clause 752.7012, Protection of the Individual as a Research Subject, provide a blank copy of the form, document, instructions, or other instruments used to obtain informed consent from persons whose individual information is contained in the original version of the digital object.

(vi) If applicable, provide additional details or metadata regarding:

(A) Where and how to access digital information that the Contractor submits to a USAID-approved digital repository or via alternate technology as approved by USAID's Chief Information Officer;

(B) The quality of submissions of draft digital information;

(C) Known sensitivities within digital information that may jeopardize the personal safety of any individual or group, whether the Contractor has submitted the information or has received a submission exemption;

(D) Digital information for which the Contractor was unable to obtain third party usage rights, a media release, or informed consent or which has other proprietary restrictions.

(2) *Where to submit.* The Contractor must submit digital information through the DFD, unless specifically authorized by the contracting officer in writing to submit to a USAID-approved digital repository instead

or via alternate technology as approved by USAID's Chief Information Officer.

(3) *When to submit.* (i) With the exception of data sets, the Contractor must submit all other Digital Objects within 30 days of obtaining the contracting officer or delegated contracting officer representative's approval. Unless otherwise specified in the schedule of the contract or otherwise instructed by the contracting officer or delegated contracting officer's representative, the Contractor must submit data sets and all other digital information created or obtained in performance of this contract to USAID once it meets the requirements of quality digital information. Unless otherwise approved by the contracting officer in writing, within thirty (30) days after the contract completion date, the Contractor must submit all digital information not previously submitted, including both draft digital information and quality digital information required under this contract.

(ii) Upon written approval of the contracting officer or delegated contracting officer's representative, the Contractor must submit draft digital information to USAID when the ''best available'' information is required in order to meet time constraints or other programmatic or operational exigencies.

(4) *Exemptions.* (i) The Contractor must not submit digital information through the DFD that contains:

(A) Classified information.

(B) Personally identifiable information. The Contractor must, to the maximum extent possible, remove the association between the set of identifying data and the individual to which it applies unless retaining such information is essential to comply with the terms of this contract and upon written approval from the contracting officer or delegated contracting officer's representative to submit this information.

(ii) If the Contractor believes there is a compelling reason not to submit specific digital information that does not fall under an exemption in this section, including circumstances where submission may jeopardize the personal safety of any individual or group, the Contractor must obtain written approval not to submit the digital information from the contracting officer.

(5) *Approval requirements.* Upon receipt of digital information submitted by the Contractor, the contracting officer or delegated contracting officer's representative will either approve or reject the submission. When a submission is rejected, the Contractor must make corrections and resubmit the required information. USAID does not consider the submission accepted until the contracting officer or delegated contracting officer's representative provides written approval to the Contractor.

(g) *Publication considerations.* (1) If the Contractor produces a publication object, the Contractor must submit via the DFD a copy of the publication object, the publication acceptance notification, along with a link at which the final published object may be accessed.

(2) For any digital object the Contractor submits in compliance with the terms of this contract, the Contractor may request from the contracting officer or delegated contracting officer's representative an embargo on the public release of the digital object. The contracting officer or delegated contracting officer's representative may approve an embargo request that is for no more than 12 months at a time, with additional scrutiny for digital objects relied upon for journal publication. A determination on this request will be provided to the Contractor in writing.

(3) If the Contractor used a digital object previously submitted via the DFD to generate the publication object, and that digital object is governed by a pre-existing embargo, that embargo will expire on the day the publication object is scheduled for publication. USAID may elect to publish digital information on which the publication object is based as early as the date the publication object is scheduled for publication.

(h) *USAID digital collection and submission standards.* The Contractor must comply with the version of USAID's Digital Collection and Submission Standards in effect on the date of award as outlined at *data.usaid.gov/standards.* If the Contractor is unable to adhere to USAID's Digital Collection and Submission Standards, the Contractor must obtain USAID's written approval for an alternative approach.

(i) *Access to the digital information.* USAID will conduct a rigorous risk assessment of digital information that the Contractor submits to USAID to determine the appropriate permissions and restrictions on access to the digital information. USAID may release the data publicly in full, redact or otherwise protect aspects of the information prior to public release, or hold the information in a non-public status.

(j) *Obligations regarding subcontractors.* (1) The Contractor must furnish, acquire, or collect information and submit to USAID, in accordance with paragraph (f) of this clause, all digital information produced, furnished, acquired, or collected in performance of this contract by its subcontractors at any tier.

(2) The Contractor must insert the terms of this clause, except paragraph (e) of this clause, in all subcontracts.

(End of clause)

Alternate I (JUN 2024). As prescribed in AIDAR 727.7003, substitute the following paragraph (c) for paragraph (c) of the basic clause:

(c) [Reserved]

[89 FR 37961, May 6, 2024]

752.228–3 Worker's compensation insurance (Defense Base Act).

As prescribed in 728.309, the following supplemental coverage must be added to the clause specified in (48 CFR) FAR 52.228–3 by the USAID contracting officer.

WORKER'S COMPENSATION INSURANCE (DEFENSE BASE ACT) (DEC 1991)

In addition to the requirements specified in (48 CFR) FAR 52.228–3, the contractor agrees to the following:

(a) The Contractor agrees to procure Defense Base Act (DBA) insurance pursuant to the terms of the contract between USAID and USAID's DBA insurance carrier unless the Contractor has a DBA self insurance program approved by the Department of Labor or has an approved retrospective rating agreement for DBA.

(b) If USAID or the contractor has secured a waiver of DBA coverage (see (48 CFR) AIDAR 728.305–70(a)) for contractor's employees who are not citizens of, residents of, or hired in the United States, the contractor agrees to provide such employees with worker's compensation benefits as required by the laws of the country in which the employees are working, or by the laws of the employee's native country, whichever offers greater benefits.

(c) The Contractor further agrees to insert in all subcontracts hereunder to which the DBA is applicable, a clause similar to this clause, including this sentence, imposing on all subcontractors a like requirement to provide overseas workmen's compensation insurance coverage and obtain DBA coverage under the USAID requirements contract.

(End of clause)

[53 FR 50631, Dec. 16, 1988, as amended at 54 FR 16122, Apr. 21, 1989; 56 FR 67226, Dec. 30, 1991; 79 FR 74988, 74999, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.228–7 Insurance—liability to third persons.

As prescribed in 728.307–2(c), the following paragraph must be added to the clause specified in (48 CFR) FAR 52.228–7 as either paragraph (h) (if (48 CFR) FAR 52.228–7 *Alternate I* is not used) or (i) (if (48 CFR) FAR 52.228–7 Alternate I is used):

INSURANCE—LIABILITY TO THIRD PERSONS (JUL 1997)

The following paragraph is added to the clause specified in (48 CFR) FAR 52.228–7:

( ) *Insurance on private automobiles.* If the Contractor or any of its employees or their dependents transport or cause to be transported (whether or not at contract expense) privately owned automobiles to the Cooperating Country, or they or any of them purchase an automobile within the Cooperating Country, the Contractor agrees to make certain that all such automobiles during such ownership within the Cooperating Country will be covered by a paid-up insurance policy issued by a reliable company providing the following minimum coverage or such other minimum coverage as may be set by the Mission Director, payable in United States dollars or its equivalent in the currency of the Cooperating Country: injury to persons, $10,000/$20,000; property damage, $5,000. The premium costs for such insurance shall not be a reimbursable cost under this contract. Copies of such insurance policies shall be preserved and made available as part of the Contractor's records which are required to be preserved and made available by the ''Audit and Records—Negotiation'' clause of this contract.

(End of clause)

[53 FR 50632, Dec. 16, 1988, as amended at 54 FR 16122, Apr. 21, 1989; 62 FR 40470, July 29, 1997; 79 FR 74999, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.228–9 Cargo insurance.

As prescribed in 728.313(a), the following preface is to be used preceding the text of the clause at (48 CFR) FAR 52.228–9:

CARGO INSURANCE (DEC 1998)

PREFACE: To the extent that marine insurance is necessary or appropriate under this contract, the contractor shall ensure that U.S. marine insurance companies are offered a fair opportunity to bid for such insurance. This requirement shall be included in all subcontracts under this contract.

(End of clause)

[53 FR 50632, Dec. 16, 1988, as amended at 79 FR 74999, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.228–70 Medical Evacuation (MEDEVAC) Services.

As prescribed in 728.307–70, for use in all contracts requiring performance overseas:

MEDICAL EVACUATION (MEDEVAC) SERVICES (JUL 2007)

(a) The contractor must provide MEDEVAC service coverage to all U.S. citizen, U.S. resident alien, and Third Country National employees and their authorized dependents (hereinafter ''individual'') while overseas under a USAID-financed direct contract. USAID will reimburse reasonable, allowable, and allocable costs for MEDEVAC service coverage incurred under the contract. The contracting officer will determine the reasonableness, allowability, and allocability of the costs based on the applicable cost principles and in accordance with cost accounting standards.

(b) *Exceptions.* (i) The Contractor is not required to provide MEDEVAC insurance to eligible employees and their dependents with a health program that includes sufficient MEDEVAC coverage as approved by the contracting officer.

(ii) The Mission Director may make a written determination to waive the requirement for such coverage. The determination must be based on findings that the quality of local medical services or other circumstances obviate the need for such coverage for eligible employees and their dependents located at post.

(c) Contractor must insert a clause similar to this clause in all subcontracts that require performance by contractor employees overseas.

(End of clause)

[59 FR 33447, June 29, 1994, as amended at 72 FR 19669, Apr. 19, 2007; 79 FR 74988, 74999, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.229–70 Federal, state and local taxes.

For contracts involving performance overseas the clauses prescribed in (48 CFR) FAR 29.401–3 or 29.401–4 may be modified to specify that the taxes referred to are United States taxes.

[49 FR 13259, Apr. 3, 1984, as amended at 79 FR 74988, Dec. 16, 2014]

752.229–71 Reporting of Foreign Taxes

As prescribed in (48 CFR) AIDAR 729.402–70(b), insert the following clause in applicable solicitations and resulting contracts. The contracting officer must insert the address and point of contact at the Embassy, Mission, or M/CFO/CMP as appropriate under paragraph (d) of this clause.

REPORTING OF FOREIGN TAXES (JUL 2023)

(a) *Definitions.* As used in this clause—

Foreign government includes any foreign governmental entity.

Foreign taxes include value-added taxes and customs duties but not individual income taxes assessed to local staff.

Local staff means Cooperating Country National employees.

(b) *Annual report.* (1) The Contractor must submit a report detailing foreign taxes assessed under this contract during the prior U.S. government fiscal year. The report must be submitted annually by April 16.

(2) A report is required even if the Contractor did not pay any foreign taxes during the reporting period. A cumulative report may be provided if the Contractor is performing more than one award in the foreign country.

(c) *Contents of report.* The report must contain:

(1) Contractor name.

(2) Contact name with phone number and email address.

(3) Contract number(s).

(4) Amount of foreign taxes assessed by each foreign government (listed separately) under this contract during the prior U.S. Government fiscal year.

(i) Taxes assessed on any individual transaction of less than $500 should not be reported.

(ii) The Contractor must report only foreign taxes assessed by a foreign government receiving U.S. assistance under this contract. The Contractor must not report on foreign taxes assessed by a third-party foreign government.

(5) Any reimbursements of foreign taxes received by the Contractor on the taxes reported in paragraph (c)(4) of this clause received through the date of the report.

(d) *Submission of report.* The Contractor must submit the report to: [*Contracting Officer must insert address and point of contact at the Embassy or Mission in the country in which the contract will be performed, or CFO/CMP for USAID/W-issued contracts, as appropriate*], with a copy to the Contracting Officer's Representative.

(e) *Subcontracts.* The Contractor must include this reporting requirement in all subcontracts issued under this contract. The Contractor shall collect and incorporate into the Contractor's report all information received from subcontractors pursuant to this clause.

(End of clause)

[88 FR 39192, June 15, 2023]

752.231–71 Salary supplements for HG employees.

As prescribed in 731.205–71, for use in all contracts with a possible need or services of a HG employee. The clause should also be inserted in all subsequent sub-contracts.

SALARY SUPPLEMENTS FOR HG EMPLOYEES (MAR 2015)

(a) Salary supplements are payments made that augment an employee's base salary or premiums, overtime, extra payments, incentive payment and allowances for which the HG employee would qualify under HG rules or practice for the performance of his/hers regular duties or work performed during his/hers regular office hours. Per diem, invitational travel, honoraria and payment for work carried out outside of normal working hours are not considered to be salary supplements.

(b) Salary supplements to HG Employees are not allowable without the written approval of the contracting officer.

(c) The Contractor must insert a clause containing all the terms of this clause, including the requirement to obtain the written approval of the contracting officer for all salary supplements, in all subcontracts under this contract that may entail HG employee salary supplements.

(End of clause)

[64 FR 16649, Apr. 6, 1999, as amended at 79 FR 74988, 74999, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.231–72 Conference planning and required approval

As prescribed in (48 CFR) AIDAR 731.205–43(d), insert the following clause in section H of all USAID-funded solicitations and contracts anticipated to include a requirement for a USAID-funded conference.

CONFERENCE PLANNING AND REQUIRED APPROVAL (JUL 2023)

(a) *Definitions.* As used in this clause—

Conference means a seminar, meeting, retreat, symposium, workshop, training activity or other such event that is funded in whole or in part by USAID.

Net conference expense means the total conference expenses excluding: any fees or revenue received by the Agency through the conference, costs to ensure the safety of attending governmental officials, and salary of USAID employees and USAID personal services contractors.

Personal Services Contractor (PSC) means any individual who is awarded a personal services contract in accordance with AIDAR appendix D or J of this chapter.

Temporary duty (TDY) travel means official travel at least fifty (50) miles from both the traveler's home and duty station for a period exceeding twelve (12) hours.

USAID employee means a USAID direct-hire employee or a direct-hire Federal employee from another U.S. government agency detailed to USAID.

(b) *Prior approval.* Unless an exception in paragraph (c) applies, the Contractor must obtain prior written approval from the Contracting Officer at least 30 days prior to committing costs, for the following:

(1) A conference funded in whole or in part by USAID when ten (10) or more USAID employees or Personal Services Contractors are required to travel on temporary duty status to attend the conference; or

(2) A conference funded in whole or in part by USAID and attended by USAID employees or USAID Personal Services Contractors, when the net conference expense funded by USAID is expected to exceed $100,000, regardless of the number of USAID participants.

(c) *Exceptions.* Prior USAID approval is not required for the following:

(1) Co-creation conferences to facilitate the design of programs or procurements.

(2) Events funded and scheduled by the Center for Professional Development within the USAID Office of Human Capital and Talent Management.

(3) A single course presented by an instructor conducted at a U.S. Government training facility (including the Washington Learning Center or other USAID training facilities), a commercial training facility, or other venue if a U.S. Government training facility is not available.

(4) Conferences conducted at a U.S. Government facility or other venue not paid directly or indirectly by USAID, when travel of USAID employees or USAID Personal Services Contractors, light refreshments and, if applicable, costs associated with participation of the Contractor's staff are the only direct costs associated with the event.

(d) *Allowability of cost.* Costs associated with a conference that meet the criteria above, incurred without USAID prior written approval, are unallowable.

(e) *Post-award.* Conferences approved at the time of award will be incorporated into the contract. The Contractor must submit subsequent requests for approval of conferences on a case-by-case basis, or requests for multiple conferences may be submitted at one time.

(f) *Documentation.* Requests for approval of a conference that meets the criteria in paragraphs (b) of this clause must include:

(1) A brief summary of the proposed event;

(2) A justification for the conference and alternatives considered, *e.g.*, teleconferencing and video-conferencing;

(3) The estimated budget by line item (*e.g.*, travel and per diem, venue, facilitators, meals, equipment, printing, access fees, ground transportation);

(4) A list of USAID employees or PSCs attending and a justification for each, and the number of other USAID-funded participants (*e.g.*, Contractor personnel);

(5) A cost comparison for at least three potential venues (including a U.S. Government owned or leased facility) and a justification if the lowest cost facility is not selected;

(6) If meals will be provided to local USAID employees or PSCs (a local employee would not be in travel status), a statement on whether the meals are a necessary expense to support the conference objectives; and

(7) A statement signed by an employee of the Contractor with authority to bind the Contractor, confirming that strict fiscal responsibility has been exercised in making decisions regarding conference expenditures, the proposed costs are comprehensive and represent the greatest cost advantage to the U.S. Government, and that the proposed conference representation has been limited to the minimum number necessary to support the conference objectives.

(End of clause)

[88 FR 39193, June 15, 2023]

752.232–70 Letter of credit advance payment.

As required by 732.406–73, insert the following clause in contracts being paid by Letter of Credit.

LETTER OF CREDIT ADVANCE PAYMENT (MAR 2015)

(a) Payment under this contract must be by means of a Letter of Credit (LOC) in accordance with the terms and conditions of the LOC and any instructions issued by the USAID, Bureau for Management, Office of the Chief Financial Officer, Cash Management and Payment Division (M/CFO/CMP).

(b) Immediately upon award, or as soon as the Letter of Credit payment method is approved by the contracting officer, contractors without an established LOC account must submit the following forms with original signatures, to the address specified below:

Forms:

(1) A signed original SF–1199A (Direct Deposit Sign-Up Form); and

(2) ''Division of Payment Management Payment Management System Access Form'' found at the Department of State and Human Services (DHHS) Web site.

Address:

ATTN: James DuBois,
U.S. Agency for International Development,
M/CFO/CMP—LOC Unit,
1300 Pennsylvania Ave. NW.,
SA–44, Room 430–J,
Washington, DC 20523–7700.

Contractors must also submit the forms specified above electronically to *loc@usaid.gov*.

(c) As long as the LOC is in effect, the terms and conditions of the LOC and any instructions issued by M/CFO/CMP constitute the payment conditions of this contract, superseding and taking precedence over any other clause of this contract concerning payment.

(d) If the LOC is revoked, payment may be made on a cost-reimbursement basis, in accordance with the other clauses of this contract concerning payment.

(e) Revocation of the LOC is at the discretion of M/CFO/CMP after consultation with the contracting officer. Notification to the contractor of revocation must be in writing and must specify the reasons for such action. The contractor may appeal any such revocation to the contracting officer, in accordance with the Disputes clause of this contract. Pending final decision, payments under the contract will be in accordance with paragraph (d) of this clause.

(End of clause)

[79 FR 74999, Dec. 16, 2014, as amended at 89 FR 4209, Jan. 23, 2024]

752.236–70 Standards for accessibility for the disabled in USAID construction contracts.

As prescribed in 736.570, for contracts for construction or renovation using program funds, insert the following clause.

STANDARDS FOR ACCESSIBILITY FOR THE DISABLED IN USAID CONSTRUCTION CONTRACTS (JUL 2007)

(a) One of the objectives of the USAID Disability Policy is to engage other U.S. Government agencies, host country counterparts, governments, implementing organizations and other donors in fostering a climate of nondiscrimination against people with disabilities. As part of this policy USAID has established standards for any new or renovation construction project funded by USAID to allow access by people with disabilities (PWDs). The full text of the policy paper can be found at the following Web site: *http://www.usaid.gov/about_usaid/disability/*.

(b) USAID requires the contractor to comply with standards of accessibility for people with disabilities in all structures, buildings or facilities resulting from new or renovation construction or alterations of an existing structure.

(c) The contractor must comply with the host country or regional standards for accessibility in construction when such standards result in at least substantially equivalent accessibility and usability as the standard provided in the Americans with Disabilities Act (ADA) of 1990 and the Architectural Barriers Act (ABA) Accessibility Guidelines of July 2004. Where there are no host country or regional standards for universal access or where the host country or regional standards fail to meet the ADA/ABA threshold, the standard prescribed in the ADA and the ABA must be used.

(d) *New Construction.* All new construction must comply with the above standards for accessibility.

(e) *Alterations.* Changes to an existing structure that affect, or could affect, the usability of the structure must comply with the above standards for accessibility unless the contractor obtains the contracting officer's advance approval that compliance is technically infeasible or constitutes an undue burden or both. Compliance is technically infeasible where structural conditions would require removing or altering a load-bearing member that is an essential part of the structural frame or because other existing physical or site constraints prohibit modification or addition of elements, spaces, or features that are in full and strict compliance with the minimum requirements of the standard. Compliance is an undue burden where it entails either a significant difficulty or expense or both.

(f) *Exceptions.* The following construction related activities are excepted from the requirements of paragraphs (a) through (d) of this section:

(1) Normal maintenance, re-roofing, painting or wallpapering, or changes to mechanical or electrical systems are not alterations and the above standards do not apply unless they affect the accessibility of the building or facility; and

(2) emergency construction (which may entail the provision of plastic sheeting or tents, minor repair and upgrading of existing structures, rebuilding of part of existing structures, or provision of temporary structures) intended to be temporary in nature. A portion of emergency construction assistance may be provided to people with disabilities as part of the process of identifying disaster- and crisis-affected people as ''most vulnerable.''

(End of clause)

[79 FR 75000, Dec. 16, 2014, as amended at 89 FR 4209, Jan. 23, 2024]

752.239–70 Information Technology Authorization.

As prescribed in AIDAR 739.106(b), insert the following clause in Section I of solicitations and contracts:

INFORMATION TECHNOLOGY AUTHORIZATION (MAY 2024)

(a) *Definitions.* As used in this contract:

Information Technology means

(1) Any services or equipment, or interconnected system(s) or subsystem(s) of equipment, that are 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; where

(2) such services or equipment are ''used by an agency'' if used by the agency directly or if used by a contractor under a contract with the agency that requires either use of the services or equipment or requires use of the services or equipment to a significant extent in the performance of a service or the furnishing of a product.

(3) 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 provisioned services such as cloud computing and support services that support any point of the lifecycle of the equipment or service), and related resources.

(4) The term ''information technology'' does not include any equipment that is acquired by a contractor incidental to a contract that does not require use of the equipment.

(b) *Approval Requirements.* The Federal Information Technology Acquisition Reform Act (FITARA) requires Agency Chief Information Officer (CIO) review and approval of acquisitions of information technology and information technology services. Any information technology specified in the Schedule of this contract has already been approved by the CIO. The Contractor must not acquire any additional information technology without the prior written approval of the Contracting Officer as specified in this clause.

(c) *Request for Approval Procedure.*

(1) If the Contractor determines that any information technology not specified in the Schedule will be necessary in the performance of the contract, the Contractor must request prior written approval from the Contracting Officer, including the Contracting Officer's Representative and the Office of the CIO (*ITAuthorization@usaid.gov*) on the request.

(2) In the request, the Contractor must provide an itemized description of the information technology to be procured. For equipment (including hardware and software), the Contractor must include any applicable brand names, model/version numbers, quantities, and estimated unit and total cost information. For services, the Contractor must provide a detailed description of the services, name(s) of the service provider(s), and estimated cost information.

(3) The Contracting Officer will approve or deny in writing the Contractor's request. If granted, the Contracting Officer will specify in writing the information technology approved by the CIO for purchase.

(d) *Subcontracts.* The Contractor must insert the substance of this clause, including this paragraph (d), in all subcontracts. The Contractor is responsible for requesting any approval required under paragraphs (b) and (c) of this clause for any applicable subcontractor information technology acquisition.

(End of clause)

[89 FR 19759, Mar. 20, 2024]

§ 752.239–71 Information and Communication Technology Accessibility.

As prescribed in AIDAR 739.106(c), insert the following clause in Section I of solicitations and contracts:

INFORMATION AND COMMUNICATION TECHNOLOGY ACCESSIBILITY (MAY 2024)

(a) Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794d) requires (1) Federal agencies to offer access to information and communication technology (ICT) to individuals with disabilities who are Federal employees or members of the public seeking information or services, and (2) that this access be comparable to that which is offered to Federal employees or members of the public who are not individuals with disabilities. Standards for complying with this law are prescribed by the Architectural and Transportation Barriers Compliance Board (''Access Board'') in 36 CFR part 1194, are viewable at *https://www.access-board.gov/ict/.*

(b) Except as indicated elsewhere in the contract, all ICT supplies, services, information, documentation, and deliverables developed, acquired, maintained, or delivered under this contract must meet the applicable Section 508 accessibility standards at 36 CFR part 1194, as amended by the Access Board.

(c) The Section 508 accessibility standards applicable to this contract are identified in Section C or other applicable sections of this contract.

(d) The Contractor must, upon written request from the Contracting Officer, or if so designated, the Contracting Officer's Representative, provide the information necessary to assist the Government in determining that the ICT supplies or services conform to Section 508 accessibility standards.

(e) If it is determined by the Government that any ICT supplies or services delivered by the Contractor do not conform to the required accessibility standards, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(f) The Contractor must insert this clause in all subcontracts that involve the acquisition of ICT supplies and/or services. The Contractor is responsible for the submission of any information as required under paragraph (e) of this clause.

(End of clause)

[89 FR 19759, Mar. 20, 2024]

§ 752.239–72 USAID-Financed Project Websites.

As prescribed in AIDAR 739.106(d), insert the following clause in Section I of solicitations and contracts:

USAID-FINANCED PROJECT WEBSITES (MAY 2024)

(a) *Definitions.* As used in this contract: *Project Website* means a website that is:

(1) funded under this contract;

(2) hosted outside of a Federal Government domain (*i.e.*, ''*.gov*'');

(3) operated exclusively by the Contractor, who is responsible for all website content, operations and management, information security, and disposition of the website;

(4) not operated by or on behalf of USAID; and

(5) does not provide official USAID communications, information, or services.

(b) *Requirements.* The Contractor must adhere to the following requirements when developing, launching, or maintaining a Project Website:

(1) *Domain name.* The domain name of the website must not contain the term ''USAID''. The domain name must be registered in the Contractor's business name with the relevant domain registrar on the relevant domain name registry.

(2) *Information to be collected.* In the website, the Contractor may collect only the amount of information necessary to complete the specific business need. The Contractor must not collect or store privacy information that is unnecessary for the website to operate, or is prohibited by statute, regulation, or Executive Order.

(3) *Disclaimer.* The website must be marked on the index page of the site and every major entry point to the website with a disclaimer

that states: ''The information provided on this website is not official U.S. Government information and does not represent the views or positions of the U.S. Agency for International Development or the U.S. Government.''

(4) *Accessibility*. To comply with the requirements of the Section 508 of the Rehabilitation Act, as amended (29 U.S.C. 794d), the Contractor must ensure the website meets all applicable accessibility standards (''Web-based intranet and internet information and applications'') at 36 CFR part 1194, Appendix D.

(5) *Information security:* The Contractor is solely responsible for the information security of the website. This includes incident response activities as well as all security safeguards, including adequate protection from unauthorized access, alteration, disclosure, or misuse of information collected, processed, stored, transmitted, or published on the website. The Contractor must minimize and mitigate security risks, promote the integrity and availability of website information, and use state-of-the-art: system/software management; engineering and development; event logging; and secure-coding practices that are equal to or better than USAID standards and information security best practices. Rigorous security safeguards, including but not limited to, virus protection; network intrusion detection and prevention programs; and vulnerability management systems must be implemented and critical security issues must be resolved within 30 calendar days.

(c) *Disposition*. At least 120 days prior to the contract end date, unless otherwise approved by the Contracting Officer, the Contractor must submit for the Contracting Officer's approval a disposition plan that addresses how any Project Website funded under this contract will be transitioned to another entity or decommissioned and archived. If the website will be transitioned to another entity, the disposition plan must provide details on the Contractor's proposed approach for the transfer of associated electronic records, technical documentation regarding the website's development and maintenance, and event logs. Prior to the end of the contract, the Contractor must comply with the disposition plan approved by the Contracting Officer.

(d) *Subcontracts*. The Contractor must insert this clause in all subcontracts that involve the development, launch, or maintenance of a Project Website. The Contractor is responsible for the submission of any information as required under paragraphs (b) and (c) of this clause.

(End of clause)

[89 FR 19759, Mar. 20, 2024]

752.242–70 Periodic progress reports.

As prescribed in (48 CFR) AIDAR 742.1170–4(c), insert the following clause in contracts for which periodic progress reports are required from the contractor. The term ''contract'' shall be interpreted as ''task order'' or ''delivery order'' when this clause is used in an indefinite-delivery contract.

PERIODIC PROGRESS REPORTS (OCT 2007)

(a) The contractor shall prepare and submit progress reports as specified in the contract schedule. These reports are separate from the interim and final performance evaluation reports prepared by USAID in accordance with (48 CFR) FAR 42.15 and internal Agency procedures, but they may be used by USAID personnel or their authorized representatives when evaluating the contractor's performance.

(b) During any delay in furnishing a progress report required under this contract, the contracting officer may withhold from payment an amount not to exceed US$25,000 (or local currency equivalent) or 5 percent of the amount of this contract, whichever is less, until such time as the contractor submits the report or the contracting officer determines that the delay no longer has a detrimental effect on the Government's ability to monitor the contractor's progress.

(End of clause)

[72 FR 53164, Sept. 18, 2007, as amended at 79 FR 74988, 75000, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.242–71 Activity Monitoring, Evaluation, and Learning Plan

As prescribed in AIDAR 742.1170–5, insert the following clause in section F of solicitations and contracts.

ACTIVITY MONITORING, EVALUATION, AND LEARNING PLAN (JUN 2024)

(a) *Definitions*. As used in this clause—

Activity Monitoring, Evaluation, and Learning Plan (AMELP) means a plan for monitoring, evaluating, and collaborating, learning, and adapting during implementation of a USAID contract. Some USAID documentation may refer to ''MEL Plan'' or ''Activity MEL Plan''. These terms are synonymous.

Contract will be interpreted as ''task order'' or ''delivery order'' when this clause is used in an indefinite-delivery contract.

Evaluation means the systematic collection and analysis of data and information about the characteristics and outcomes of the programming carried out through a contract,

conducted as a basis for judgments, to understand and improve effectiveness and efficiency, and timed to inform decisions about current and future programming.

Feedback from beneficiaries means perceptions or reactions voluntarily communicated by a beneficiary of USAID assistance about the USAID assistance received.

Indicator means a quantifiable measure of a characteristic or condition of people, institutions, systems, or processes that might change over time.

Learning activity means efforts for the purpose of generating, synthesizing, sharing, and applying evidence and knowledge.

Monitoring context means the systematic collection of information about conditions and external factors relevant to implementation and performance of the contract.

Output means the tangible, immediate, and intended products or consequences of contract implementation within the Contractor's control or influence.

Outcome means the conditions of people, systems, or institutions that indicate progress or lack of progress toward the achievement of the goals and objectives of the contract.

Performance indicator means an indicator that measures expected outputs and/or outcomes of the contract implementation.

Target means a specific, planned level of results to achieve within a specific timeframe with a given level of resources.

(b) *Requirements.* (1) Unless otherwise specified in the schedule of the contract, the Contractor must develop and submit a proposed AMELP to the contracting officer or delegated contracting officer's representative within ninety (90) days of contract award. The contracting officer or delegated contracting officer's representative will review and provide comments within thirty (30) days after receiving the proposed AMELP. The Contractor must submit a final AMELP for contracting officer or delegated contracting officer's representative approval no later than 15 days after receiving comments.

(2) The Contractor must revise the AMELP as necessary during the period of performance of this contract. Any revisions to the plan must be approved by the contracting officer or delegated contracting officer's representative.

(c) *Content.* (1) The Contractor's proposed AMELP must include, at a minimum, the following:

(i) The Contractor's plan for monitoring, including any existing systems or processes for monitoring progress, any Standard Foreign Assistance Indicators as agreed upon by the contracting officer or delegated contracting officer's representative, any other USAID required indicators, and other relevant performance indicators of the contract's outputs and outcomes, their baseline (or plan for collecting baseline), and targets; and

(ii) The Contractor's plan for regular and systematic collection of feedback from beneficiaries, responding to feedback received, and reporting to USAID a summary of feedback and actions taken in response to the feedback received, or a rationale for why collecting feedback from beneficiaries is not applicable for this contract.

(2) The Contractor's proposed AMELP must be appropriate to the size and complexity of the contract and address the following, as applicable:

(i) Plans for monitoring context and emerging risks that could affect the achievement of the contract's results;

(ii) Plans for any evaluations to be conducted by the contractor, sub-contractor or third-party, including collaboration with an external evaluator;

(iii) Learning activities, including plans for capturing knowledge at the close-out of the contract;

(iv) Estimated resources for the AMELP tasks that are a part of the contract's budget; and

(v) Roles and responsibilities for all proposed AMELP tasks.

[End of clause]

[89 FR 37963, May 6, 2024]

752.245–70 Government property—USAID reporting requirements.

USAID contracts, except those for commercial items, must contain the following preface and reporting requirement as additions to the appropriate Government Property clause prescribed by (48 CFR) FAR 45.107, per a GAO audit recommendation.

Preface: To be inserted preceding the text of the FAR clause.

GOVERNMENT PROPERTY—USAID REPORTING REQUIREMENTS (OCT 2017)

(a)(1) The term Government-furnished property, wherever it appears in the following clause, shall mean (i) non-expendable personal property owned by or leased to the U.S. Government and furnished to the contractor, and (ii) personal property furnished either prior to or during the performance of this contract by any U.S. Government accountable officer to the contractor for use in connection with performance of this contract and identified by such officer as accountable. All mobile Information Technology (IT) equipment, including but not limited to, mobile phones (*e.g.* smartphones), laptops, tablets, and encrypted devices provided as government furnished property, title to which vests in the U.S. Government,

are considered accountable personal property.

(2) The term Government property, wherever it appears in the following clause, shall mean Government-furnished property, Contractor acquired mobile IT equipment and non-expendable personal property title to which vests in the U.S. Government under this contract.

(3) Non-expendable personal property, for purposes of this contract, is defined as personal property that is complete in itself, does not lose its identity or become a component part of another article when put into use; is durable, with an expected service life of two years or more; and that has a unit cost of more than $500.

(b) *Reporting Requirement:* To be inserted following the text of the (48 CFR) FAR clause.

Reporting Requirements: The Contractor will submit an annual report on all Government property in a form and manner acceptable to USAID substantially as follows:

ANNUAL REPORT OF GOVERNMENT PROPERTY IN CONTRACTOR'S CUSTODY

[Name of Contractor as of (end of contract year), 20XX]

	Motor vehicles	Furniture and furnishings—		Other Government property
		Office	Living quarters	
A. Value of property as of last report				
B. Transactions during this reporting period				
1. Acquisitions (add):				
a. Contractor acquired property [1]				
b. Government furnished [2]				
c. Transferred from others, without reimbursement [3]				
2. Disposals (deduct):				
a. Returned to USAID				
b. Transferred to USAID—Contractor purchased				
c. Transferred to other Government agencies [3]				
d. Other disposals [3]				
C. Value of property as of reporting date				
D. Estimated average age of contractor held property				
	Years	Years	Years	Years

[1] Non-expendable property and all mobile IT equipment.
[2] Government-furnished property listed in this contract as nonexpendable or accountable, including all mobile IT equipment.
[3] Explain if transactions were not processed through or otherwise authorized by USAID.

PROPERTY INVENTORY VERIFICATION

I attest that (1) physical inventories of Government property are taken not less frequently than annually; (2) the accountability records maintained for Government property in our possession are in agreement with such inventories; and (3) the total of the detailed accountability records maintained agrees with the property value shown opposite line C above, and the estimated average age of each category of property is as cited opposite line D above.

Authorized Signature _____

Name _____

Title _____

Date _____

(End of clause)

[83 FR 9713, Mar. 7, 2018]

752.245–71 Title to and care of property.

As prescribed in paragraph (a) of (48 CFR) AIDAR 745.107, the following clause must be inserted in all contracts when the contractor will acquire property under the contract for use overseas and the contract funds were obligated under a Development Objective Agreement (DOAG) (or similar bilateral obligating agreement) with the cooperating country.

TITLE TO AND CARE OF PROPERTY (APR 1984)

(a) Title to all non-expendable property purchased with contract funds under this contract and used in the Cooperating Country, shall at all times be in the name of the Cooperating Government, or such public or private agency as the Cooperating Government may designate, unless title to specified types or classes of non-expendable property is reserved to USAID under provisions set forth in the schedule of this contract; but all

such property shall be under the custody and control of Contractor until the owner of title directs otherwise, or completion of work under this contract or its termination, at which time custody and control shall be turned over to the owner of title or disposed of in accordance with its instructions. All performance guaranties and warranties obtained from suppliers shall be taken in the name of the title owner. (Non-expendable property is property which is complete in itself, does not lose its identity or become a component part of another article when put into use; is durable, with an expected service life of two years or more; and which has a unit cost of $500 of more.)

(b) Contractor shall prepare and establish a program, to be approved by the Mission, for the receipt, use, maintenance, protection, custody, and care of non-expendable property for which it has custodial responsibility, including the establishment of reasonable controls to enforce such program.

(c)(1) For non-expendable property to which title is reserved to the U.S. Government under provisions set forth in the schedule of this contract, Contractor shall submit an annual report on all non-expendable property under its custody as required in the clause of this contract entitled ''Government Property''.

(2) For non-expendable property titled to the Cooperating Government, the Contractor shall, within 90 days after completion of this contract, or at such other date as may be fixed by the contracting officer, submit an inventory schedule covering all items of non-expendable property under its custody, which have not been consumed in the performance of this contract. The Contractor shall also indicate what disposition has been made of such property.

(End of clause)

[49 FR 13259, Apr. 3, 1984, as amended at 62 FR 40470, July 29, 1997; 64 FR 5009, Feb. 2, 1999; 79 FR 74988, 75001, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.247–70 Preference for privately owned U.S.-flag commercial vessels.

As prescribed in 747.507, insert the following clause:

PREFERENCE FOR PRIVATELY OWNED U.S.-FLAG COMMERCIAL VESSELS (OCT 1996)

(a) Under the provisions of the Cargo Preference Act of 1954 (46 U.S.C. 55305)) at least 50 percent of the gross tonnage of equipment, materials, or commodities financed by USAID, or furnished without provision for reimbursement, or at least 50 percent of the gross tonnage of cargo moving under P.L. 480 financed by the U.S. Department of Agriculture, that may be transported in ocean vessels (computed separately for dry bulk carriers, dry cargo liners, and tankers) shall be transported in privately owned U.S.-flag commercial vessels.

(b) In accordance with USAID regulations and consistent with the regulations of the Maritime Administration, USAID applies Cargo Preference requirements on the basis of program that generally include more than one contract. Thus, the amount of cargo fixed on privately owned U.S.-flag vessels under this contract may be more or less than the required 50 percent, depending on current compliance with Cargo Preference requirements.

(c)(1) The contractor must submit one legible copy of a rated on-board ocean bill of lading for each shipment to both Office of Cargo and Commercial Sealift, Maritime Administration (MARAD), U.S. Department of Transportation, 1200 New Jersey Ave. SE., Washington, DC 20590, and the U.S. Agency for International Development (USAID), Bureau for Management, Office of Acquisition and Assistance, 1300 Pennsylvania Ave. NW., SA–44, Room 859, Washington, DC 20523 as follows:

(i) for PL 480 (Food aid shipments) scanned copies must be sent to: *freightedbills@usaid.gov*.

(ii) For all Non P.L. 480 (Non Food Aid Shipments) scanned copies must be sent to: *Oceantransportation@USAID.gov*.

(iii) For all shipments, scanned copies for MARAD must be sent to: *Cargo.MARAD@DOT.gov*.

(2) The contractor shall furnish these bill of lading copies within 20 working days of the date of loading for shipments originating in the United States, or within 30 working days for shipments originating outside the United States. Each bill of lading copy shall contain the following information:

(i) Sponsoring U.S. Government agency.

(ii) Name of vessel.

(iii) Vessel flag registry.

(iv) Date of loading.

(v) Port of loading.

(vi) Port of final discharge.

(vii) Description of commodity.

(viii) Gross weight in kilograms/pounds and volume in liters/cubic feet, if available.

(ix) Total ocean freight revenue in U.S. dollars.

(End of clause)

[64 FR 5009, Feb. 2, 1999, as amended at 72 FR 19670, Apr. 19, 2007; 79 FR 75001, Dec. 16, 2014; 81 FR 47047, July 20, 2016; 89 FR 4209, Jan. 23, 2024]

752.252–1 AIDAR solicitation provisions incorporated by reference

In accordance with 752.107(a), insert the following clause.

AIDAR SOLICITATION PROVISIONS INCORPORATED BY REFERENCE (MAR 2015)

This solicitation incorporates one or more 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. Also, the full text of all AIDAR solicitation provisions is contained in the Code of Federal Regulations (CFR) located at 48 CFR chapter 7.

(End of clause)

[79 FR 75001, Dec. 16, 2014, as amended at 89 FR 4209, Jan. 23, 2024]

752.252–2 AIDAR clauses incorporated by reference

In accordance with 752.107(b), insert the following clause.

AIDAR CLAUSES INCORPORATED BY REFERENCE (MAR 2015)

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 all AIDAR solicitation provisions and contract clause is contained in the Code of Federal Regulations (CFR) located at 48 CFR chapter 7.

(End of clause)

[79 FR 75001, Dec. 16, 2014, as amended at 89 FR 4209, Jan. 23, 2024]

752.252–70 Provisions and clauses to be completed by the offeror.

In accordance with 752.107(c), insert the following clause.

PROVISIONS AND CLAUSES TO BE COMPLETED BY THE OFFEROR (MAR 2015)

The following FAR and AIDAR provisions or clauses incorporated by reference in this solicitation or contract must be completed by the offeror or prospective contactor and submitted with the quotation or offer:

NUMBER TITLE DATE

AIDAR (48 CFR chapter 7)

[The contracting officer must list all FAR and AIDAR provisions or clauses incorporated by reference that must be completed by the offeror or prospective contactor and submitted with the quotation or offer.]

(End of clause)

[79 FR 75001, Dec. 16, 2014, as amended at 89 FR 4209, Jan. 23, 2024]

Subpart 752.70—Texts of USAID Contract Clauses

752.7000 Scope of subpart.

Subpart 752.70 contains the text of USAID-specific contract clauses for which there is no (48 CFR) FAR equivalent. The clauses in this subpart do not apply to contracts for personal services. For personal service contract clauses see (48 CFR) AIDAR Appendix D—Direct USAID Contracts with U.S. Citizens or U.S. Residents for Personal Services Abroad and (48 CFR) AIDAR Appendix J—Direct USAID Contracts with Cooperating Country Nationals and with Third Country Nationals for Personal Services Abroad.

[49 FR 13259, Apr. 3, 1984, as amended at 57 FR 5237, Feb. 13, 1992; 79 FR 74988, Dec. 16, 2014]

752.7001 Biographical data.

The following clause is to be inserted in all USAID cost reimbursement contracts.

BIOGRAPHICAL DATA (JUL 1997)

The Contractor agrees to furnish to the contracting officer on USAID Form 1420–17, ''Contractor Employee Biographical Data Sheet'', biographical information on the following individuals to be employed in the performance of the contract: (1) All individuals to be sent outside the United States, or (2) any employees designated as ''key personnel''. Biographical data in the form usually maintained by the Contractor on the other individuals employed under the contract shall be available for review by USAID at the Contractor's headquarters. A supply of USAID Form 1420–17 will be provided with this contract. The Contractor may reproduce additional copies as necessary.

(End of clause)

[62 FR 40470, July 29, 1997; 62 FR 45334, Aug. 27, 1997; 62 FR 47532, Sept. 9, 1997; 79 FR 74988, 75001, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.7002 Travel and transportation.

For use in cost reimbursement contracts performed in whole or in part overseas.

TRAVEL AND TRANSPORTATION (JAN 1990)

(a) *General.* The Contractor will be reimbursed for reasonable, allocable and allowable travel and transportation expenses incurred under and for the performance of this

contract. Determination of reasonableness, allocability and allowability will be made by the contracting officer based on the applicable cost principles, the Contractor's established policies and procedures, USAID's established policies and procedures for USAID direct-hire employees, and the particular needs of the project being implemented by this contract. The following paragraphs provide specific guidance and limitations on particular items of cost.

(b) *International travel.* For travel to and from post of assignment the Contractor shall be reimbursed for travel costs and travel allowances of travelers from place of residence in the United States (or other location provided that the cost of such travel does not exceed the cost of the travel from the employee's residence in the United States) to the post of duty in the Cooperating Country and return to place of residence in the United States (or other location provided that the cost of such travel does not exceed the cost of travel from the post of duty in the Cooperating Country to the employee's residence) upon completion of services by the individual. Reimbursement for travel will be in accordance with the applicable cost principles and the provisions of this contract, and will be limited to the cost of travel by the most direct and expeditious route. If a regular employee does not complete one full year at post of duty (except for reasons beyond his/her control), the costs of going to and from the post of duty for that employee and his/her dependents are not reimbursable hereunder. If the employee serves more than one year but less than the required service in the Cooperating Country (except for reasons beyond his/her control) the costs of going to the post of duty are reimbursable hereunder but the costs of going from post of duty to the employee's permanent, legal place of residence at the time he or she was employed for work under this contract or other location as approved by the contracting officer are not reimbursable under this contract for the employee and his/her dependents. When travel is by economy class accommodations, the Contractor will be reimbursed for the cost of transporting up to 10 kilograms/22 pounds of accompanied personal baggage per traveler in addition to that regularly allowed with the economy ticket provided that the total number of kilograms/pounds of baggage does not exceed that regularly allowed for first class travelers. Travel allowances for travelers must not be in excess of the rates authorized in the Department of State Standardized Regulations—hereinafter referred to as the Standardized Regulations—as from time to time amended, for not more than the travel time required by scheduled commercial air carrier using the most expeditious route. One stopover en route for a period of not to exceed 24 hours is allowable when the traveler uses economy class accommodations for a trip of 14 hours or more of scheduled duration. Such stopover shall not be authorized when travel is by indirect route or is delayed for the convenience of the traveler. Per diem during such stopover shall be paid in accordance with the established practice of the Contractor but not to exceed the amounts stated in the Standardized Regulations.

(c) *Local travel.* Reimbursement for local travel in connection with duties directly referable to the contract shall not be in excess of the rates established by the Mission Director for the travel costs of travelers in the Cooperating Country. In the absence of such established rates the Contractor shall be reimbursed for actual travel costs of travelers in the Cooperating Country, if not provided by the Cooperating Government or the Mission, including travel allowances at rates not in excess of those prescribed by the Standardized Regulations.

(d) *Travel for consultation.* The Contractor shall be reimbursed for the round trip of the Contractor's Chief of Party in the Cooperating Country or other designated Contractor employee or consultant in the Cooperating Country performing services required under this Contract, for travel from the Cooperating Country to the Contractor's office in the United States or to USAID/Washington for consultation and return on occasions deemed necessary by the Contractor and approved in advance, in writing, by the contracting officer or the Mission Director.

(e) *Special international travel and third country travel.* For special travel which advances the purpose of the contract, which is not otherwise provided by the Cooperating Government, and with the prior written approval of the contracting officer or the Mission Director, the Contractor shall be reimbursed for—

(i) The travel cost of travelers other than between the United States and the Cooperating Country and for local travel within other countries and

(ii) Travel allowance for travelers while in travel status and while performing services hereunder in such other countries at rates not in excess of those prescribed by the Standardized Regulations.

(f) *Indirect travel for personal convenience.* When travel is performed by an indirect route for the personal convenience of the traveler, the allowable costs of such travel will be computed on the basis of the cost of allowable air fare via the direct usually traveled route. If such costs include fares for air or ocean travel by foreign flag carriers, approval for indirect travel by such foreign flag carriers must be obtained from the contracting officer or the Mission Director before such travel is undertaken, otherwise only that portion of travel accomplished by

United States-flag carriers will be reimbursable within the above limitation of allowable costs.

(g) *Limitation on travel by dependents.* Travel costs and allowances will be allowed only for dependents of regular employees and such costs shall be reimbursed for travel from place of abode to assigned station in the Cooperating Country and return, only if dependent remains in the country for at least 9 months or one-half of the required tour of duty of the regular employee responsible for such dependent, whichever is greater. If the dependent is eligible for educational travel pursuant to the ''Differential and Allowances'' clause of this contract, time spent away from post resulting from educational travel will be counted as time at post.

(h) *Delays en route.* The Contractor may grant to travelers under this contract reasonable delays en route while in travel status when such delays are caused by events beyond the control of such traveler or Contractor. It is understood that if delay is caused by physical incapacitation, personnel shall be eligible for such sick leave as provided under the ''Leave and Holidays'' clause of this contract.

(i) *Travel by privately owned automobile.* The Contractor shall be reimbursed for the cost of travel performed by a regular employee in his/her privately owned automobile at a rate not to exceed that authorized in the Federal Travel Regulations plus authorized per diem for the employee and for each of the authorized dependents traveling in the automobile, if the automobile is being driven to or from the Cooperating Country as authorized under the contract, provided that the total cost of the mileage and the per diem paid to all authorized travelers shall not exceed the total constructive cost of fare and normal per diem by all authorized travelers by surface common carrier or authorized air fare, whichever is less.

(j) *Emergency and irregular travel and transportation.* Emergency transportation costs and travel allowances while en route, as provided in this section will also be reimbursed not to exceed amounts authorized by the Foreign Service Travel Regulations for USAID-direct hire employees in like circumstances under the following conditions:

(1) The costs of going from post of duty in the Cooperating Country to the employee's permanent, legal place of residence at the time he or she was employed for work under this contract or other location for Contractor employees and dependents and returning to the post of duty, when the Contractor's Chief of Party, with the concurrence of the Contracting Officer or Mission Director makes a written determination that such travel is necessary for one of the reasons specified in subparagraphs (j)(1) (i) and (ii) of this section. A copy of the written determination shall be furnished to the contracting officer.

(i) Need for medical care beyond that available within the area to which the employee is assigned, or serious effect on physical or mental health if residence is continued at assigned post of duty, subject in either case, to the limitations stated in the clause of this contract entitled ''Personnel—Physical Fitness of Employee and Dependents.'' The Mission Director may authorize a medical attendant to accompany the employee at contract expense if, based on medical opinion, such an attendant is necessary.

(ii) Death, or serious illness or injury of a member of the immediate family of the employee or the immediate family of the employee's spouse.

(2) When, for any reason, the Mission Director determines it is necessary to evacuate the Contractor's entire team (employees and dependents) or Contractor dependents only, the Contractor will be reimbursed for travel and transportation expenses and travel allowance while en route, for the cost of the individuals going from post of duty in the Cooperating Country to the employee's permanent, legal place of residence at the time he or she was employed for work under this contract or other approved location. The return of such employees and dependents may also be authorized by the Mission Director when, in his/her discretion, he/she determines it is prudent to do so.

(3) The Mission Director may also authorize emergency or irregular travel and transportation in other situations, when in his/her opinion, the circumstances warrant such action. The authorization shall include the kind of leave to be used and appropriate restrictions as to time away from post, transportation of personal and/or household effects, etc. Requests for such emergency travel shall be submitted through the Contractor's Chief of Party.

(k) *Home leave travel.* To the extent that home leave has been authorized as provided in the ''Leave and Holidays'' clause of this contract, the cost of travel for home leave is reimbursable for travel costs and travel allowances of travelers from the post of duty in the Cooperating Country to place of residence in the United States (or other location provided that the cost of such travel does not exceed the cost of travel to the employee's residence in the United States) and return to the post of duty in the Cooperating Country. Reimbursement for travel will be in accordance with the applicable cost principles and the provisions of this contract, and will be limited to the cost of travel by the most direct and expeditious route. When travel is by economy class accommodations, the Contractor will be reimbursed for the cost of transporting up to 10 kilograms/22 pounds of accompanied personal baggage per

traveler in addition to that regularly allowed with the economy ticket provided that the total number of kilograms/pounds of baggage does not exceed that regularly allowed for first class travelers. Travel allowances for travelers shall not be in excess of the rates authorized in the Standardized Regulations as from time to time amended, for not more than the travel time required by scheduled commercial air carrier using the most expeditious route. One stopover en route for a period of not to exceed 24 hours is allowable when the traveler uses economy class accommodations for a trip of 14 hours or more of scheduled duration. Such stopover shall not be authorized when travel is by indirect route or is delayed for the convenience of the traveler. Per diem during such stopover shall be paid in accordance with the established practice of the Contractor but not to exceed the amounts stated in the Standardized Regulations.

(l) *Rest and recuperation travel.* The Contractor shall be reimbursed for the cost of travel performed by regular employees and dependents for purposes of rest and recuperation provided that such reimbursement does not exceed that authorized for USAID direct hire employees, and provided further that no reimbursement will be made unless approval is given by the Contractor's Chief of party.

(m) *Transportation of motor vehicles, personal effects and household goods.* (1) Transportation, including packing and crating costs, will be paid for shipping from the point of origin in the United States (or other location as approved by the contracting officer) to post of duty in the Cooperating Country and return to point of origin in the United States (or other location as approved by the contracting officer) of one privately-owned vehicle for each regular employee, personal effects of travelers and household goods of each regular employee not to exceed the limitations in effect for such shipments for USAID direct hire employees in accordance with the Foreign Service Travel Regulations as in effect when shipment is made.

(2) If a regular employee does not complete one full year at post of duty (except for reasons beyond his/her control), the costs for transportation of vehicles, effects and goods to and from the post of duty are not reimbursable hereunder. If the employee serves more than one year but less than the required service in the Cooperating Country (except for reasons beyond his/her control) the costs for transportation of vehicles, effects and goods to the post of duty are reimbursable hereunder but the costs for transportation of vehicles, effects and goods from post of duty to the employee's permanent, legal place of residence at the time he or she was employed for work under this contract or other location as approved by the contracting officer are not reimbursable under this contract.

(3) The cost of transporting motor vehicles and household goods shall not exceed the cost of packing, crating and transportation by surface. In the event that the carrier does not require boxing or crating of motor vehicles for shipment to the Cooperating Country, the cost of boxing or crating is not reimbursable. The transportation of a privately-owned motor vehicle for a regular employee may be authorized by the Contractor as replacement of the last such motor vehicle shipped under this contract for the employee when the Mission Director or his/her designee determines in advance and so notifies the Contractor in writing that the replacement is necessary for reasons not due to the negligence or malfeasance of the regular employee. The determination shall be made under the same rules and regulations that apply to Mission employees.

(n) *Unaccompanied baggage.* Unaccompanied baggage is considered to be those personal belongings needed by the traveler immediately upon arrival at destination. To permit the arrival of effects to coincide with the arrival of regular employees and dependents, consideration should be given to advance shipments of unaccompanied baggage. The Contractor will be reimbursed for costs of shipment of unaccompanied baggage (in addition to the weight allowance for household effects) not to exceed the limitations in effect for USAID direct hire employees in accordance with the Foreign Service Travel Regulations as in effect when shipment is made.

This unaccompanied baggage may be shipped as air freight by the most direct route between authorized points of origin and destination regardless of the modes of travel used. This provision is applicable to home leave travel and to short-term employees when these are authorized by the terms of this contract.

(o) *Storage of household effects.* The cost of storage charges (including packing, crating, and drayage costs) in the U.S. of household goods of regular employees will be permitted in lieu of transportation of all or any part of such goods to the Cooperating Country under paragraph (m) above provided that the total amount of effects shipped to the Cooperating Country or stored in the U.S. shall not exceed the amount authorized for USAID direct hire employees under the Uniform Foreign Service Travel Regulations.

(p) *International ocean transportation.* (1) Flag eligibility requirements for ocean carriage are covered by the ''Source and Nationality Requirements'' clause of this contract.

(i) Transportation of goods. Where U.S. flag vessels are not available, or their use would result in a significant delay, the Contractor must contact the U.S. Agency for International Development (USAID), Bureau for Management, Office of Acquisition and Assistance, Transportation Division (M/OAA/

T) for required guidance and may obtain a release from this requirement from M/OAA/T. The contact email address for these matters is *Oceantransportation@USAID.gov*.

(ii) *Transportation of persons.* Where U.S. flag vessels are not available, or their use would result in a significant delay, the Contractor may obtain a release from this requirement from the contracting officer or the Mission Director, as appropriate.

(2) *Transportation of foreign-made vehicles.* Reimbursement of the costs of transporting a foreign-made motor vehicle will be made in accordance with the provisions of the Foreign Service Travel Regulations.

(3) *Reduced rates on U.S. flag carriers.* Reduced rates on United States flag carriers are in effect for shipments of household goods and personal effects of USAID contract personnel. These reduced rates are available provided the shipper states on the bill of lading that the cargo is ''Personal property-not for resale-payment of freight charges is at U.S. Government (USAID) expense and any special or diplomatic discounts accorded this type cargo are applicable.'' The Contractor will not be reimbursed for shipments of household goods or personal effects in an amount in excess of the reduced rates available in accordance with the foregoing.

(End of clause)

[55 FR 6803, Feb. 27, 1990, as amended at 56 FR 2699, Jan. 24, 1991; 72 FR 19670, Apr. 19, 2007; 79 FR 74988, 75001, Dec. 16, 2014]

752.7003 Documentation for payment.

The following clause is required in all USAID direct contracts, excluding fixed price contracts:

DOCUMENTATION FOR PAYMENT (NOV 1998)

(a) Claims for reimbursement or payment under this contract must be submitted to the Paying Office indicated in the schedule of this contract. The contracting officer's representative (CTO) is the authorized representative of the Government to approve vouchers under this contract. The Contractor must submit either paper or fax versions of the SF–1034—Public Voucher for Purchases and Services Other Than Personal. Each voucher shall be identified by the appropriate USAID contract number, in the amount of dollar expenditures made during the period covered.

(1) The SF 1034 provides space to report by line item for products or services provided. The form provides for the information to be reported with the following elements:

TOTAL EXPENDITURES

[Document Number: XXX–X–XX–XXXX–XX]

Line item No.	Description	Amt. vouchered to date	Amt. vouchered this period
001	Product/Service Desc. for Line Item 001	$XXXX.XX	$ XXXX.XX
002	Product/Service Desc. for Line Item 002	XXXX.XX	XXXX.XX
Total		XXXX.XX	XXXX.XX

(2) The fiscal report shall include the following certification signed by an authorized representative of the Contractor:

The undersigned hereby certifies to the best of my knowledge and belief that the fiscal report and any attachments have been prepared from the books and records of the Contractor in accordance with the terms of this contract and are correct: the sum claimed under this contract is proper and due, and all the costs of contract performance (except as herewith reported in writing) have been paid, or to the extent allowed under the applicable payment clause, will be paid currently by the Contractor when due in the ordinary course of business; the work reflected by these costs has been performed, and the quantities and amounts involved are consistent with the requirements of this Contract; all required contracting officer approvals have been obtained; and appropriate refund to USAID will be made promptly upon request in the event of disallowance of costs not reimbursable under the terms of this contract.

BY: _____

TITLE: _____

DATE: _____

(b) *Local currency payment.* The Contractor is fully responsible for the proper expenditure and control of local currency, if any, provided under this contract. Local currency will be provided to the Contractor in accordance with written instructions provided by the Mission Director. The written instructions will also include accounting, vouchering, and reporting procedures. A copy of the instructions shall be provided to the Contractor's Chief of Party and to the contracting officer. The costs of bonding personnel responsible for local currency are reimbursable under this contract.

(c) Upon compliance by the Contractor with all the provisions of this contract, acceptance by the Government of the work and final report, and a satisfactory accounting by the Contractor of all Government-owned property for which the Contractor had custodial responsibility, the Government shall promptly pay to the Contractor any moneys (dollars or local currency) due under the completion voucher. The Government will make suitable reduction for any disallowance or indebtedness by the Contractor by applying the proceeds of the voucher first to such deductions and next to any unliquidated balance of advance remaining under this contract.

(d) The Contractor agrees that all approvals of the Mission Director and the Contracting Officer which are required by the provisions of this contract shall be preserved and made available as part of the Contractor's records which are required to be presented and made available by the clause of this contract entitled ''Audit and Records—Negotiation''.

(End of clause)

[53 FR 6829, Mar. 3, 1988, as amended at 64 FR 5009, Feb. 2, 1999; 79 FR 74988, 75001, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.7004 Emergency locator information.

The following clause is to be inserted in all contracts requiring travel overseas.

EMERGENCY LOCATOR INFORMATION (JUL 1997)

The Contractor agrees to provide the following information to the Mission Administrative Officer on or before the arrival in the host country of every contract employee or dependent:

(1) The individual's full name, home address, and telephone number.

(2) The name and number of the contract, and whether the individual is an employee or dependent.

(3) The contractor's name, home office address, and telephone number, including any after-hours emergency number(s), and the name of the contractor's home office staff member having administrative responsibility for the contract.

(4) The name, address, and telephone number(s) of each individual's next of kin.

(5) Any special instructions pertaining to emergency situations such as power of attorney designees or alternate contact persons.

(End of clause)

[62 FR 40470, July 29, 1997; 62 FR 45334, Aug. 27, 1997, as amended at 79 FR 75001, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.7005 [Reserved]

752.7006 Notices.

The following clause shall be used in all USAID contracts.

NOTICES (APR 1984)

Any notice given by any of the parties hereunder shall be sufficient only if in writing and delivered in person or sent by telegraph, cable, or registered or regular mail as follows:

To USAID: Administrator, U.S. Agency for International Development, Washington, DC 20523–0061. Attention: Contracting Officer (the name of the cognizant contracting officer with a copy to the appropriate Mission Director).

To Contractor: At Contractor's address shown on the cover page of this contract, or to such other address as either of such parties shall designate by notice given as herein required. Notices hereunder shall be effective when delivered in accordance with this clause or on the effective date of the notice, whichever is later.

(End of clause)

[49 FR 13259, Apr. 3, 1984, as amended at 56 FR 2699, Jan. 24, 1991; 61 FR 39095, July 26, 1996 ; 79 FR 75002, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.7007 Personnel compensation.

The following clause shall be used in all USAID cost-reimbursement contracts.

PERSONNEL COMPENSATION (JUL 2007)

(a) Direct compensation of the Contractor's personnel will be in accordance with the Contractor's established policies, procedures, and practices, and the cost principles applicable to this contract.

(b) Reimbursement of the employee's base annual salary plus overseas recruitment incentive, if any, which exceed the USAID Contractor Salary Threshold (USAID CST) stated in USAID Automated Directives System (ADS) Chapter 302 USAID Direct Contracting, must be approved in writing by the contracting officer, as prescribed in 731.205–6(b) or 731.371(b), as applicable.

(End of clause)

[49 FR 13259, Apr. 3, 1984, as amended at 49 FR 33669, Aug. 24, 1984; 61 FR 39095, July 26, 1996; 62 FR 40470, July 29, 1997; 72 FR 19669, Apr. 19, 2007; 79 FR 74988, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.7008 Use of Government facilities or personnel.

The following clause is for use in all USAID non-commercial contracts.

USE OF GOVERNMENT FACILITIES OR PERSONNEL (APR 1984)

(a) The Contractor and any employee or consultant of the Contractor is prohibited from using U.S. Government facilities (such as office space or equipment) or U.S. Government clerical or technical personnel in the performance of the services specified in the contract, unless the use of Government facilities or personnel is specifically authorized in the contract, or is authorized in advance, in writing, by the contracting officer.

(b) If at any time it is determined that the Contractor, or any of its employees or consultants have used U.S. Government facilities or personnel without authorization either in the contract itself, or in advance, in writing, by the contracting officer, then the amount payable under the contract shall be reduced by an amount equal to the value of the U.S. Government facilities or personnel used by the Contractor, as determined by the contracting officer.

(c) If the parties fail to agree on an adjustment made pursuant to this clause, it shall be considered a dispute, and shall be dealt with under the terms of the clause of this contract entitled ''Disputes''.

(End of clause)

[49 FR 13259, Apr. 3, 1984, as amended at 62 FR 40470, July 29, 1997; 79 FR 74988, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.7009 Marking.

The following clause is for use in all USAID contracts performed in whole or in part overseas.

MARKING (JAN 1993)

(a) It is USAID policy that USAID-financed commodities and shipping containers, and project construction sites and other project locations be suitably marked with the USAID emblem. Shipping containers are also to be marked with the last five digits of the USAID financing document number. As a general rule, marking is not required for raw materials shipped in bulk (such as coal, grain, etc.), or for semifinished products which are not packaged.

(b) Specific guidance on marking requirements should be obtained prior to procurement of commodities to be shipped, and as early as possible for project construction sites and other project locations. This guidance will be provided through the cognizant technical office indicated on the cover page of this contract, or by the Mission Director in the Cooperating Country to which commodities are being shipped, or in which the project site is located.

(c) Authority to waive marking requirements is vested with the Regional Assistant Administrators, and with Mission Directors.

(d) A copy of any specific marking instructions or waivers from marking requirements is to be sent to the contracting officer; the original should be retained by the Contractor.

(End of clause)

[49 FR 13259, Apr. 3, 1984, as amended at 58 FR 8703, Feb. 17, 1993; 79 FR 74988, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.7010 Conversion of U.S. dollars to local currency.

For use in all USAID non-commercial contracts involving performance overseas.

CONVERSION OF U.S. DOLLARS TO LOCAL CURRENCY (APR 1984)

Upon arrival in the Cooperation Country, and from time to time as appropriate, the Contractor's Chief of Party shall consult with the Mission Director who shall provide, in writing, the procedure the Contractor and its employees shall follow in the conversion of United States dollars to local currency. This may include, but is not limited to, the conversion of said currency through the cognizant U.S. Disbursing Officer or Mission Controller, as appropriate.

(End of clause)

[49 FR 13259, Apr. 3, 1984, as amended at 62 FR 40470, July 29, 1997; 89 FR 4209, Jan. 23, 2024]

752.7011 Orientation and language training.

For use in all USAID cost-reimbursement contracts involving performance overseas.

ORIENTATION AND LANGUAGE TRAINING (APR 1984)

(a) Regular employees shall receive a maximum of 2 weeks USAID sponsored orientation before travel overseas. The dates of orientation shall be selected by the Contractor from the orientation schedule provided by USAID.

(b) Participation in USAID sponsored orientation in no way relieves the Contractor of its responsibility for assuring that all employees, regular and short-term, are properly oriented. As an addition to or substitution for USAID's sponsored orientation for regular employees, the following types of orientation may be authorized taking into consideration specific job requirements, the employee's prior overseas experience, or unusual circumstances.

(1) Modified orientation.

(2) Language training, particularly when significant for operating capabilities.

(3) Orientation and language training for regular employee's dependents.

(4) Contractor-sponsored orientation.

(5) Orientation in all matters related to the administrative, logistical, and technical aspects of the employee's movement to, and tour of duty in, the Cooperating Country.

(c) Authorization for an additional or alternate orientation program, if any, shall be either set forth in the schedule or provided in writing by the contracting officer.

(d) Travel expenses not to exceed one round trip from regular employee's residence to place of orientation and return will be reimbursed, pursuant to the cost principles applicable to this contract. Allowable salary costs during the period of orientation are also reimbursable.

(End of clause)

[49 FR 13259, Apr. 3, 1984, as amended at 79 FR 74988, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.7012 Protection of the individual as a research subject.

This clause is for use in any USAID contract which involves research using human subjects.

PROTECTION OF THE INDIVIDUAL AS A RESEARCH SUBJECT (AUG 1995)

(a) Safeguarding the rights and welfare of human subjects in research conducted under a USAID contract is the responsibility of the contractor. USAID has adopted the Common Federal Policy for the Protection of Human Subjects. USAID's Policy is found in Part 225 of Title 22 of the Code of Federal Regulations (the ''Policy''). Additional interpretation, procedures, and implementation guidance of the Policy are found in USAID General Notice entitled ''Procedures for the Protection of Human Subjects in Research Supported by USAID'', issued April 19, 1995, as from time to time amended (a copy of which is attached to this contract). USAID's Cognizant Human Subjects Officer (CHSO) and USAID/W has oversight, guidance, and interpretation responsibility for the Policy.

(b) Contractors must comply with the Policy when humans are the subject of research, as defined in 22 CFR 225.102(d), performed as part of the contract, and contractors must provide ''assurance'', as required by 22 CFR 225.103, that they follow and abide by the procedures in the Policy. See also Section 5 of the April 19, 1995, USAID General Notice which sets forth activities to which the Policy is applicable. The existence of a bona fide, applicable assurance approved by the Department of Health and Human Services (HHS) such as the ''multiple project assurance'' (MPA) will satisfy this requirement. Alternatively, contractors can provide an acceptable written assurance to USAID as described in 22 CFR 225.103. Such assurances must be determined by the CHSO to be acceptable prior to any applicable research being initiated or conducted under the contract. In some limited instances outside the U.S., alternative systems for the protection of human subjects may be used provided they are deemed ''at least equivalent'' to those outlined in part 225 (see 22 CFR 225.101(h)). Criteria and procedures for making this determination are described in the General Notice cited in the preceding paragraph.

(c) Since the welfare of the research subject is a matter of concern to USAID as well as to the contractor, USAID staff, consultants and advisory groups may independently review and inspect research, and research processes and procedures involving human subjects, and based on such findings, the CHSO may prohibit research which presents unacceptable hazards or otherwise fails to comply with USAID procedures. Informed consent documents must include the stipulation that the subject's records may be subject to such review.

(End of clause)

[61 FR 39095, July 26, 1996, as amended at 89 FR 4209, Jan. 23, 2024]

752.7013 Contractor-mission relationships.

For use in all USAID contracts involving performance overseas. Note that paragraph (f) of this clause is applicable only in contracts with an educational institution.

CONTRACTOR-MISSION RELATIONSHIPS (OCT 1989)

(a) The Contractor acknowledges that this contract is an important part of the United States Foreign Assistance Program and agrees that its operations and those of its employees in the Cooperating Country will be carried out in such a manner as to be fully commensurate with the responsibility which this entails.

(b) The Mission Director is the chief representative of USAID in the Cooperating Country. In this capacity, he/she is responsible for both the total USAID program in the cooperating country including certain administrative responsibilities set forth in this contract, and for advising USAID regarding the performance of the work under the contract and its effect on the United States Foreign Assistance Program. Although the Contractor will be responsible for all professional, technical, and administrative details of the work called for by the contract, it shall be under the guidance of the Mission Director in matters relating to foreign policy. The Chief of Party shall keep the Mission Director currently informed of the progress of the work under the contract.

(c) In the event the conduct of any Contractor employee is not in accordance with the preceding paragraphs, the Contractor's Chief of Party shall consult with the Mission Director and the employee involved and shall recommend to the Contractor a course of action with regard to such employee.

(d) The parties recognize the right of the U.S. Ambassador to direct the removal from a country of any U.S. citizen or the discharge from this contract of any third-country national or cooperating-country national when, at the discretion of the Ambassador, the interests of the United States so require. Under these circumstances termination of an employee and replacement by an acceptable substitute shall be at no cost to USAID.

(e) If it is determined that the services of such employee shall be terminated, the Contractor shall use its best efforts to cause the return of such employee to the United States or point of origin as appropriate.

[The following paragraph (f) is applicable if the contract is with an educational institution:]

(f) It is understood by the parties that the Contractor's responsibilities shall not be restrictive of academic freedom. Notwithstanding these academic freedoms, the Contractor's employees, while in the Cooperating Country, are expected to show respect for its conventions, customs, and institutions, to abide by applicable laws and regulations, and not to interfere in its internal political affairs.

(End of clause)

[54 FR 46391, Nov. 3, 1989]

752.7014 Notice of changes in travel regulations.

The following clause is for use in cost-reimbursement contracts involving work overseas.

NOTICE OF CHANGES IN TRAVEL REGULATIONS (JAN 1990)

(a) Changes in travel, differential, and allowance regulations shall be effective on the beginning of the Contractor's next pay period following the effective date of the change as published in the applicable travel regulations (the Department of State Standardized Regulations, Foreign Service Travel Regulations).

(b)(1) Department of State Standardized Regulations are available at: *http://aoprals.state.gov/content.asp?content_id=231&menu_id=92*.

(2)Foreign Service Travel Regulations are available at: 14 FAM 500: *http://www.state.gov/m/a/dir/regs/fam/14fam/500/index.htm*.

(3) Federal Travel Regulations are available at: *http://www.gsa.gov/portal/content/104790?utm_source=OGP&utm_medium=print-radio&utm_term=ftr&utm_campaign=shortcut*.

(c) Information regarding these regulations as referenced in the ''Travel and Transportation'' clause of this contract may be obtained from the contracting officer.

(End of clause)

[55 FR 6805, Feb. 27, 1990, as amended at 79 FR 75002, Dec. 16, 2014]

752.7015 Use of pouch facilities.

For use in all USAID non-commercial contracts exceeding the simplified acquisition threshold and involving performance overseas.

USE OF POUCH FACILITIES (JUL 1997)

(a) Use of diplomatic pouch is controlled by the Department of State. The Department of State has authorized the use of pouch facilities for USAID contractors and their employees as a general policy, as detailed in paragraphs (a)(1) through (a)(7) of this clause; however, the final decision regarding use of pouch facilities rests with the Embassy or USAID Mission. In consideration of the use of pouch facilities as hereinafter stated, the Contractor and its employees agree to indemnify and hold harmless the Department of State and USAID against loss or damage occurring in pouch transmission.

(1) Contractors and their employees are authorized use of the pouch for transmission

and receipt of up to a maximum of 0.9 kilogram/2 pounds per shipment of correspondence and documents needed in the administration of foreign assistance programs.

(2) U.S. citizen employees of U.S. contractors are authorized use of the pouch for personal mail up to a maximum of 0.5 kilogram/one pound per shipment (but see paragraph (a)(3) of this section).

(3) Merchandise, parcels, magazines, or newspapers are not considered to be personal mail for purposes of this clause, and are not authorized to be sent or received by pouch.

(4) Official mail as authorized by paragraph (a)(1) of this clause should be addressed as follows: Individual or Organization name, followed by the symbol ''C'', city Name of Post, U.S. Agency for International Development, Washington, DC 20523–0001.

(5) Personal mail pursuant to paragraph (a)(2) of this clause should be sent to the address specified in paragraph (a)(4) of this clause, but without the name of the organization.

(6) Mail sent via the diplomatic pouch may not be in violation of U.S. Postal laws and may not contain material ineligible for pouch transmission.

(7) USAID contractor personnel are not authorized use of military postal facilities (APO/FPO). This is an Adjutant General's decision based on existing laws and regulations governing military postal facilities and is being enforced worldwide. Posts having access to APO/FPO facilities and using such for diplomatic pouch dispatch, may, however, accept official mail from Contractors and letter mail from their employees for the pouch, provided of course, adequate postage is affixed.

(b) The Contractor shall be responsible for advising its employees of this authorization and these guidelines and limitations on use of pouch facilities.

(c) Specific additional guidance on use of pouch facilities in accordance with this clause is available from the Post Communication Center at the Embassy or USAID Mission.

(End of clause)

[49 FR 13259, Apr. 3, 1984, as amended at 56 FR 2699, Jan. 24, 1991; 57 FR 5237, Feb. 13, 1992; 62 FR 40471, July 29, 1997; 62 FR 45334, Aug. 27, 1997; 79 FR 75002, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.7017–752.7024 [Reserved]

752.7025 Approvals.

For use in all USAID contracts.

APPROVALS (APR 1984)

All approvals required to be given under the contract by the contracting officer or the Mission Director shall be in writing and, except when extraordinary circumstances make it impracticable, shall be requested by the Contractor sufficiently in advance of the contemplated action to permit approval, disapproval or other disposition prior to that action. If, because of existing conditions, it is impossible to obtain prior written approval, the approving official may, at his discretion, ratify the action after the fact.

(End of clause)

[49 FR 13259, Apr. 3, 1984, as amended at 79 FR 74988, Dec. 16, 2014; 89 FR 4209, Jan. 23, 2024]

752.7026 [Reserved]

752.7027 Personnel.

For use in all USAID services contracts involving performance overseas. Note that paragraphs (f) and (g) of this clause are for use only in cost reimbursement contracts.

PERSONNEL (DEC 1990)

(a) *Clearance.* (1) *Individuals engaged or assigned within the United States.* The contractor will obtain written notification from the contracting officer of Cooperating Country clearance of any employee sent outside the United States to perform duties under this contract.

(2) *Individuals engaged or assigned when outside the United States.* No individual shall be engaged or assigned when outside the United States to perform work outside the United States under this contract unless authorized in the schedule or otherwise approved by the contracting officer or Mission Director. However, when services are performed in the Cooperating Country on a casual or irregular basis or in an emergency, exception to this provision can be made in accordance with instructions or regulations established by the Mission Director.

(b) *Physical fitness of employees and dependents.* See the clause of this contract entitled Physical Fitness.

(c) *Conformity to laws and regulations of Cooperating Country.* Contractor agrees to use its best efforts to assure that its employees and their dependents, while in the Cooperating Country, abide by all applicable laws and regulations of the Cooperating Country and political subdivisions thereof.

(d) *Importation or sale of personal property or automobiles.* To the extent permitted by Cooperating Country laws, the importation and sale of personal property or automobiles by contractor employees and their dependents in the Cooperating Country shall be subject to the same limitations and prohibitions which apply to U.S. nationals employed by

the Mission. This provision does not apply to employees or consultants who are citizens or legal residents of the Cooperating Country.

(e) *Economic and financial activities.* Other than work to be performed under this contract for which an employee or consultant is assigned by the contractor, no such employee or consultant of the contractor shall engage, directly or indirectly, either in his/her own name or in the name or through the agency of another person, in any business, profession or occupation in the Cooperating Country or other foreign countries to which he/she is assigned, nor shall he make loans or investments to or in any business, profession or occupation in the Cooperating Country or other foreign countries in which he/she is assigned. This provision does not apply to employees or consultants who are citizens or legal residents of the Cooperating Country.

[The following paragraphs (f) and (g) are applicable only to cost reimbursement contracts.]

(f) *Duration of appointments.* (1) Regular employees will normally be appointed for a minimum of 2 years which period includes orientation (less language training) in the United States and authorized international travel under the contract except:

(i) An appointment may be made for less than 2 years if the contract has less than 2 years but more than 1 year to run provided that if the contract is extended the appointment shall also be extended to the full 2 years. This provision shall be reflected in the employment agreement prior to employment under this contract.

(ii) When a 2-year appointment is not required, appointment may be made for less than 2 years but in no event less than 1 year.

(iii) When the normal tour of duty established for USAID personnel at a particular post is less than 2 years, then a normal appointment under this contract may be of the same duration.

(iv) When the contractor is unable to make appointments of regular employees for a full 2 years, the contractor may make appointments of less than 2 but not less than 1 year, provided that such appointment is approved by the contracting officer.

(2) Services required for less than 1 year will be considered short-term appointments and the employee will be considered a short-term employee.

(g) *Employment of dependents.* If any person who is employed for services in the Cooperating Country under this contract is either (1) a dependent of an employee of the U.S. Government working in the Cooperating Country, or (2) a dependent of a contractor employee working under a contract with the U.S. Government in the Cooperating Country, such person shall continue to hold the status of a dependent. He or she shall be entitled to salary for the time services are actually performed in the Cooperating Country, and differential and allowances as established by the Standardized Regulations (Government Civilians, Foreign Areas).

(End of clause)

[56 FR 7587, Feb. 25, 1991, as amended at 62 FR 40471, July 29, 1997; 79 FR 74988, Dec. 16, 2014]

752.7028 Differentials and Allowances.

The following clause is for use in all USAID cost reimbursement contracts performed in whole or in part overseas.

DIFFERENTIALS AND ALLOWANCES (MAY 2024)

The differentials and allowances authorized in this clause apply only to U.S. employees. Any reimbursement of differentials or allowances to TCN or CCN employees under this contract is limited to separate and specific authorization(s) for identified differentials or allowances which are granted by the cognizant Assistant Administrator or Mission Director pursuant to 722.170, or by the Mission Director in conjunction with an authorized evacuation as provided in paragraph (i). A copy of such authorization shall be retained and made available as part of the contractor's records which are required to be preserved and made available by the ''Examination of Records by the Comptroller General'' and ''Audit'' clauses of this contract.

(a) *Post hardship differential.* Post hardship differential is an additional compensation for service at places in foreign areas where conditions of environment differ substantially from conditions of environment in the continental United States and warrant additional compensation as a recruitment and retention incentive. In areas where post hardship differential is paid to USAID direct-hire employees, the contractor will be reimbursed for post hardship differential paid to its employees, not to exceed the rate authorized in the Standardized Regulations (Government Civilians, Foreign Areas) Chapter 500 (except the limitation contained in Section 552, ''Ceiling on Payment'') and Tables in Chapter 900, as from time to time amended. When post hardship differential is provided to regular employees of the Contractor, it will commence and continue, and be suspended or terminated, as prescribed in the Standardized Regulations Chapter 500. The Contractor will be reimbursed post hardship differential paid to short-term employees, not to exceed such payments made to USAID U.S. citizen direct-hire detailed employees in accordance with the Standardized Regulations Chapter 500, as from time to time amended.

(b) *Living quarters allowance.* Living quarters allowance is an allowance granted to reimburse an employee for substantially all of

his/her cost for either temporary or residence quarters whenever Government-owned or Government-rented quarters are not provided to him/her at his/her post without charge. Such costs are those incurred for temporary lodging (temporary lodging allowance) or one unit of residence quarters (living quarters allowance) and include rent, plus any costs not included therein for heat, light, fuel, gas, electricity and water. The temporary lodging allowance and the living quarters allowance are never both payable to an employee for the same period of time. The Contractor will be reimbursed for payments made to employees for a living quarters allowance for rent and utilities if such facilities are not supplied. Such allowance shall not exceed the amount paid USAID employees of equivalent rank in the Cooperating Country, in accordance with either the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 130, as from time to time amended, or other rates approved by the Mission Director. Subject to the written approval of the Mission Director, short-term employees may be paid per diem (in lieu of living quarters allowance) at rates prescribed by the Federal Travel Regulations, as from time to time amended, during the time such short-term employees spend at posts of duty in the Cooperating Country under this contract. In authorizing such per diem rates, the Mission Director shall consider the particular circumstances involved with respect to each such short-term employee including the extent to which meals and/or lodging may be made available without charge or at nominal cost by an agency of the United States Government or of the Cooperating Government, and similar factors.

(c) *Temporary quarters subsistence allowance.* Temporary quarters subsistence allowance is a quarters allowance granted to an employee for the reasonable cost of temporary quarters incurred by the employee and his family for a period not in excess of (i) 90 days after first arrival at a new post in a foreign area or a period ending with the occupation of residence (permanent) quarters, if earlier, and (ii) 30 days immediately preceding final departure from the post subsequent to the necessary vacating of residence quarters, unless an extension is authorized in writing by the Mission Director. The Contractor will be reimbursed for payments made to employees and authorized dependents for temporary quarters subsistence allowance, in lieu of living quarters allowance, not to exceed the amount set forth in the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 120, as from time to time amended.

(d) *Post allowance.* Post allowance is a cost-of-living allowance granted to an employee officially stationed at a post where the cost of living, exclusive of quarters cost, is substantially higher than in Washington, DC. The Contractor will be reimbursed for payments made to employees for post allowance not to exceed those paid USAID employees in the Cooperating Country, in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 220, as from time to time amended.

(e) *Supplemental post allowance.* Supplemental post allowance is a form of post allowance granted to an employee at his/her post when it is determined that assistance is necessary to defray extraordinary subsistence costs. The Contractor will be reimbursed for payments made to employees for supplemental post allowance not to exceed the amount set forth in the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 230, as from time to time amended.

(f) *Educational allowance.* Educational allowance is an allowance to assist an employee in meeting the extraordinary and necessary expenses, not otherwise compensated for, incurred by reason of his/her service in a foreign area in providing adequate elementary and secondary education for his/her children. The Contractor will be reimbursed for payments made to regular employees for educational allowances for their dependent children in amounts not to exceed those set forth in the Standardized (Regulations Government Civilians, Foreign Areas), Chapter 270, as from time to time amended.

(g) *Educational travel.* Educational travel is travel to and from a school in the United States for secondary education (in lieu of an educational allowance) and for college education. The Contractor will be reimbursed for payments made to regular employees for educational travel for their dependent children provided such payment does not exceed that which would be payable in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 280, as from time to time amended. Educational travel shall not be authorized for regular employees whose assignment is less than two years.

(h) *Separate maintenance allowance.* Separate maintenance allowance is an allowance to assist an employee to meet the additional expenses of maintaining members of family elsewhere than at the employee's foreign post of assignment. The Contractor will be reimbursed for payments made to regular employees for a separate maintenance allowance not to exceed that made to USAID employees in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 260, as from time to time amended.

(i) *Payments during evacuation.* The Standardized Regulations (Government Civilians, Foreign Areas) provide the authority for efficient, orderly, and equitable procedures for

the payment of compensation, post differential, and allowances in the event of an emergency evacuation of employees or their dependents, or both, from duty stations for military or other reasons, or because of imminent danger to their lives. If evacuation has been authorized by the Mission Director, the Contractor will be reimbursed for payments made to employees and authorized dependents evacuated from their post of assignment in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 600, and the Federal Travel Regulations, as from time to time amended. In conjunction with an evacuation authorization, the Mission Director may also specifically authorize payments of identified differentials or allowances for TCN or CCN employees.

(j) *Danger pay allowance.* (1) The contractor will be reimbursed for payments made to its employees for danger pay not to exceed that paid USAID employees in the cooperating country, in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 650, as from time to time amended.

(2) Danger pay is an allowance that provides additional compensation above basic compensation to an employee in a foreign area where civil insurrection, civil war, terrorism or wartime conditions threaten physical harm or imminent danger to the health or well-being of the employee. The danger pay allowance is in lieu of that part of the post differential which is attributable to political violence. Consequently, the post differential may be reduced while danger pay is in effect to avoid dual crediting for political violence.

(End of clause)

[49 FR 13259, Apr. 3, 1984, as amended at 51 FR 11450, Apr. 3, 1986; 53 FR 50632, Dec. 16, 1988; 61 FR 39096, July 26, 1996; 61 FR 51235, Oct. 1, 1996; 79 FR 75002, Dec. 16, 2014; 89 FR 4208, Jan. 23, 2024]

752.7029 Post privileges.

For use in all USAID non-commercial contracts involving performance overseas.

POST PRIVILEGES (JUL 1993)

(a) Routine health room services may be available, subject to post policy, to U.S. citizen contractors and their authorized dependents (regardless of citizenship) at the post of duty. These services do not include hospitalization, or predeparture or end of tour medical examinations. The services normally include such medications as may be available, immunizations and preventive health measures, diagnostic examinations and advice, and home visits as medically indicated. Emergency medical treatment is provided to U.S. citizen employees and dependents, whether or not they may have been granted access to routine health room services, on the same basis as it would be to any U.S. citizen in an emergency medical situation in the country.

(b) Privileges such as the use of APO, PX's, commissaries, and officer's clubs are established at posts abroad pursuant to agreements between the U.S. and Cooperating Governments. These facilities are intended for and usually limited to members of the official U.S. establishment including the Embassy, USAID Mission, U.S. Information Service, and the Military. Normally, the agreements do not permit these facilities to be made available to nonofficial Americans.

(End of clause)

[49 FR 13259, Apr. 3, 1984, as amended at 56 FR 7587, Feb. 25, 1991; 58 FR 58596, Nov. 2, 1993; 62 FR 40471, July 29, 1997; 89 FR 4209, Jan. 23, 2024]

752.7030 Inspection trips by contractor's officers and executives.

For use in cost reimbursement contracts with an educational institution involving performance overseas.

INSPECTION TRIPS BY CONTRACTOR'S OFFICERS AND EXECUTIVES (APR 1984)

Provided it is approved by the Mission Director, the Contractor may send the Campus Coordinator, a professional member of its staff as an alternate to the Campus Coordinator, or such of its senior officials (e.g., president, vice presidents, deans, or department heads) to the Cooperating Country as may be required to review the progress of the work under this contract. Except for the Campus Coordinator or his/her alternate, no direct salary charges will be paid hereunder with respect to any such officials.

(End of clause)

[49 FR 13259, Apr. 3, 1984, as amended at 89 FR 4209, Jan. 23, 2024]

752.7031 Leave and holidays.

For use in all USAID cost-reimbursement contracts for technical or professional services.

LEAVE AND HOLIDAYS (OCT 1989)

(a) *Vacation leave.* (1) The Contractor may grant to its employees working under this contract vacations of reasonable duration in accordance with the Contractor's practice for its employees, but in no event shall such

vacation leave be earned at a rate exceeding 26 work days per annum. Reimbursement for vacation leave is limited to the amount earned by employees while serving under this contract.

For regular employees during their tour of duty in the Cooperating Country, vacation leave is provided under this contract primarily for purposes of affording necessary rest and recreation. The Contractor's Chief of Party, the employee and the Cooperating Country institution associated with this project shall develop vacation leave schedules early in the employee's tour of duty taking into consideration project requirements, employee preference and other factors.

(2) Leave taken during the concluding weeks of an employee's tour shall be included in the established leave schedule and be limited to that amount of leave which can be earned during a twelve-month period unless approved in accordance with paragraph (a)(3) of this clause.

(3) Vacation leave earned but not taken by the end of the employee's tour pursuant to paragraphs (a) (1) and (2) of this clause will be forfeited unless the requirements of the project precluded the employee from taking such leave, and the contracting officer (with the endorsement of the Mission) approves one of the following as an alternative:

(i) Taking, during the concluding weeks of the employee's tour, leave not permitted under (a)(2) of this section, or

(ii) Lump-sum payment for leave not taken provided such leave does not exceed the number of days which can be earned by the employee during a twelve-month period.

(b) *Sick Leave.* Sick leave is earned by employees in accordance with the Contractor's usual practice but not to exceed 13 work days per annum or 4 hours every 2 weeks. Additional sick leave after use of accrued vacation leave may be advanced in accordance with Contractor's usual practice, if in the judgment of the Contractor's Chief of Party it is determined that such additional leave is in the best interest of the project. In no event shall such additional leave exceed 30 days. The Contractor agrees to reimburse USAID for leave used in excess of the amount earned during the employee's assignment under this contract. Sick leave earned and unused at the end of a regular tour of duty may be carried over to an immediately-succeeding tour of duty under this contract. The use of home leave authorized under this clause shall not constitute a break in service for the purpose of sick leave carry-over. Contractor employees will not be compensated for unused sick leave at the completion of their duties under this contract.

(c) *Home leave.* (1) Home leave is leave earned for service abroad for use only in the United States, in the Commonwealth of Puerto Rico, or in the possessions of the United States.

(2) A regular employee who is a U.S. citizen or resident and has served at least 2 years overseas, as defined in paragraph (c)(4) of this clause, under this contract and has not taken more than 30 workdays leave (vacation, sick, or leave without pay) in the United States, may be granted home leave of not more than 15 workdays for each such year of service overseas, provided that such regular employee agrees to return overseas upon completion of home leave under an additional 2 year appointment, or for a shorter period of not less than 1 year of overseas service under the contract if the Mission Director has approved in advance. Home leave must be taken in the United States, the Commonwealth of Puerto Rico, or the possessions of the United States; any days spent elsewhere will be charged to vacation leave or leave without pay.

(3) Notwithstanding the requirement in paragraph (c)(2), of this clause, that the Contractor's regular employee must have served 2 years overseas under this contract to be eligible for home leave, Contractor may grant advance home leave to such regular employee subject to all of the following conditions:

(i) Granting of advance home leave would in each case serve to advance the attainment of the objectives of this contract;

(ii) The regular employee shall have served a minimum of 18 months in the Cooperating Country on his/her current tour of duty under this contract; and

(iii) The regular employee shall have agreed to return to the Cooperating Country to serve out the remainder of his/her current tour of duty and an additional 2 year appointment under this contract, or such other additional appointment of not less than 1 year of overseas service as the Mission Director may approve.

(4) The period of service overseas required under paragraph (c)(2) or paragraph (c)(3) of this clause shall include the actual days spent in orientation in the United States (less language training) and the actual days overseas beginning on the date of departure from the United States port of embarkation on international travel and continuing, inclusive of authorized delays en route, to the date of arrival at the United States port of debarkation from international travel. Allowable vacation and sick leave taken while overseas, but not leave without pay, shall be included in the required period of service overseas. An amount equal to the number of days vacation and sick leave taken in the United States, the Commonwealth of Puerto Rico, or the possessions of the United States will be added to the required period of service overseas.

(5) Salary during travel to and from the United States for home leave will be limited

to the time required for travel by the most expeditious air route. The Contractor will be responsible for reimbursing USAID for salary payments made during home leave if in spite of the undertaking of the new appointment the regular employee, except for reasons beyond his/her control as determined by the contracting officer, does not return overseas and complete the additional required service. Unused home leave is not reimbursable under this contract.

(6) To the extent deemed necessary by the Contractor, regular employees in the United States on home leave may be authorized to spend not more than 5 days in work status for consultation at home office/campus or at USAID/Washington before returning to their post of duty. Consultation at locations other than USAID/Washington or home office/campus, as well as any time in excess of 5 days spent for consultation, must be approved by the Mission Director or the contracting officer.

(7) Except as provided in the schedule or approved by the Mission Director or the contracting officer, home leave is not authorized for TCN or CCN employees.

(d) *Holidays.* Holidays for Contractor employees serving in the United States shall be in accordance with the Contractor's established policy and practice. Holidays for Contractor employees serving overseas should take into consideration local practices and shall be established in collaboration with the Mission Director.

(e) *Military leave.* Military leave of not more than 15 calendar days in any calendar year may be granted in accordance with the Contractor's usual practice to each regular employee whose appointment is not limited to 1 year or less and who is a reservist of the United States Armed Forces, provided that such military leave has been approved in advance by the cognizant Mission Director or Assistant Administrator. A copy of any such approval shall be provided to the contracting officer.

(f) *Leave Records.* The Contractor's leave records shall be preserved and made available as part of the contractor's records which are required to be preserved and made available by the Examination of Records by the Comptroller General and Audit clauses of this contract.

(End of clause)

[54 FR 46392, Nov. 3, 1989, as amended at 56 FR 2699, Jan. 24, 1991; 79 FR 74988, Dec. 16, 2014]

752.7032 International travel approval and notification requirements (APR 2014).

For use in any USAID contract requiring international travel.

INTERNATIONAL TRAVEL APPROVAL AND NOTIFICATION REQUIREMENTS (APR 2014)

Prior written approval by the contracting officer, or the contracting officer's representative (COR) if delegated in the Contracting Officer's Representative Designation Letter, is required for all international travel directly and identifiably funded by USAID under this contract. The Contractor must therefore present to the contracting officer or the contracting officer's representative, an itinerary for each planned international trip, showing the name of the traveler, purpose of the trip, origin/destination (and intervening stops), and dates of travel, as far in advance of the proposed travel as possible, but in no event less than three weeks before travel is planned to commence. The contracting officer's or contracting officer's representative's (if delegated by the contracting officer) prior written approval may be in the form of a letter or telegram or similar device or may be specifically incorporated into the schedule of the contract. At least one week prior to commencement of approved international travel, the Contractor must notify the cognizant Mission, with a copy to the contracting officer or contracting officer's representative, of planned travel, identifying the travelers and the dates and times of arrival.

(End of clause)

[79 FR 75002, Dec. 16, 2014, as amended at 89 FR 4209, Jan. 23, 2024]

752.7033 Physical fitness.

For use in all USAID contracts involving performance overseas.

PHYSICAL FITNESS (JUL 1997)

(The requirements of this provision do not apply to employees hired in the Cooperating Country or to authorized dependents who were already in the Cooperating Country when their sponsoring employee was hired.)

(a) *Assignments of less than 60 days in the Cooperating Country.* The contractor shall require employees being assigned to the Cooperating Country for less than 60 days to be examined by a licensed doctor of medicine. The contractor shall require the doctor to provide to the contractor a written statement that in his/her medical opinion the employee is physically qualified to engage in the type of activity for which he/she is employed and the employee is physically able to reside in the country to which he/she is assigned. Under a cost reimbursement contract, if the contractor has no written statement of medical opinion on file prior to the departure for the Cooperating Country of any employee and such employee is unable to perform the type of activity for which he/

she is employed or cannot complete his/her tour of duty because of any physical disability (other than physical disability arising from an accident while employed under this contract), the contractor shall be responsible for returning the disabled employee to his/her point of hire and providing a replacement at no additional cost to the Government. In addition, in the case of a cost reimbursement contract, the contractor shall not be entitled to reimbursement for any additional costs attributable to delays or other circumstances caused by the employee's inability to complete his/her tour of duty.

(b) *Assignments of 60 days or more in the Cooperating Country.* (1) The contracting officer shall provide the contractor with a reproducible copy of the ''USAID Contractor Employee Physical Examination Form''. Information required by the Paperwork Reduction Act for reporting the burden estimate, the points of contact regarding burden estimate, and the OMB approval expiration date, are printed on the form. The contractor shall reproduce the form as required, and provide a copy to each employee and authorized dependent proposed for assignments of 60 days or more in the Cooperating Country. The contractor shall have the employee and all authorized dependents obtain a physical examination from a licensed physician, who will complete the form for each individual. The employee will deliver the physical examination form(s) to the embassy health unit in the Cooperating Country.

(2) (The following information is provided for two purposes: To assist fixed price offerors to develop their price proposal, and to provide cost reimbursement contractors with guidance in determining reasonable and allowable costs.) As a contribution to the cost of medical examinations, USAID shall reimburse the contractor for the physical examination authorized in paragraph (a) of this section in an amount not to exceed $100 for the physical examination, plus reimbursement of charges for immunizations to the extent not covered by the contractor's health insurance policy. For physical examinations authorized in paragraph (b)(1) above, the USAID contribution to the cost of the examination shall be as follows:

(i) For the employee and authorized dependents 12 years of age and over, one half of the cost of each examination up to a maximum USAID share of $300 per individual, plus reimbursement of charges for immunizations to the extent not covered by the contractor's health insurance policy.

(ii) For authorized dependents under 12 years of age, one half of the cost of each examination up to a maximum USAID share of $120 per individual, plus reimbursement of charges for immunizations to the extent not covered by the contractor's health insurance policy.

(iii) The contractor must obtain the prior written approval of the contracting officer to receive any USAID contributions higher than these limits.

(End of clause)

[56 FR 7588, Feb. 25, 1991, as amended at 58 FR 58596, Nov. 2, 1993; 62 FR 40471, July 29, 1997; 62 FR 45334, Aug. 27, 1997; 79 FR 74988, 75003, Dec. 16, 2014]

752.7034 Acknowledgement and disclaimer.

For use in any USAID contract which funds or partially funds publications, videos, or other information/media products.

ACKNOWLEDGEMENT AND DISCLAIMER (DEC 1991)

(a) USAID shall be prominently acknowledged in all publications, videos or other information/media products funded or partially funded through this contract, and the product shall state that the views expressed by the author(s) do not necessarily reflect those of USAID. Acknowledgements should identify the sponsoring USAID Office and Bureau or Mission as well as the U.S. Agency for International Development substantially as follows:

''This (publication, video or other information/media product (specify)) was made possible through support provided by the Office of _____, Bureau for _____, U.S. Agency for International Development, under the terms of Contract No. _____. The opinions expressed herein are those of the author(s) and do not necessarily reflect the views of the U.S. Agency for International Development.''

(b) Unless the contractor is instructed otherwise by the cognizant technical office, publications, videos or other information/media products funded under this contract and intended for general readership or other general use will be marked with the USAID logo and/or U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT appearing either at the top or at the bottom of the front cover or, if more suitable, on the first inside title page for printed products, and in equivalent/appropriate location in videos or other information/media products. Logos and markings of co-sponsors or authorizing institutions should be similarly located and of similar size and appearance.

(End of clause)

[57 FR 5237, Feb. 13, 1992]

752.7035 Public notices.

The following clause is for use when the contracting officer's representative determines that the contract is of public interest, and that both the public and the Government would benefit from public notices concerning the contract, and requests that the contracting officer include the clause in the contract.

PUBLIC NOTICES (DEC 1991)

It is USAID's policy to inform the public as fully as possible of its programs and activities. The contractor is encouraged to give public notice of the receipt of this contract and, from time to time, to announce progress and accomplishments. Press releases or other public notices should include a statement substantially as follows: ''The U.S. Agency for International Development administers the U.S. foreign assistance program providing economic and humanitarian assistance in more than 80 countries worldwide.'' The contractor may call on USAID's Legislative and Public Affairs (LPA) for advice regarding public Notices. The contractor is requested to provide copies of notices or announcements to the contracting officer's representative and to USAID's Legislative and Public Affairs (LPA) as far in advance of release as possible.

(End of clause)

[57 FR 5237, Feb. 13, 1992, as amended at 60 FR 11913, Mar. 3, 1995; 79 FR 74988, Dec. 16, 2014]

752.7036 USAID Implementing Partner Notices (IPN) portal for acquisition.

Insert the following clause in section I of all solicitations and resulting contracts, except for orders under indefinite delivery contracts issued pursuant to (48 CFR) FAR subpart 16.5; orders under Federal Supply (GSA) Schedules issued pursuant to (48 CFR) FAR subpart 8.4; and contracts and purchase orders awarded under the simplified acquisitions procedures of (48 CFR) FAR part 13.

USAID Implementing Partner Notices (IPN) Portal FOR Acquisition (July 2014)

(a) *Definitions.* As used in this clause—

''*Universal*'' *bilateral modification* means a bilateral modification, as defined in FAR subpart 43.1, that updates or incorporates new FAR or AIDAR clauses, other terms and conditions, or special requirements, affecting all USAID awards or a class of awards, as specified in the Agency notification of such modification.

USAID Implementing Partner Notices (IPN) Portal for Acquisition (IPN Portal) means the single point where USAID uploads universal bilateral modifications, which can be accessed electronically by registered USAID contractors. The IPN Portal is located at *https://sites.google.com/site/ipnforacquisitions/.*

IPN Portal Administrator means the USAID official designated by the M/OAA Director, who has overall responsibility for managing the USAID Implementing Partner Notices Portal for Acquisition.

(b) By submission of an offer and execution of a contract, the Offeror/Contractor acknowledges the requirement to:

(1) Register with the IPN Portal if awarded a contract resulting from this solicitation; and

(2) Receive universal bilateral modifications of this contract and general notices through the IPN Portal.

(c) *Procedure to register for notifications.* Go to: *https://sites.google.com/site/usaidipnforacquisitions/* and click the ''Register'' button at the top of the page. Contractor representatives must use their official organization email address when subscribing, not personal email addresses.

(d) *Processing of IPN portal modifications.* (1) The contractor may access the IPN Portal at any time to review all IPN Portal modifications; however, the system will also notify the contractor by email when the USAID IPN Portal Administrator uploads a universal bilateral modification for contractor review and signature. Proposed IPN Portal modifications distributed through the IPN Portal are applicable to all awards, unless otherwise noted in the proposed modification.

(2) Within 15 calendar days from receipt of the notification email from the IPN Portal, the contractor must do one of the following:

(i)(A) Verify applicability of the proposed modification to their award(s) per the instructions provided with each modification;

(B) Download the modification and incorporate the following information on the SF30 form: contract number, organization name, and organization mailing address as it appears in the basic award;

(C) Sign the hardcopy version; and

(D) Send the signed modification (by email or hardcopy) to the contracting officer for signature;

Note to paragraph (d)(2)(i): The contractor must not incorporate any other changes to the IPN Portal modification.

(ii) Notify the Contracting Officer in writing if the modification requires negotiation of the additional changes to terms and conditions of the contract; or

(iii) Notify the contracting officer that the contractor declines to sign the modification.

(3) Within 30 calendar days of receipt of a signed modification from the contractor, the contracting officer must provide the fully executed modification to the contractor or initiate discussions with the contractor. Bilateral modifications provided through the IPN Portal are not effective until both the contractor and the contracting officer sign the modification.

(End of clause)

[81 FR 48718, July 26, 2016]

752.7037 Child safeguarding standards.

Insert the following clause in section I of all solicitations and contracts other than those for commercial items.

CHILD SAFEGUARDING STANDARDS (AUG. 2016)

(a) Implementation of activities under this award may involve children, or personnel engaged in the implementation of the award may come into contact with children, which could raise the risk of child abuse, exploitation, or neglect within this award. The contractor agrees to abide by the following child safeguarding core principles:

(1) Ensure compliance with host country and local child welfare and protection legislation or international standards, whichever gives greater protection, and with U.S. law where applicable;

(2) Prohibit all personnel from engaging in child abuse, exploitation, or neglect;

(3) Consider child safeguarding in project planning and implementation to determine potential risks to children that are associated with project activities and operations;

(4) Apply measures to reduce the risk of child abuse, exploitation, or neglect, including, but not limited to, limiting unsupervised interactions with children; prohibiting exposure to pornography; and complying with applicable laws, regulations, or customs regarding the photographing, filming, or other image-generating activities of children;

(5) Promote child-safe screening procedures for personnel, particularly personnel whose work brings them in direct contact with children; and

(6) Have a procedure for ensuring that personnel and others recognize child abuse, exploitation, or neglect; mandating that personnel and others report allegations; investigating and managing allegations; and taking appropriate action in response to such allegations, including, but not limited to, dismissal of personnel.

(b) The contractor must also include in the code of conduct for all personnel implementing USAID-funded activities, the child safeguarding principles in paragraphs (a)(1) through (6) of this clause.

(c) The following definitions apply for purposes of this clause:

(1) *Child.* A child or children are defined as persons who have not attained 18 years of age.

(2) *Child abuse, exploitation, or neglect.* Constitutes any form of physical abuse; emotional ill-treatment; sexual abuse; neglect or insufficient supervision; trafficking; or commercial, transactional, labor, or other exploitation resulting in actual or potential harm to the child's health, well-being, survival, development, or dignity. It includes, but is not limited to: Any act or failure to act which results in death, serious physical or emotional harm to a child, or an act or failure to act which presents an imminent risk of serious harm to a child.

(3) *Emotional abuse or ill treatment.* Constitutes injury to the psychological capacity or emotional stability of the child caused by acts, threats of acts, or coercive tactics. Emotional abuse may include, but is not limited to: Humiliation, control, isolation, withholding of information, or any other deliberate activity that makes the child feel diminished or embarrassed.

(4) *Exploitation.* Constitutes the abuse of a child where some form of remuneration is involved or whereby the perpetrators benefit in some manner. Exploitation represents a form of coercion and violence that is detrimental to the child's physical or mental health, development, education, or well-being.

(5) *Neglect.* Constitutes failure to provide for a child's basic needs within USAID-funded activities that are responsible for the care of a child in the absence of the child's parent or guardian.

(6) *Physical abuse.* Constitutes acts or failures to act resulting in injury (not necessarily visible), unnecessary or unjustified pain or suffering without causing injury, harm or risk of harm to a child's health or welfare, or death. Such acts may include, but are not limited to: Punching, beating, kicking, biting, shaking, throwing, stabbing, choking, or hitting (regardless of object used), or burning. These acts are considered abuse regardless of whether they were intended to hurt the child.

(7) *Sexual abuse.* Constitutes fondling a child's genitals, penetration, incest, rape, sodomy, indecent exposure, and exploitation through prostitution or the production of pornographic materials.

(d) The contractor must insert this clause in all subcontracts under this award.

(End of clause)

[81 FR 48718, July 26, 2016]

752.7038 Nondiscrimination against End-Users of Supplies or Services.

The following clause must be inserted in section I of all solicitations and resulting contracts.

NONDISCRIMINATION AGAINST END-USERS OF SUPPLIES OR SERVICES (OCT 2016)

(a) USAID policy requires that the contractor not discriminate against any end-user of the contract supplies or services (*i.e.*, the beneficiaries of the supplies or services) in implementation of this award, such as, but not limited to, by withholding, adversely impacting, or denying equitable access to the supplies or services (benefits) provided through this contract on the basis of any factor not expressly stated in the award. This includes, for example, race, color, religion, sex (including gender identity, sexual orientation, and pregnancy), national origin, disability, age, genetic information, marital status, parental status, political affiliation, or veteran's status. Nothing in this clause is intended to limit the ability of the contractor to target activities toward the assistance needs of certain populations as defined in the contract.

(b) The Contractor must insert this clause, including this paragraph, in all subcontracts under this contract.

(End of clause)

[81 FR 73354, Oct. 25, 2016]

Subpart 752.3–70—USAID Clause Matrices [Reserved]

PART 753—FORMS

Subpart 753.1—General

Sec.
753.107 Obtaining forms.

Subpart 753.2—Prescription of Forms

753.270 Prescription of USAID Forms.

Subpart 753.3—Illustration of Forms

753.300 Scope of subpart.

AUTHORITY: Sec. 621, Pub. L. 87–195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979 44 FR 56673, 3 CFR, 1979 Comp., p. 435.

SOURCE: 53 FR 50632, Dec. 16, 1988, unless otherwise noted.

Subpart 753.1—General

753.107 Obtaining forms.

Copies of any USAID Form referenced in the AIDAIR may be obtained from the U.S. Agency for International Development, Washington, DC 20523–0001, Attention: M/AS/ISS, Distribution, Room B–929 N.S., or from the cognizant contracting officer.

[53 FR 50632, Dec. 16, 1988, as amended at 56 FR 2699, Jan. 24, 1991; 56 FR 67226, Dec. 30, 1991; 59 FR 33447, June 29, 1994; 62 FR 40471, July 29, 1997; 79 FR 75003, Dec. 16, 2014]

Subpart 753.2—Prescription of Forms

753.270 Prescription of USAID forms.

The requirements for use of USAID forms are contained in parts 701 through 752 where the subject matter applicable to the form is addressed.

Subpart 753.3—Illustration of Forms

753.300 Scope of subpart.

USAID forms are not illustrated in the AIDAR. Copies of any USAID form prescribed in the AIDAR may be obtained as provided in 753.107.

PARTS 754–799 [RESERVED]

APPENDIXES A–C TO CHAPTER 7 [RESERVED]

APPENDIX D TO CHAPTER 7—DIRECT USAID CONTRACTS WITH A U.S. CITIZEN OR A U.S. RESIDENT ALIEN FOR PERSONAL SERVICES ABROAD

1. *General.* (a) *Purpose.* This appendix sets forth the authority, policy, and procedures under which USAID contracts with a U.S. citizen or U.S. resident alien for personal services abroad.

(b) *Definitions.* (1) *Personal services contract (PSC)* means a contract that, by its express terms or as administered, make the contractor personnel appear, in effect, Government employees (see FAR 37.104).

(2) *Employer-employee relationship* means an employment relationship under a service contract with an individual which occurs when, as a result of the contract's terms or the manner of its administration during performance, the contractor is subject to the

relatively continuous supervision and control of a Government officer or employee.

(3) *Non-person services contract* means a contract under which the personnel rendering the services are not subject either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.

(4) *Independent contractor relationship* means a contract relationship in which the contractor is not subject to the supervision and control prevailing in relationships between the Government and its employees. Under this relationship, the Government does not normally supervise the performance of the work, control the days of the week or hours of the day in which it is to be performed, or the location of performance.

(5) *Resident hire* means a U.S. citizen who, at the time of hire as a PSC, resides in the cooperating country as a spouse or dependent of a U.S. citizen employed by a U.S. government agency or under any U.S. government-financed contract or agreement, or for reasons other than for employment with a U.S. government agency or under any U.S. government-financed contract or agreement. A U.S. citizen for purposes of this definition also includes persons who at the time of contracting are lawfully admitted permanent residents of the United States.

(6) *U.S. resident alien* means a non-U.S. citizen lawfully admitted for permanent residence in the United States.

(7) *Abroad* means outside the United States and its territories and possessions.

(8) *USAID direct-hire employees* means civilian employees appointed under USAID Handbook 25 procedures or superseding Automated Directive System (ADS) Chapters.

2. *Legal Basis.* (a) Section 635(b) of the Foreign Assistance Act of 1961, as amended (hereinafter referred to as the ''FAA'') provides the Agency's contracting authority.

(b) Section 636(a)(3) of the FAA (22 U.S.C. 2396(a)(3)) authorizes the Agency to enter into personal services contracts with individuals for personal services abroad and provides further that such individuals ''* * * shall not be regarded as employees of the U.S. Government for the purpose of any law administered by the Civil Service Commission.'' [1]

3. *Applicability.* (a) This appendix applies to all personal services contracts with U.S. citizens or U.S. resident aliens to provide assistance abroad under Section 636(a)(3) of the FAA.

(b) This appendix does not apply to:

(1) Nonpersonal services contracts with U.S. citizens or U.S. resident aliens; such contracts are covered by the basic text of the FAR (48 CFR Chapter 1) and the AIDAR (48 CFR chapter 7).

(2) Personal services contracts with individual Cooperating Country Nationals (CCNs) or Third Country Nationals (TCNs). Such contracts are covered by Appendix J of this chapter.

(3) Other personal services arrangements covered by USAID Handbook 25—Employment and Promotion or superseding ADS Chapters.

(4) Interagency agreements (e.g., PASAs and RSSAs covered by ADS 306—Interagency Agreements.

4. *Policy.* (a) *General.* USAID may finance, with either program or operating expense (OE) funds, the cost of personal services contracts as part of the Agency's program of foreign assistance by entering into a direct contract with an individual U.S. citizen or U.S. resident alien for personal services abroad.

(1) *Program funds.* Under the authority of Section 635(h) of the FAA, program funds may be obligated for periods up to five years where necessary and appropriate to the accomplishment of the tasks involved.

(2) *Operating Expense Funds.* Pursuant to USAID budget policy, OE funded salaries and other recurrent cost items may be forward funded for a period of up to three (3) months beyond the fiscal year in which these funds were obligated. Non-recurring cost items may be forward funded for periods not to exceed twenty-four (24) months where necessary and appropriate to accomplishment of the work. [2]

(b) *Limitations on Personal Services Contracts.* (1) Personal services contracts may only be used when adequate supervision is available.

(2) Personal services contracts may be used for commercial activities. Commercial activities provide a product or service which could be obtained from a commercial source. See Attachment A of OMB Circular A–76 for a representative list of such activities.

(3) Notwithstanding any other provision of USAID directives, regulations or delegations, U.S. citizen personal services contractors (USPSCs) may be delegated or assigned any authority, duty or responsibility delegable to U.S. citizen direct-hire employees (USDH employees) except that:

a. They may not supervise U.S. direct-hire employees of USAID or other U.S. Government agencies. They may supervise USPSCs and non-U.S. citizen employees.

b. They may not be delegated authority to sign obligating or subobligating documents except when specifically designated as a contracting officer or an agreement officer in

[1] The Civil Service Commission is now the Federal Office of Personnel Management.

[2] If there is a need, these contracts may be written for 5 years also but funded only as outlined in paragraph 4(a) of this appendix.

accordance with FAR subpart 1.6 and the Agency's applicable warrant program.

c. They may represent the agency, except that communications that reflect a final policy, planning or budget decision of the agency must be cleared by a USDH employee.

d. They may participate in personnel selection matters, but may not be delegated authority to make a final decision on personnel selection.

e. Exceptions to the limitations in this paragraph (b)(3) must be approved by the Assistant Administrator for Management (AA/M).

(4) *Exceptions.* The Assistant Administrator, Bureau for Management (AA/M) must approve exceptions to the limitations in (b)(3). Approval of an exception by the AA/M is not required when the Director, Bureau for Management, Office of Acquisition and Assistance (M/OAA Director) designates a USPSC as a contracting officer or an agreement officer.

(c) *Withholdings and Fringe Benefits.* (1) Personal services contractors (PSCs) are Government employees for purposes of the Internal Revenue Code (Title 26 of the United States Code) and are, therefore, subject to social security (FICA) and Federal income tax (FIT) withholdings. As employees, they are ineligible for the ''foreign earned income'' exclusion under the Internal Revenue Service (IRS) regulations (see 26 CFR 1.911–3(c)(3)).

(2) Personal services contractors are treated on par with other Government employees, except for programs based on any law administered by the Federal Office of Personnel Management (e.g., incentive awards, life insurance, health insurance, and retirement programs covered by 5 CFR Parts 530, 531, 831, 870, 871, and 890). While PSCs are ineligible to participate in any of these programs, the following fringe benefits are provided as a matter of policy:

(i) The employer's FICA contribution for retirement purposes.

(ii) A contribution against the actual cost of the PSC's annual health and life insurance costs. Proof of health and life insurance coverage and its actual cost to the PSC shall be submitted to the Contracting Officer before any contribution is made. (See also paragraph 4(c)(3) of this appendix.)

(A) The contribution for health insurance shall not exceed 50% of the actual cost to the PSC for his/her annual health insurance, or the maximum U.S. Government contribution for a direct-hire employee, as announced annually by the Office of Personnel Management, whichever is less. If the PSC is covered under a spouse's health insurance plan, where the spouse's employer pays some or all of the health insurance costs, the cost to the PSC for annual health insurance shall be considered to be zero.

(B) The contribution for life insurance shall be up to 50% of the actual annual costs to the PSC for life insurance, not to exceed $500.00 per year.

(iii) PSCs shall receive the same percentage pay comparability adjustment as U.S. Government employees subject to the availability of funds.

(iv) PSCs shall receive a 3% annual salary increase subject to satisfactory performance documented in their annual written evaluation. Such increase may not exceed 3% without a deviation. This 3% limitation also applies to extensions of the same service or negotiations for a new contract for the same or similar services unless a deviation has been approved.

(v) PSCs shall receive the following allowances and differentials provided in the State Department's Standardized Regulations (Government Civilians Foreign Areas) on the same basis as U.S. Government employees (except for U.S. resident hires, see paragraph 4(d) and Section 12, General Provisions, Clause 22, ''U.S. Resident Hire Personal Services Contractors''):

(A) Temporary lodging allowance (Section 120),[3]

(B) Living quarters allowance (Section 130),[3]

(C) Post allowance (Section 220),[3]

(D) Supplemental post allowance (Section 230),[3]

(E) Separate maintenance allowance (Section 260),[4]

(F) Education allowance (Section 270),[4]

(G) Educational travel (Section 280),[4]

(H) Post differential (Section 500),

(I) Payments during evacuation/authorized departure (Section 600), and

(J) Danger pay (Section 650).

(vi) Any allowance or differential that is not expressly stated in paragraph 4(c)(2)(v) is not authorized for any PSC unless a deviation is approved. The only exception is a consumables allowance if authorized for the post under Handbook 22 or superseding ADS Chapter.

(vii) Health room services may be provided in accordance with the clause of this contract entitled ''Physical Fitness and Health Room Privileges.''

(viii) PSCs are eligible to receive benefits for injury, disability, or death under the Federal Employees' Compensation Act since the law is administered by the Department of Labor not the Office of Personnel Management.

(ix) PSCs are eligible to earn four hours of annual leave and four hours of sick leave for each two week period. However, PSCs with

[3] Mission Directors may authorize per diem in lieu of these allowances.

[4] These allowances are not authorized for short tours (i.e., less than a year).

previous service are eligible to earn annual leave in accordance with the ''Leave and Holidays'' General Provision contract clause in section 12 of this appendix.

(3) A PSC who is a spouse of a current or retired Civil Service, Foreign Service, or Military Service member and who is covered by their spouse's Government health or life insurance policy is ineligible for the contribution under paragraph 4(c)(2)(ii) of this appendix.

(4) Retired U.S. Government employees shall not be paid additional contributions for health or life insurance under their contract (since the Government will normally have already paid its contribution for the retiree) unless the employee can prove to the satisfaction of the Contracting Officer that his/her health and life insurance does not provide or specifically excludes coverage overseas. If coverage overseas is excluded, then eligibility as cited in paragraph 4(c)(3) applies.

(5) Retired U.S. Government employees may be awarded Personal Services Contracts without any reduction in or offset against their Government annuity.

(d) *U.S. Resident Hire Personal Services Contractors.* U.S. resident-hire PSCs are not eligible for any fringe benefits (except contributions for FICA, health insurance, and life insurance), including differentials and allowances unless such individuals can demonstrate to the satisfaction of the Contracting Officer that they have received similar benefits and allowances from their immediately previous employer in the cooperating country, or the Mission Director may determine that payment of such benefits would be consistent with the Mission's policy and practice and would be in the best interests of the U.S. Government.

(e) *Determining salary for personal services contractors.* (1) There are two separate and distinct methods of establishing a salary for personal services contractors. Use of method number 1 is required unless justified and approved as provided for in paragraph (e)(1)(ii).

(i) *Method 1:* Salaries for Personal Services Contractors shall be established based on the market value in the United States of the position being recruited for. This requires the Contracting Officer in coordination with the Technical Officer to determine the correct market value (a salary range) of the position to be filled. This method is required in establishing salary for all PSCs unless method 2 is authorized as provided for in paragraph (e)(1)(ii). Contract Information Bulletin (CIB) 96–8 dated February 23, 1996 provides a guide which contains information concerning Preparation of Scopes of Work, Determination of Salary Class Grade, Salary Class Bench Marks and Salary Class Review. The market value of the position then becomes the basis along with the applicants' certified salary history on the SF 171, ''Personal Qualifications Statement'' for salary negotiations by the Contracting Officer. The SF 171 must be retained in the permanent contract file. Any position which is determined to be above the GS–13 equivalent and exceeds six months in duration must be classified by M/HR/POD. The crucial point is the establishment of a realistic and reasonable market value for a job. The final determination regarding the reasonableness of a salary level rests with the Contracting Officer. Paying salaries using this method avoids ''rank in person'' salaries which are in excess of the value of the job being contracted for.

(ii) *Method 2:* If approved in writing by the Mission Director or the cognizant Assistant Administrator, based on written justification, salary may be negotiated based on the applicant's current earnings adjusted in accordance with the factors set out in paragraphs (e)(1)(ii) (A) through (C). This approval requirement cannot be redelegated. Current earnings must be certified by the contractor on the SF 171, (see paragraph 6(b)(3) of this appendix). This is guidance for establishing initial salaries, not subsequent increases, for the same contractor performing the same function.

(A) As a rule, up to a 3 percent increase above current earnings may be given. However, a 3 percent increase is awarded only to a PSC whose earnings are based on a period of twelve months or more; 2 percent for established earnings of less than twelve months but not less than four months; or 1 percent for established earnings during the past four months.

(B) Additional percentages may be given for the following factors. If a PSC has worked in a developing country for more than two years, an additional 1 percent may be awarded. Education related to the area of specialization and above the minimum qualification required may warrant an additional 1 percent, and those specialties for which there is keen competition in the employment market or a serious shortage category nationwide may be awarded an additional 2 percent. In addition, related technical experience over 5 years may increase the percentage by 1 and over ten years by 3.

(C) All requests for an initial rate of pay above 10 percent over current earnings must be approved in writing by the appropriate Assistant Administrator or Mission Director. Current earnings are actual earnings for work reasonably related to the position for which the applicant is being considered. Paragraphs 4(e)(1)(ii) (A) through (C) apply only to salary setting method number 2 in paragraph 4 (e)(1)(ii).

(2) When an applicant has no current earnings history (e.g., a person returning to the workforce after an absence of a number of years) or when an applicant's current earnings history doesn't accurately reflect the applicant's job market worth (e.g., a Peace

Corps volunteer), every effort should be made to establish a market value for the position as a basis for negotiation, notwithstanding the lack of a current earnings history, provided that the applicant has the full qualifications for the job and could command a similar salary in the open job market.

(3) This appendix applies the ''USAID Contractor Salary Threshold (USAID CST)'' policy in Automated Directives System (ADS) Chapter 302.3.6.8 to salaries for U.S. PSCs. Salaries in excess of the USAID CST, which is equivalent to the maximum rate for Federal agencies without a certified SES performance appraisal system, must be approved by the M/OAA Director in accordance with the approval procedures in ADS 302.3.6.8(e). This approval cannot be re-delegated.

(f) *Incentive awards.* U.S. personal services contractors are not eligible to participate in, or be funded under, the incentive-awards program administered by the Office of Personnel Management (OPM) for USAID U.S. direct-hire employees in accordance with section 636(a) of the Foreign Assistance Act of 1961, as amended. U.S. personal services contractors are eligible to receive certain monetary and non-monetary incentive awards as authorized under this section. All nominations for incentive awards must be approved by a U.S. direct-hire employee, who is either the contractor's supervisor or is at the next higher level within the Mission/Bureau/Independent Office (M/B/IO). The list of incentive awards and detailed eligibility, nomination, and approval processes are specified in internal Agency policies in Chapter 309 of Automated Directive System (ADS), available on the USAID website. These awards will be funded from the authorizations used to fund the specific contract.

(g) *Annual salary increase.* PSC contracts written for more than one year should provide for a 3% annual increase based on satisfactory performance documented in their annual written evaluations.

(h) *Pay comparability adjustment.* PSCs shall receive the same percentage pay comparability adjustment as that received by U.S. Government employees subject to the availability of funds.

(i) *Subcontracting.* PSCs are U.S. Government employees and may not be called upon (or permitted) to subcontract out any part of their work. Funds for subcontracting have no place in the budget of a personal services contract. Support services, equipment, and supplies (e.g., typing and report preparation, paper, pens, computers, and furniture) should be furnished to PSCs just as they would be to direct-hire employees. To the extent that direct-hire personnel may be authorized to purchase supporting services or supplies under a travel authorization, so may PSCs; otherwise, contracts for personal services should not contain any funds for procurement.

5. *Soliciting for Personal Services Contracts.* (a) *Technical Officer's responsibilities.* The Technical Officer will prepare a written detailed statement of duties and a statement of minimum qualifications to cover the position being recruited for. The statement shall be included in the procurement request (the Acquisition & Assistance Request Document) e.g., the request shall also include the following additional information as a minimum:

(1) The specific foreign location(s) where the work is to be performed, including any travel requirements (with an estimate of frequency);

(2) The length of the contract, with beginning and ending dates, plus any options for renewal or extension;

(3) The basic education, training, experience, and skills required for the position;

(4) An estimate of what a comparable GS/FS equivalent position should cost, including basic salary, allowances, and differentials, if appropriate; and

(5) A list of Government or host country furnished items (e.g., housing).

(b) *Contracting Officer's responsibilities.* (1) The Contracting Officer will prepare the solicitation for personal services which shall contain:

(i) Three sets of SF 171s and SF 171As. (Upon receipt, one copy of each SF 171 and SF 171A shall be forwarded to the Project Officer.)

(ii) A detailed statement of duties or a completed position description for the position being recruited for.

(iii) A copy of the prescribed contract Cover Page, Contract Schedule, General Provisions as appropriate, as well as the FAR Clauses to be incorporated in full text and by reference.

(iv) A copy of the USAID General Notice entitled ''Employee Review of the New Standards of Conduct''.

(2) The Contracting Officer shall comply with the requirements of (48 CFR) AIDAR 706.302–70(c) as detailed in paragraph 5(c) except those recruited from the U.S.

(c) *Competition.* (1) Under (48 CFR) AIDAR 706.302–70(b)(1), Personal Services Contracts (except those recruited from the U.S.) are exempt from the requirements for full and open competition with two limitations that must be observed by Contracting Officers:

(i) Offers are to be requested from as many potential offerors as is practicable under the circumstances, and

(ii) A justification supporting less than full and open competition must be prepared in accordance with FAR 6.303.

(2) *PSCs with Untied States citizens or resident aliens recruited from outside the cooperating country.* Solicitations for PSCs recruited outside the cooperating country

must be publicized via the Agency's External Home Page on the Internet under the caption ''Business & Procurement, USAID Procurements.'' Instructions regarding how to access the External Internet and the information to be provided have been approved and included in a CIB. A justification under FAR 6.303 is not required when this procedure is followed.

(3) A class justification was approved by the USAID Procurement Executive to satisfy the requirements of (48 CFR) AIDAR 706.302–70(c)(2) for a justification in accordance with FAR 6.303. This class justification for Personal Services Contracts with U.S. Citizens may only be used for those who are recruited locally subject to the following conditions:

(i) The position was publicized locally in accordance with established Mission policy or procedure, or the procedures in paragraph 5(c)(ii) was followed;

(ii) As an alternative to the procedures in paragraphs 5(c) (i) and (ii), at least 3 individuals were considered by consulting source lists (e.g., applications or resumes on hand) or conducting other informal solicitation.

(iii) Extensions or renewals with the same individual for continuing services do not need to be publicized.

(iv) A copy of the class justification (which was distributed to all USAID Contracting Officers via Contract Information Bulletin) must be included in the contract file, together with a written statement, signed by the Contracting Officer, that the contract is being awarded pursuant to (48 CFR) AIDAR 706.302–70(b)(1); that the conditions for use of this class justification have been met; and that the cost of the contract is fair and reasonable.

(4) If the appropriate competitive procedure in paragraph 5(3) is not followed, the Contracting Officer must prepare a separate justification as required under (48 CFR) AIDAR 706.302–70(c)(2).

(5) Since the award of a Personal Services Contract is based on technical qualifications, not price, and since the SF 171, ''Personal Qualifications Statement'', and SF 171A, ''Continuation Sheet for Standard Form 171'', are used to solicit for such contracts, FAR subparts 15.4 and 15.5 and FAR parts 52 and 53 are inappropriate and shall not be used. Instead, the solicitation and selection procedures outlined in this Appendix shall govern.

6. *Negotiating a Personal Services Contract.* Negotiating a Personal Services Contract is significantly different from negotiating a nonpersonal services contract because it establishes an employer-employee relationship; therefore, the selection procedures are more akin to the personnel selection procedures.

(a) *Technical Officer's responsibilities.* The Technical Officer shall be responsible for reviewing and evaluating the applications (i.e., SF 171s) received in response to the solicitation issued by the Contracting Officer. If deemed appropriate, interviews may be conducted with the applicants before the final selection is submitted to the Contracting Officer.

(b) *Contracting Officer's responsibilities.* (1) The Contracting Officer shall forward a copy of each SF 171 received under the solicitation to the Project Officer for evaluation.

(2) On receipt of the Technical Officer's recommendation, the Contracting Officer shall conduct negotiations with the recommended applicant. Normally, the Contracting Officer shall negotiate only the salary (see the salary setting coverage in paragraph 4(e) of this Appendix). The terms and conditions of the contract, including differentials and allowances, are not negotiable or waivable without a properly approved deviation (see (48 CFR) AIDAR 701.470). If the Contracting Officer can negotiate a salary that is fair and reasonable, then the award shall be made.

(3) The Contracting Officer shall use the certified salary history on the SF 171 as the basis for salary negotiations, along with the market value of the position being recruited for (unless approval not to use market value has been granted under paragraph 4(e)(1)(ii)), and the Technical Officer's cost estimate.

(4) The Contracting Officer will obtain two copies of IRS Form W–4, ''Employee's Withholding Allowance Certificate'', from the successful applicant. (Upon receipt, the Contracting Officer will forward one copy of the W–4 to the Office of the Controller.)

(5) Security clearance is required for all U.S. citizens entering into USAID PSCs. The Contracting Officer will obtain four sets of SF 86, ''Security Investigation Data for Sensitive Position'', from the successful applicant and forward them to the Office of Security. PSCs may receive a preliminary clearance and be placed under contract prior to receipt of clearance provided the appropriate paper work has been completed, reviewed by IG/SEC/PSI and acknowledged as a ''no objection'' to the appropriate Mission. See General Provision 24 in section 12 of this appendix.

7. *Executing a Personal Services Contract.* Contracting Officers or Heads of Contracting Activities, whether USAID/W or Mission, may execute Personal Services Contracts, provided that the amount of the contract does not exceed the contracting authority that has been redelegated to them. In executing a Personal Services Contract, the Contracting Officer is responsible for insuring that:

(a) The proposed contract is within his/her delegated authority;

(b) A Request Number covering the proposed contract has been received;

(c) The position has been classified by either the Mission or M/HR/POD (see CIB 96–8) and the classification is in the contract file;

(d) The proposed Statement of Duties is contractible, contains a statement of minimum qualifications from the technical office requesting the services, and is suitable to the use of a Personal Services Contract in that:

(1) Performance of the proposed work requires or is best suited for an employer-employee relationship, and is thus not suited to the use of a non-personal services contract;

(2) The Statement of Duties does not require performance of any function normally reserved for Federal employees (see paragraph 4(b) of this Appendix); and

(3) There is no apparent conflict of interest involved (if the Contracting Officer believes that a conflict of interest may exist, the question should be referred to the cognizant legal counsel);

(e) Selection of the contractor is documented and justified. (48 CFR) AIDAR 706.302–70(b)(1) provides an exception to the requirement for full and open competition for Personal Services Contracts abroad (see paragraph 5(c) of this appendix);

(f) The standard contract format prescribed for Personal Services Contracts (Sections 10, 11, 12 and 13 to this appendix) is used; or that any necessary deviations are processed as required by (48 CFR) AIDAR 701.470.

(NOTE: The prescribed contract format is designed for use with contractors who are residing in the U.S. when hired. If the contract is with a U.S. citizen residing in the cooperating country when hired, contract provisions governing physical fitness and travel/transportation expenses, and home leave, allowances, and orientation should be suitably modified (see paragraph 4(d) of this appendix)).

These modifications are not considered deviations subject to (48 CFR) AIDAR 701.470. (Justification and explanation of these modifications is to be included in the contract file);

(g) Orientation is arranged in accordance with General Provision 23 in section 12 of this appendix;

(h) The contractor has submitted the names, addresses, and telephone numbers of at least two persons who may be notified in the event of an emergency (this information is to be retained in the contract file);

(i) The contract is complete and correct and all information required on the contract Cover Page (USAID Form 1420–36A) has been entered;

(j) The contract has been signed by the Contracting Office and the contractor, and fully executed copies are properly distributed;

(k) The following clearances, approvals and forms have been obtained, properly completed, and placed in the contract file before the contract is signed by both parties;

(1) Evidence of job classification in the file by the Mission except for grade equivalents above GS–13. For those positions with grade equivalent above GS–13, evidence of job classification done by M/HR/POD;

(2) Security clearance, including the completed SF 86, to the extent required by USAID Handbook 6, Security or superseding ADS Chapter, (see General Provisions 14 and 24 in section 12 of this appendix);

(3) Mission, host country, Human Resources Office, and technical office clearance, as appropriate;

(4) Medical examinations and certifications as required by the contract general provision entitled ''Physical Fitness and Health Room Privileges'';

(5) One original executed IRS Form W–4 entitled ''Employee's Withholding Allowance Certificate'', and one copy, shall be obtained. The original shall be sent to the Controller of the paying office and one shall be placed in the contract file;

(6) Evidence of DAA/HR clearance that the position may be filled by PSC.

(7) The approval for any salary in excess of the ''USAID Contractor Salary Threshold (USAID CST)'', which is equivalent to the maximum rate for Federal agencies without a certified SES performance appraisal system, in accordance with approval procedures in ADS 302.3.6.8(e) as required in Section 4.(e)(3);

(8) A copy of the class justification or other appropriate explanation and support required by (48 CFR) AIDAR 706.302–70, if applicable;

(9) Any deviation to the policy or procedures of this appendix, processed and approved under (48 CFR) AIDAR 701.470;

(10) A fully executed SF 171, and a copy of the position classification, and approved deviation, if appropriate;

(11) The Memorandum of Negotiation; and

(12) The Contracting Officer's signed certification that competition requirements have been satisfied as described in paragraph 5(c) of the policy text of this Appendix. The certification shall be a part of the Memorandum of Negotiations.

(l) Funds for the contract are properly obligated to preclude violation of the Anti-Deficiency Act, 31 U.S.C. 1341 (the Contracting Officer ensures that the contract has been properly recorded by the appropriate accounting office prior to its release for the signature of the selected contractor);

(m) The contractor receives and understands the USAID General Notice entitled ''Employee Review of the New Standards of Conduct'' and a copy is attached to each contract as provided for in paragraph (c) of General Provision 1, section 12;

(n) Agency conflict of interest requirements as set out in the General Notice ''Employee Review of the New Standards of Conduct'' are met by the contractor prior to his/her reporting for duty;

(o) A copy of a Checklist for Personal Services contractors which may be in the format set out in this section or another format convenient for the Contracting Officer, provided that a memorandum containing all of the information described in this section 7 shall be prepared for each PSC and placed in the contract file;

(p) The contractor understands that he/she is an employee of the United States for purposes of the Foreign Assistance Act of 1961, as amended, and the Internal Revenue Code (Title 26 of the United States Code). This subjects the employee to withholding for both FICA and Federal Income Tax and precludes the employee from receiving the Federal Earned Income Tax exclusion of 26 U.S.C. Section 911. See Special Note on the Cover Page of USAID Form 1420–36.

(q) The contractor also understands that he/she may commence work prior to the completion of the security clearance. However, until such time as clearance is received, the contractor may not have access to classified or administratively controlled materials. Failure to obtain clearances will constitute cause for termination.

8. *Post Audit.* The Inspector General, or his/her designee, audits the Personal Services Contracts of all contracting activities for the purpose of ensuring conformance to applicable policy and regulations.

9. *Contracting Format.* The prescribed Contract Cover Page, Contract Schedule, General Provisions, and appropriate Federal Acquisition Regulations (FAR) clauses for Personal Services Contracts covered by this appendix are included as follows:

10. *Form USAID 1420–36, ''Cover Page'' and ''Schedule''.*

11. *Optional Schedule With a U.S. Citizen or U.S. Resident Alien.*

12. *General Provisions.*

13. *FAR Clauses to be Incorporated in Full Text in Personal Services Contracts.*

14. *FAR Clauses to be incorporated by reference in Personal Services Contracts.*

10. *Form USAID 1420–36, ''Cover Page'' and ''Schedule''.*

Contract With a U.S. Citizen or U.S. Resident Alien for Personal Services Abroad—Form AID 1420–36A (11/96) (Cover Page)

U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523

CONTRACT WITH A U.S. CITIZEN OR U.S. RESIDENT ALIEN FOR PERSONAL SERVICES ABROAD

Ethics Code *("X" Appropriate Box)* ☐ N ☐ C ☐ P

Negotiated Pursuant to Section 636(a)(3) of the Foreign Assistance Act of 1961, as amended, and Executive Order 11223	Contract Number	
Country of Performance	Amount Obligated This Action	Total Estimated Contract Cost $
Contract For Technical Services	Request Document Number	
For	Contractor *(Name, Street, City, State, Postal Zone)*	
Contracting Office *(Name and Address)*		
Administered By *(If other than Contracting Office)*	Effective Date	Estimated Completion Date
Cognizant Scientific/Technical Office *(Name, Office Symbol, Address)*	Accounting and Appropriation Data Resource Category Organization Request ID Activity Fund Fund Account Allotment Symbol Nationality Social Security Number	
Supervising Officer	Green Card Holder ☐ Yes ☐ No	
Payment Will be Made By	Type of Advance *("X" Appropriate Box)* ☐ INITIAL ☐ NONE AUTHORIZED	

The United States of America, hereinafter called the Government, represented by the Contracting Office executing this contract, and the Contractor agree that the Contractor shall perform all the services set forth in the attached Schedule, for the consideration stated therein. The rights and obligations of the parties to this contract shall be subject to and governed by the Schedule and the General Provisions. To the extent of any inconsistency between the Schedule or the General Provisions and any specifications or other provisions which are made a part of this contract, by reference or otherwise, the Schedule and the General Provisions shall control. To the extent of any inconsistency between the Schedule and the General Provisions, the Schedule shall control.

SPECIAL NOTE: As an employee for purposes of Section 636(a)(3) of the Foreign Assistance Act of 1961, as amended, *(22 USC 2396(a)(3))*, the Contractor is generally an employee of the United States for purposes of laws other than those administered by the Office of Personnel Management *(I.e., Title 5, United States Code)*. This includes being an employee of the United States for purposes of Title 26, United States Code, which subjects the Contractor to withholding for both FICA and Federal Income Tax, and precludes the Contractor from receiving the federal earned income tax exclusion of 26 USC Section 911.

(Fill In Appropriate Spaces)

This Contract consists of this Cover Pager, the Schedule of _____pages, including the Table of Contents,

The General Provisions Section 11 and Section 12 FAR Clauses by reference.

	UNITED STATES OF AMERICA AGENCY FOR INTERNATIONAL DEVELOPMENT
Signature of Contractor	By *(Signature of Contracting Officer)*
Typed or Printed Name	Typed or Printed Name
Date	Date

AID 1420-36A (11/96) -32-

PRIVACY ACT STATEMENT

This information is provided pursuant to Public Law 93–579 (Privacy Act of 1974), December 31, 1974, for individuals who complete this form.

The Executive Office of the President, Office of Management and Budget has required

that all departments and agencies comply with the reporting requirements of Section 6041 of the Internal Revenue Code, Section 6041 states that all departments and agencies making payments totalling $600 or more in one year to a recipient for services provided must be reported to the Internal Revenue Service (IRS). The SSN and all financial numbers will be disclosed to U.S. Agency for International Development (USAID) payroll office personnel and personnel in the Department of the Treasury, Division of Disbursements. USAID will use this SSN to complete Form W-2 of the Code on employee compensation. Disclosure by the personal services contractor of the SSN is necessary to obtain the services, benefits or processes provided by this contract. Disclosure of the SSN may be made outside USAID (a) pursuant to any applicable routine use listed in USAID's Notice for implementing the Privacy Act as published in the FEDERAL REGISTER or (b) when disclosure by virtue of a contract being a public document after signatures is authorized under the Freedom of Information Act.

Schedule

(The Illustrated Schedule consists of this Table of Contents—Articles I–VI, and the General Provisions.)

TABLE OF CONTENTS

Article I—Statement of Duties
Article II—Period of Service Overseas
Article III—Contractor's Compensation and Reimbursement in U.S. Dollars
Article IV—Costs Reimbursable and Logistic Support
Article V—Precontract Expenses
Article VI—Additional Clauses

General Provisions:

The following provisions numbered as shown below omitting number(s) _____, are the General Provisions (GPs) of this Contract:

1. Definitions
2. Laws and Regulations Applicable Abroad
3. Physical Fitness and Health Room Privileges
4. Workweek and Compensation (Pay Comparability Adjustments)
5. Leave and Holidays
6. Differential and Allowances
7. Social Security, Federal Income Tax and Foreign Earned Income
8. Advance of Dollar Funds
9. Insurance
10. Travel and Transportation Expenses
11. Payment
12. Conversion of U.S. Dollars to Local Currency
13. Post of Assignment Privileges
14. Security Requirements
15. Contractor-Mission Relationships
16. Termination
17. Release of Information
18. Notices
19. Reports
20. Use of Pouch Facilities
21. Biographical Data
22. Resident Hire PSC
23. Orientation and Language Training
24. Conditions for Contracting Prior to Receipt of Security Clearance
25. Medical Evacuation Services
26. Governing Law
27. [Reserved]
28. [Reserved]
29.Incentive Awards

For each tour of duty, attach the applicable General Provisions.

Schedule: (NOTE: Use of the following Schedule Articles are not mandatory. They are intended to serve as guidelines for contracting offices in drafting contract schedules. Article language may be changed to suit the needs of the particular contract).

Article I—Statement of Duties

(The statement of duties shall include:

A. General statement of the purpose of the contract.

B. Statement of duties to be performed.

C. Any USAID consultation or orientation.)

Article II—Period of Service Overseas

Within _____ days after written notice from the Contracting Officer that all clearances, including the doctor's statement of medical opinion required under General Provision Clause 4, have been received or unless another date is specified by the Contracting Officer in writing, the contractor shall proceed to _____ where he/she shall promptly commence performance of the duties specified above. The contractor's period of service overseas shall be approximately _____ in _____. (Specify time of duties in each location as well as authorized stopovers with purpose of each.)

Article III—Contractor's Compensation and Reimbursement in U.S. Dollars

A. Except to the extent reimbursement is payable in the currency of the Cooperating Country pursuant to Article IV, USAID shall pay the contractor compensation after it has accrued and reimburse him/her in U.S. dollars for necessary and reasonable costs actually incurred by him/her in the performance of this contract within the categories listed in paragraph C, below, and subject to the conditions and limitations applicable thereto as set out herein and in the attached General Provisions (GP).

B. The amount budgeted and available as personal compensation to the contractor is calculated to cover a calendar period of approximately _____ (days) (weeks) (months) (years) which is to include:

(1) vacation, sick, and home leave which may be earned during the contractor's tour of duty (GP Clause 5);

(2) _____ days for authorized travel (GP Clause 10); and

(3) _____ days for orientation and consultation in the United States (GP Clause 23).

C. Allowable Costs: 1. Compensation at the rate of $_____ per (year) (month) (week) (day). Adjustments in compensation (pay) for periods when the contractor is not in compensable pay status shall be calculated as follows:

Rate of $_____ per (day) (hour).

Contingency for Compensation (Pay Comparability) Adjustments. $_____.

Annual Salary increase (3%) $_____.

2. Overtime (Unless specifically authorized in the Schedule of this contract, no overtime hours shall be allowed hereunder.) $_____.

*3. Overseas Differential (Ref. GP Clause No. 6.) Rate $_____ and Contingency $_____ = Total $_____.

**4. Allowances in Cooperating Country (Ref. GP Clause 6.) $_____.

**5. Travel and Transportation (Ref. GP Clause 10.) (Includes the value of GTRs furnished by the Government, not payable to contractor). $_____.

a. United States $_____

b. International $_____

c. Cooperating and Third Country $_____

Subtotal Item 5 $_____

**6. Subsistence or Per Diem (Ref. GP Clause 10.)

a. Untied States $_____

b. International $_____

c. Cooperating and Third Country $_____.

Subtotal Item 6 $_____

7. Other Direct Costs.

a. Health and Life Insturance $_____

b. Precontract Costs, passport, visa, inoculations, etc. (Ref. GP Clause 8.) $_____

c. Physical Examination (Ref. GP Clause 3.) $_____

d. Communications, Miscellaneous. $_____

Subtotal Item 7 $_____

8. F.I.C.A.–U.S.G. Contribution (not payable to contractor). $_____

D. Maximum U.S.-Dollar Obligation:

In no event shall the maximum U.S.-dollar obligation under this contract exceed $_____. Contractor shall keep a close account of all obligations he/she incurs and accrues hereunder and promptly notify the Contracting Officer whenever in his/her opinion the said maximum is not sufficient to cover all compensation and costs reimbursable in U.S. dollars which he/she anticipates under the contract.

Article IV—Costs Reimbursable and Logistic Support

A. General: The contractor shall be provided with or reimbursed in local currency (_____) for the following:

[Complete]

B. Method of Payment of Local Currency Costs: Those contract costs which are specified as local currency costs in paragraph A above, if not furnished in kind by the cooperating government or the Mission, shall be paid to the contractor in a manner adapted to the local situation, based on vouchers submitted in accordance with General Provision Clause 11. The documentation for such costs shall be on such forms and in such manner as the Mission Director shall prescribe.

[Complete]

Article V—Precontract Expenses

No expense incurred before execution of this contract will be reimbursed unless such expense was incurred after receipt and acceptance of a precontract expense letter issued to the contractor by the Contracting Officer, and then only in accordance with the provisions and limitations contained in such letter. The rights and obligations created by such letter shall be considered as merged into this contract.

Article VI—Additional Clauses

(Additional Schedule Clauses may be added such as the implementation of General Provisions or Additional Clauses.)

11.*Optional Schedule With a U.S. Citizen or U.S. Resident Alien*

A U.S. Citizen or a U.S. Resident Alien PSC Contract No. _____

TABLE OF CONTENTS

(Optional Schedule)

(Use of the Optional Schedule is not mandatory. It is intended to serve as an alternate procedure for OE funded U.S. PSCs or U.S. Resident Alien PSCs. The Schedule is for use when the Contracting Officer anticipates incremental recurring cost funded contracts.

Use of the Optional Schedule eliminates the need to amend the contract each time funds are obligated. However, the Contracting Officer is required to amend each contract not less than twice during a 12 month period to ensure that the contract record of obligations is up to date and agrees

*If post differential is applicable to the assigned post, a contingency for the adjusted amount of differential resulting from compensation (pay comparability) adjustment should be included.

**Do not include the value of any costs to be paid or reimbursed in local currency.

with the figures in the master funding document.)

The Schedule on pages _____ thru _____ consists of this Table of Contents and the following Articles:

Article I—Statement of Duties
Article II—Period of Service Overseas
Article III—Contractor's Compensation and Reimbursement in U.S. Dollars
Article IV—Costs Reimbursable and Logistic Support
Article V—Precontract Expenses
Article VI—Additional Clauses

General Provisions:

The following provisions, numbered as shown below, omitting number(s) _____, are the General Provisions (GP) of this Contract:

1. Definitions
2. Laws and Regulations Applicable Abroad
3. Physical Fitness and Health Room Privileges
4. Workweek and Compensation (Pay Comparability Adjustments)
5. Leave and Holidays
6. Differential and Allowances
7. Social Security and Federal Income Tax
8. Advance of Dollar Funds
9. Insurance
10. Travel and Transportation Expenses
11. Payment
12. Conversion of U.S. Dollars of Local Currency
13. Post of Assignment Privileges
14. Security Requirements
15. Contractor-Mission Relationships
16. Termination
17. Release of Information
18. Notices
19. Reports
20. Use of Pouch Facilities
21. Biographical Data
22. Resident Hire PSC
23. Orientation and Language Training
24. Conditions for Contracting Prior to Receipt of Security Clearance
25. Medical Evacuation Services
26. Governing Law
27. [Reserved]
28. [Reserved]
29. Incentive Awards

For each tour of duty, attach the applicable General Provisions.

Article I—Statement of Duties.

(The statement of duties shall include:

A. General statement of the purpose of the contract.

B. Statement of duties to be performed.

C. Any USAID consultation or orientation.)

Article II—Period of Service Overseas.

Within _____ days after written notice form the Contracting Officer that all clearances, including the doctor's statement of medical opinion required under General Provision Clause 3, have been received or unless another date is specified by the Contracting Officer in writing, the contractor shall proceed to _____ where he/she shall promptly commence performance of the duties specified above. The contractor's period of service overseas shall be approximately _____ in _____. (Specify time of duties in each location as well as authorized stopovers with purpose of each.)

Article III—Contractor's Compensation and Reimbursement in U.S. Dollars.

A. Except to the extent reimbursement is payable in the currency of the Cooperating Country pursuant to Article IV, USAID shall pay the contractor compensation after it has accrued and reimburse him/her in U.S. dollars for necessary and reasonable costs actually incurred by him/her in the performance of this contract within the categories listed in paragraph C, below, and subject to the conditions and limitations applicable thereto as set out herein and in the attached General Provisions (GP).

B. The amount budgeted and available as personal compensation to the contractor is calculated to cover a calendar period of approximately _____ (days) (weeks) (months) (years) which is to include:

1. Vacation, sick, and home leave which may be earned during the contractor's tour of duty (GP Clause 5);

2. _____ days for authorized travel (GP Clause 10); and

3. _____ days for orientation and consultation in the United States (GP Clause 23).

C. Allowable Costs: 1. The following illustrative budget details allowable costs under this contract and provides estimated incremental recurrent cost funding in the total amount shown. Additional funds for the full term of this contract will be provided by the preparation of a master PSC funding document issued by the Mission Controller for the purpose of providing additional funding for a specific period. The master PSC funding document will be attached to this contract and will form a part of the executed contract while also serving to amend the budget.

2. Compensation at the rate of $_____ per (year) (month) (week) (day). Adjustments in compensation (pay) for periods when the contractor is not in compensable pay status shall be calculated as follows:

Rate of $_____ per (day) (hour).

Contingency for Compensation (Pay Comparability Adjustments.) $_____

Annual Salary increase (3%) $_____

3. Overtime (Unless specifically authorized in the Schedule of this contract, no overtime hours shall be allowed hereunder.) $_____

*4. Overseas Differential (Ref. GP Clause No. 6.) Rate $_____ and Contingency $_____ = Total $_____.

**5. Allowances in Cooperating Country (Ref. GP Clause 6.) $_____

**6. Travel and Transportation (Ref. GP Clause 10.) (Includes the value of GTRs furnished by the Government, not payable to contractor). $_____.

a. United States $_____

b. International $_____

c. Cooperating and Third Country $_____

Subtotal Item 6 $_____

**7. Subsistence or Per Diem (Ref. GP Clause 10.)

a. United States $_____

b. International $_____

c. Cooperating and Third Country $_____

Subtotal Item 7 $_____

**8. Other Direct Costs

a. Health and Life Insurance (Ref. GP Clause 9.) $_____

b. Precontract Costs, passport, visa, inoculations, etc. (Ref. GP Clause 8.) $_____

c. Physical Examination (Ref. GP Clause 3.) $_____

d. Communications, Miscellaneous Subtotal Item 8 $_____

9. F.I.C.A.—U.S.G. contribution (not payable to contractor). $_____

D. Maximum U.S.-Dollar Obligation: In no event shall the maximum U.S.-dollar obligation under this contract exceed $_____.

E. Salary changes and personnel-related contract actions will be made by processing the same forms as used in making such changes and actions for direct-hire employees. When issued by the Contracting Officer, the forms utilized will be attached to the contract and will form a part of the contract terms and conditions.

F. Any adjustment or increase in the compensation granted to direct-hire employees will be allowed for in PSCs subject to the availability of funds. Such an adjustment will be effected by a mass pay adjustment notice from the Contracting Officer, which will be attached to the contract and form a part of the executed contract.

G. At the end of each year of satisfactory service, PSC contractors will be eligible to receive an increase equal to 3% pending availability of funds provided their services have been satisfactory. Such increase will be effected by the execution of an SF–1126, payroll change slip which is to be attached to each contract and each action forms a part of the official contract file.

H. The master PSC funding document may not exceed the term or estimated total cost of this contract. Notwithstanding that additional funds are obligated under this contract through the issuance and attachment of the master PSC funding document, all other contract terms and conditions remain in full effect.

Article IV—Costs Reimbursable and Logistic Support

A. General: The contractor shall be provided with or reimbursed in local currency (_____) for the following:

[Complete]

B. Method of Payment of Local Currency Costs: Those contract costs which are specified as local currency costs in paragraph A above, if not furnished in kind by the cooperating government or the Mission, shall be paid to the contractor in a manner adapted to the local situation, based on vouchers submitted in accordance with General Provision Clause 12. The documentation for such costs shall be on such forms and in such manner as the Mission Director shall prescribe.

Article V—Precontract Expenses

No expense incurred before execution of this contract will be reimbursed unless such expense was incurred after receipt and acceptance of a precontract expense letter issued to the contractor by the Contracting Officer, and then only in accordance with the provisions and limitations contained in such letter. The rights and obligations created by such letter shall be considered as merged into this contract.

Article VI—Additional Clauses

(Additional Schedule Clauses may be added such as the implementation of General Provisions or Additional Clauses.)

12. General Provisions for a Contract With a U.S. Citizen or a U.S. Resident Alien for Personal Services Abroad

The following clauses are to be used (when applicable), for both tours of duty of less than 1 year as well as 1 year or more.

INDEX OF CLAUSES

1. Definitions
2. Compliance with Laws and Regulations Applicable Abroad
3. Physical Fitness and Health Room Privileges
4. Workweek and Compensation (Pay Comparability Adjustments)
5. Leave and Holidays
6. Differential and Allowances
7. Social Security, Federal Income Tax, and Foreign Earned Income
8. Advance of Dollar Funds
9. Insurance
10. Travel and Transportation Expenses
11. Payment

*If post differential is applicable to the assigned post, a contingency for the adjusted amount of differential resulting from compensation (pay comparability) adjustment should be included.

**Do not include the value of any costs to be paid or reimbursed in local currency.

12. Conversion of U.S. Dollars to Local Currency
13. Post of Assignment Privileges
14. Security Requirements
15. Contractor-Mission Relationships
16. Termination
17. Release of Information
18. Notices
19. Reports
20. Use of Pouch Facilities
21. Biographical Data
22. U.S. Resident Hire Personal Services Contractor
23. Orientation and Language Training
24. Conditions for Contracting Prior to Receipt of Security Clearance
25. Medical Evacuation (MEDEVAC) Services
26. Governing Law
27. [Reserved]
28. [Reserved]
29. Incentive Awards

1. Definitions (June 1990)

(a) *USAID* shall mean the U.S. Agency for International Development.

(b) *Administrator* shall mean the Administrator or the Deputy Administrator of USAID.

(c) *Contracting Officer* shall mean a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

(d) *Contractor* shall mean the individual engaged to serve under this contract.

(e) *Cooperating Country* shall mean the foreign country in or for which services are to be rendered hereunder.

(f) *Cooperating Government* shall mean the government of the Cooperating Country.

(g) *Government* shall mean the United States Government.

(h) *Local currency* shall mean the currency of the Cooperating Country.

(i) *Mission* shall mean the United States USAID Mission, or principal USAID office, in the Cooperating Country, or USAID/Washington (USAID/W).

(j) *Mission Director* shall mean the principal officer in the Mission in the Cooperating Country, or his/her designated representative.

(k) *Technical Officer* shall mean the USAID official to whom the contractor reports, and who is responsible for monitoring the contractor's performance.

(l) *Tour of duty* shall mean the contractor's period of service under this contract and shall include orientation in the United States (less language training), authorized leave, and international travel.

(m) *Traveler* shall mean—

(1) The contractor in authorized travel status or

(2) Dependents of the contractor who are in authorized travel status.

(n) *Dependents* means:

(1)Spouse.

(2) Children (including step and adopted children) who are unmarried and under 21 years of age or, regardless of age, are incapable of self-support.

(3) Parents (including step and legally adoptive parents) of the employee or of the spouse, when such parents are at least 51 percent dependent on the contractor for support.

(4) Sisters and brothers (including step or adoptive sisters or brothers) of the contractor, or of the spouse, when such sisters and brothers are at least 51 percent dependent on the contractor for support, unmarried and under 21 years of age, or regardless of age, are incapable of self-support.

(o) *U.S. Resident Alien,* as used in this contract, shall mean an alien immigrant, legally resident in the United States, the Commonwealth of Puerto Rico, or the possessions of the United States, and having a valid ''Alien Registration and Receipt Card'' (Immigration and Naturalization Service forms I–151 or I–551).

(p) *U.S. Resident Hire Personal Services Contractor (PSC)* means a U.S. citizen who, at the time of hiring as a PSC, resides in the Cooperating Country:

(1) As a spouse or dependent of a U.S. citizen employed by a U.S. Government Agency or under any U.S. Government-financed contract or agreement, or

(2) For reasons other than for employment with a U.S. Government Agency or under any U.S. Government-financed contract or agreement. A U.S. citizen for purposes of this definition also includes a person who at the time of contracting, is a lawfully admitted permanent resident of the United States.

2. Compliance With Laws and Regulations Applicable Abroad (July 1993)

(a) *Conformity to Laws and Regulations of the Cooperating Country.* Contractor agrees that, while in the cooperating country, he/she as well as authorized dependents will abide by all applicable laws and regulations of the cooperating country and political subdivisions thereof.

(b) *Purchase or Sale of Personal Property or Automobiles.* To the extent permitted by the cooperating country, the purchase, sale, import, or export of personal property or automobiles in the cooperating country by the contractor shall be subject to the same limitations and prohibitions which apply to Mission U.S.-citizen direct-hire employees.

(c) *Code of Conduct.* The contractor shall, during his/her tour of duty under this contract, be considered an ''employee'' (or if his/her tour of duty is for less than 130 days, a

''special Government employee'') for the purposes of, and shall be subject to, the provisions of 18 U.S.C. 202(a) and the USAID General Notice entitled ''Employee Review of the New Standards of Conduct'' pursuant to 5 CFR part 2635. The contractor acknowledges receipt of a copy of these documents by his/her acceptance of this contract.

3. Physical Fitness and Health Room Privileges (APR 7)

(a) *Physical Fitness.* (1) For all assignments outside of the United States the contractor and any authorized dependents shall be required to be examined by a licensed doctor of medicine, and the contractor shall obtain from the doctor a statement of medical opinion that, in the doctor's opinion, the contractor is physically able to engage in the type of activity for which he/she is to be employed under the contract, and the contractor and any dependents are physically able to reside in the Cooperating Country. A copy of the statement(s) shall be provided to the Contracting Officer prior to the contractor's departure for the Cooperating Country, or for a U.S. resident hire, before he/she starts work under the contract.

(2) For assignments of 60 days or more in the Cooperating Country, the Contracting Officer shall provide the contractor and all authorized dependents copies of the ''USAID Contractor Employee Physical Examination Form''. This form is for collection of information; it has been reviewed and approved by OMB, and assigned Control No. 0412–0536. Information required by the Paperwork Reduction Act (burden estimate, points of contract, and OMB approval expiration date) is printed on the form. The contractor and all authorized dependents shall obtain a physical examination from a licensed physician, who will complete the form for each individual. The contractor will deliver the physical examination form(s) to the Embassy health unit in the Cooperating Country. A copy of the doctor's statement of medical opinion at the end of the form which identifies the contractor or dependent by name may be used to meet the requirement in (a)(1) above.

(3) For end-of-tour the contractor and his/her authorized dependents are authorized physical examinations within 60 days after completion of the contractor's tour-of-duty.

(b) *Reimbursement.* (1) As a contribution to the cost of medical examinations required by paragraph (a)(1) of this clause, USAID shall reimburse the contractor not to exceed $100 for each physical examination, plus reimbursement of charges for immunizations.

(2) As a contribution to the cost of medical examinations required by paragraph (a)(2) of this clause the contractor shall be reimbursed in an amount not to exceed half of the cost of the examination up to a maximum USAID share of $300 per examination plus reimbursement of charges for immunizations for himself/herself and each authorized dependent 12 years of age or over. The USAID contribution for authorized dependents under 12 years of age shall not exceed half of the cost of the examination up to a maximum share of $120 per individual plus reimbursement of charges for immunizations. The contractor must obtain the prior written approval of the Contracting Officer to receive any USAID obligations higher than these limits.

(c) *Health Room Privileges.* Routine health room services may be available, subject to post policy and in accordance with the requirements of paragraph (a) of this clause, to U.S. citizen contractors and their authorized dependents (regardless of citizenship) at the post of duty. These services do not include hospitalization or predeparture examinations. The services normally include such medications as may be available, immunizations and preventive health measures, diagnostic examinations and advice, and home visits as medically indicated. Emergency medical treatment is provided to U.S. citizen contractor employees and dependents, whether or not they may have been granted access to routine health room services, on the same basis as it would be to any U.S. citizen in an emergency medical situation in the country.

4. Workweek and Compensation (Pay Comparability Adjustments) (JUL 2007)

(a) *Workweek.* The contractor's workweek shall not be less than 40 hours, unless otherwise provided in the Contract Schedule, and shall coincide with the workweek for those employee of the Mission or the Cooperating Country agency most closely associated with the work of this contract. If the contract is for less than full time (40 hours weekly), the annual and sick leave earned shall be prorated (see the General Provision of this contract entitled Leave and Holidays).

(b) *Compensation (Pay Comparability) Adjustments.* The PSC's compensation shall be adjusted to reflect the pay comparability adjustments, which are granted from time to time to U.S. direct-hire employees by Executive Order for the statutory pay systems (usually in January). Any adjustments authorized are subject to the availability of funds and shall not exceed that percentage stated in the Executive Order granting the adjustment. Further, the adjusted compensation may not exceed the annual ''USAID Contractor Salary Threshold (USAID CST)'', which is equivalent to the maximum rate for agencies without a certified SES performance appraisal system (or the equivalent hourly rate).

5. Leave and Holidays

[Insert the following clause in all USPSC contracts.]

Leave and Holidays (NOV 2020)

(a) *Annual Leave.* (1) The contractor may accrue annual leave at the rate specified in paragraph (a)(2) of this clause as follows:

(i) If the contract period of performance is ninety (90) calendar days or more, and the contractor's performance is continuous for the contract period of performance, the contractor is entitled to accrue annual leave as of the start date of the contract.

(ii) If the contract period of performance is ninety (90) calendar days or more, and the contractor's performance is not continuous during the contract period of performance, the contractor is entitled to accrue annual leave only for each instance of continuous performance of ninety (90) calendar days or more.

(iii) If the contract period of performance is less than ninety (90) calendar days, the contractor is not entitled to accrue annual leave.

(2) The rate at which the contractor will accrue annual leave is based on the contractor's time in service according to the table of this paragraph (a)(2). The accrual rates are based on a full-time, 40-hour workweek, which will be prorated if the contract provides for a shorter workweek:

Time in service	Annual leave (AL) accrual rate
0 to 3 years	4 hours of leave for each 2-week period.
over 3, and up to 15 years	6 hours of AL for each 2-week period (including 10 hours AL for the final pay period of a calendar year).
over 15 years	8 hours of AL for each 2-week period.

(i) USAID will calculate the time in service based on all the previous service performed by the contractor as—:

(A) An individual personal services contractor with USAID for any duration covered by Sec. 636(a)(3) of the FAA or other statutory authority applicable to USAID; and/or

(B) A former U.S. Government (USG) direct-hire civilian employee; and/or

(C) An honorable active duty member of the uniformed services based on the definition in 5 U.S.C. 2101(3).

(ii) In addition to the information certified by the contractor in their Offeror Information form, the contracting officer may require the contractor to furnish copies of previously executed contracts, and/or other evidence of previous service (*e.g.*, SF 50, DD Form 214 or 215) to conduct the due diligence necessary to verify creditable previous service.

(3) Annual Leave is provided under this contract primarily for the purposes of providing the contractor necessary rest and recreation during the period of performance. The contractor, in consultation with the Supervisor, must develop an annual leave schedule early in the period of performance, taking into consideration the requirements of the position, the contractor's preference, and other factors. The maximum amount of annual leave that the contractor can carry over from one leave year to the next is limited to 240 hours. The contractor's unused annual leave balance in excess of the 240 hour maximum at the end of the last pay period of each leave year will be forfeited, unless the requirements of the position precluded the contractor from taking such leave. The contractor may be authorized to restore annual leave for exceptional circumstances beyond the control of the contractor. The restoration of annual leave may be approved only by the USAID Administrator, cognizant Assistant Administrator or Head of an Independent Office reporting directly to the USAID Administrator, and cannot be delegated further. Annual leave restored must be scheduled and used no later than the earlier of either—

(i) The end of the leave year two years after the date fixed by the approving official as the termination date of the exceptional circumstances beyond the contractor's control, which resulted in the forfeiture; or

(ii) The end of the contract.

(4) The contractor must use all accrued annual leave during the period of performance. At the end of the contract, the contractor will forfeit any unused annual leave except where the requirements of the position precluded the contractor from taking annual leave. In this case, the contracting officer may authorize the following:

(i) The contractor to take annual leave during the concluding weeks of the contract, not to exceed the period of performance; or

(ii) Payment of a lump-sum for annual leave not taken based on a signed, written determination and findings (D&F) from the contractor's supervisor. The D&F must set out the facts and circumstances that prevented the contractor from taking annual leave, and the contracting officer must find that the contractor did not cause, or have the ability to control, such facts and circumstances. This lump-sum payment must not exceed the number of days the contractor could have accrued during a twelve (12)-month period based on the contractor's accrual rate.

(5) The contractor may be granted advanced annual leave by the contracting officer when circumstances warrant. Advanced leave must be approved by the Mission Director, cognizant Assistant Administrator, or Head of an Independent Office reporting directly to the Administrator, as appropriate. In no case may the contracting officer grant advanced annual leave in excess of the amount the contractor can accrue in a twelve (12)-month period or over the life of the contract, whichever is less. At the end of the period of performance or at termination, the contractor must reimburse USAID for any outstanding balance of advanced annual leave provided to the contractor under the contract.

(b) *Sick Leave.* The contractor may use sick leave on the same basis and for the same purposes as USAID direct-hire employees. The contractor will accrue sick leave at a rate not to exceed four (4) hours every two (2) weeks for a maximum of thirteen (13) work-days per year based on a full-time, 40-hour workweek, and the rate of accrual will be prorated if the contract provides for a shorter workweek. The contractor may carry over unused sick leave from year to year under the same contract, and to a new follow-on contract for the same work at the same place of performance. The contractor is not authorized to carry over sick leave to a new contract for a different position or at a different location. The contractor will not be compensated for unused sick leave at the completion of this contract.

(c) *Home Leave.* (1) The contractor may be granted home leave to be taken only in the U.S., its commonwealth, possessions, or territories, in one continuous period, under the following conditions:

(i) The contractor must complete twenty-four (24) continuous months of service abroad under this contract, and must not have taken more than thirty (30) workdays leave (annual, sick, or LWOP) in the U.S., its commonwealths, possessions, or territories. The required service abroad will include the actual days in orientation in the U.S. (excluding any language training), travel time by the most direct route, and actual days abroad beginning on the date of arrival in the cooperating country. Any annual and sick leave taken abroad, excluding leave without pay (LWOP), will count toward the period of service abroad. Any days of annual and sick leave taken in the U.S., its commonwealths, possessions, or territories will not be counted toward the required twenty-four (24) months of service abroad.

(ii) The contractor must agree to return immediately after completing home leave to continue performance for an additional—

(A) Two (2) years, or

(B) Not less than one (1) year, if approved in writing by the Mission Director before the contractor departs on home leave.

(iii) If the contractor agrees to meet the conditions in paragraph (c)(1)(ii) of this clause above by returning to the same USAID Mission under this contract or a new contract, the contractor may be granted thirty (30) workdays of home leave.

(iv) If the contractor agrees to meet the continued performance conditions of paragraph (c)(1)(ii) of this clause and will be relocating to a different USAID Mission under a new USAID personal services contract immediately following the completion of home leave, the contractor may be granted twenty (20) workdays of home leave. USAID will provide the contractor these twenty days of home leave under this contract, not under the new contract.

(v) If home leave eligibility is based on paragraph (c)(1)(iv) of this clause, prior to departure on home leave, the contractor must submit to the contracting officer at the current Mission, a copy of the new contract with a special award condition in the contract Schedule indicating the contractor's obligation to fulfill the commitment for continued performance in accordance with paragraph (c)(1)(ii) of this clause.

(2) Notwithstanding the requirements in paragraph (c)(1) of this clause, the contractor may be granted advanced home leave subject to all of the following conditions:

(i) Granting of advanced home leave would serve in each case to advance the attainment of the objectives of this contract; and

(ii) The contractor has served at least eighteen (18) months abroad, as defined in paragraph (c)(4) of this clause, at the same USAID Mission under this contract, and has not taken more than 30 work days leave (annual, sick or LWOP) in the U.S.; and

(iii) The contractor agrees to return immediately to the same Mission to complete the time remaining to meet the twenty-four (24) month period of service required for home leave, which begins after the contractor returns from home leave, plus an additional—

(A) Two (2) years, or

(B) Not less than one (1) year, if approved by the Mission Director, under the current contract, or under a new contract for the same or similar services at the same Mission, before the contractor departs on home leave.

(3)(i) Home leave must be taken only in the U.S., its commonwealths, possessions, or territories. Any days spent in any other location will be charged to annual leave, or if the contractor does not have accrued annual leave to cover these days, the contractor will be placed on LWOP.

(ii) Travel time by the most direct route is authorized in addition to the home leave authorized under this ''Leave and Holidays'' clause. Salary during travel to and from the U.S. for home leave will be limited to the time required for travel by the most direct and expeditious route. Additional home

leave travel requirements are included in the ''Travel and Transportation Expenses'' clause of this contract.

(iii) Except for reasons beyond the contractor's control as determined by the contracting officer, the contractor must return abroad immediately after home leave to fulfill the additional required continued performance of services for any home leave provided under this contract, or else the contractor must reimburse USAID for the salary and benefits costs of home leave, travel and transportation, and any other payments related to home leave.

(iv) Unused home leave is not reimbursable under this contract.

(4) The contracting officer may authorize the contractor to spend no more than five (5) days in work status for consultation at USAID/Washington while on home leave in the U.S., before returning abroad. Consultation in excess of five (5) days or at locations other than USAID/Washington must be approved in advance by the Mission Director or the contracting officer.

(d) *Home Leave for Qualifying Posts.* (1) If the contractor ordinarily qualifies for home leave and has completed a 12-month period at one of the USAID qualifying Missions, as announced by the Department of State or USAID, the contractor is entitled to ten (10) workdays of home leave in addition to the home leave the contractor is normally entitled to in accordance with paragraph (c) of this ''Leave and Holidays'' clause.

(2) There is no requirement that an eligible contractor take this additional home leave for qualifying Missions; it is for use at the contractor's option. If the contractor is eligible and elects to take such home leave, the contractor must take all ten (10) workdays at one time in the U.S. under the conditions described in paragraphs (c)(3) and (c)(4) of this clause. If the contractor is returning to the U.S. and not returning abroad to the same or different USAID Mission, the contractor is not eligible for home leave for qualifying Missions, and this paragraph (d) will not apply.

(e) *Holidays and Administrative Leave.* The contractor is entitled to all holidays and administrative leave granted by USAID to U.S. direct-hire employees as announced by the Agency or Mission.

(f) *Military Leave.* Military leave of not more than fifteen (15) calendar days in any calendar year may be granted to the contractor who is a reservist of the U.S. Armed Forces, provided that the military leave has been approved, in advance, by the contracting officer or the Mission Director. A copy of the contractor's official orders and the contracting officer or Mission Director approval will be part of the contract file.

(g) *Leave Without Pay (LWOP).* The contractor may be granted LWOP only with the written approval of the contracting officer or Mission Director, unless a such leave is requested for family and medical leave purposes under paragraph (i) of this clause.

(h) *Compensatory Time.* USAID may grant compensatory time off only with the written approval of the contracting officer or Mission Director in rare instances when it has been determined absolutely essential and under the policies that apply to USAID U.S. direct-hire employees. The contractor may use earned compensatory time off in accordance with policies that apply to USAID direct-hire employees

(i) *Family and Medical Leave.* (1) USAID provides family and medical leave for eligible USPSCs working within the U.S., or any territories or possession of the U.S., in accordance with Title I of the Family and Medical Leave Act of 1993, as amended (FMLA), and as administered by the Department of Labor under 29 CFR 825. USAID also provides family and medical leave to eligible USPSCs working outside the U.S., or any territories or possession of the U.S., in accordance with this paragraph (i) outside the provisions of Title I of the FMLA as a matter of policy discretion.

(2) Family and medical leave only applies to USPSCs, not any other type of PSC.

(3) In accordance with 29 CFR 825.110, to be eligible for family and medical leave, the contractor must have performed services for —

(i) At least twelve (12) months with USAID; and

(ii) At least 1,250 hours with USAID during the previous 12-month period.

(4) In accordance with 29 CFR 825.200(a), and USAID's internal policies available in Automated Directive System Chapter 309 (ADS 309), an eligible contractor may take up to twelve (12) workweeks of leave under FMLA, Title I, in any 12-month period for the reasons specified in 29 CFR 825.112.

(5) In accordance with 29 CFR part 825.207, the contractor may take LWOP for family and medical leave purposes. However, the contractor may choose to substitute LWOP with accrued annual or sick leave earned under the terms of this contract. If the contractor does not choose to substitute accrued paid leave, the contracting officer, in consultation with the contractor's supervisor, may require the contractor to substitute accrued paid leave for LWOP. The CO must obtain the required certifications for approval of family medical leave in accordance with USAID policy. The contractor must notify the contractor's Supervisor of the intent to substitute paid leave for LWOP prior to the date such paid leave commences. After having invoked the entitlement to family and medical leave and taking LWOP for that purpose, the contractor cannot retroactively substitute paid leave for the LWOP already taken under family and medical leave.

(6) Family medical leave is not authorized for any period beyond the completion date of this contract.

(7) When requesting family medical leave, the contractor must submit the relevant leave request in writing, including certifications and other supporting documents required by 29 CFR 825 and USAID policy in ADS 309.

(8) The U.S. Department of Labor's (DOL's) Wage and Hour Division (WHD) Publication 1420 explains the FMLA's provisions and provides information concerning procedures for filing complaints for violations of the Act.

(j) *Leave Records.* The contractor must maintain their current leave records and make them available as requested by the Mission Director or the contracting officer.

6. Differentials and Allowances (NOV 2020)

(a) The following differential and allowances will be granted to the contractor and his/her authorized dependents to the same extent and on the same basis as they are granted to U.S. citizen direct-hire employees at the Mission by the Standardized Regulations (Government Civilians, Foreign Areas), as from time to time amended, except as noted to the contrary below:

APPLICABLE REFERENCE TO STANDARDIZED REGULATIONS

(1) Post Differential	Chapter 500 and Tables in Chapter 900.
(2) Living Quarters Allowance	Section 130.
(3) Temporary Lodging Allowance	Section 120.
(4) Post Allowance	Section 220.
(5) Supplemental Post Allowance	Section 230.
(6) Payments During Evacuation	Section 600.
(7) Education Allowance	Section 270.
(8) Separate Maintenance Allowance	Section 260.
(9) Danger Pay Allowance	Section 650.
(10) Education Travel	Section 280.

(1) *Post differential.* Post differential is an additional compensation for service at places in foreign areas where conditions of environment differ substantially from conditions of environment in the continental United States and warrant additional compensation as a recruitment and retention incentive. In areas where post differential is paid to USAID direct-hire employees, post differential not to exceed the percentage of salary as is provided such USAID employees in accordance with the Standardized Regulations (Government Civilians, Foreign Areas) Chapter 500 (except the limitation contained in Section 552, ''Ceiling on Payment'') Tables—Chapter 900, as from time to time amended, will be reimbursable hereunder for employees in respect to amounts earned during the time such employees actually spend overseas on work under this contract. When such post differential is provided to the contractor, it shall be payable beginning on the date of arrival at the post of assignment and continue, including periods away from post on official business, until the close of business on the day of departure from post of assignment enroute to the United States. Sick or annual leave taken at or away from the post of assignment will not interrupt the continuity of the assignment or require a discontinuance of such post differential payments, provided such leave is not taken within the United States or the territories of the United States. Post differential will not be payable while the employee is away from his/her post of assignment for purposes of home leave. Short-term employees shall be entitled to pose differential beginning with the forty-third (43rd) day at post.

(2) *Living quarters allowance.* Living quarters allowance is an allowance granted to reimburse an employee for substantially all of his/her cost for either temporary or residence quarters whenever Government-owned or Government-rented quarters are not provided to him/her at his/her post without charge. Such costs are those incurred for temporary lodging (temporary lodging allowance) or one unit of residence quarters (living quarters allowance) and include rent, plus any costs not included therein for heat, light, fuel, gas, electricity and water. The temporary lodging allowance and the living quarters allowance are never both payable to an employee for the same period of time. The contractor will receive living quarters allowance for payment of rent and utilities if such facilities are not supplied. Such allowance shall not exceed the amount paid USAID employees of equivalent rank in the Cooperating Country, in accordance with either the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 130, as from time to time amended, or other rates approved by the Mission Director. Subject to the written approval of the Mission Director,

short-term employees may be paid per diem (in lieu of living quarters allowance) at rates prescribed by the Federal Travel Regulations, as from time to time amended, during the time such short-term employees spend at posts of duty in the Cooperating Country under this contract. In authorizing such per diem rates, the Mission Director shall consider the particular circumstances involved with respect to each such short-term employee including the extent to which meals and/or lodging may be made available without charge or at nominal cost by an agency of the United States Government or of the Cooperating Government, and similar factors.

(3) *Temporary lodging allowance.* Temporary lodging allowance is a quarters allowance granted to an employee for the reasonable cost of temporary quarters incurred by the employee and his/her family for a period not in excess of (i) three months after first arrival at a new post in a foreign area or a period ending with the occupation of residence (permanent) quarters, if earlier, and (ii) one month immediately preceding final departure from the post subsequent to the necessary vacating of residence quarters. The contractor will receive temporary lodging allowance for himself/herself and authorized dependents, in lieu of living quarters allowance, not to exceed the amount set forth in the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 120, as from time to time amended.

(4) *Post allowance.* Post allowance is a cost-of-living allowance granted to an employee officially stationed at a post where the cost of living, exclusive of quarters cost, is substantially higher than in Washington, DC. The contractor will receive post allowance payments not to exceed those paid USAID employees in the Cooperating Country, in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 220, as from time to time amended.

(5) *Supplemental post allowance.* Supplemental post allowance is a form of post allowance granted to an employee at his/her post when it is determined that assistance is necessary to defray extraordinary subsistence costs. The contractor will receive supplemental post allowance payments not to exceed the amount set forth in the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 230, as from time to time amended.

(6) *Payments during evacuation.* The Standardized Regulations (Government Civilians, Foreign Areas) provide the authority for efficient, orderly, and equitable procedure for the payment of compensation, post differential and allowances in the event of an emergency evacuation of employees or their dependents, or both, from duty stations for military or other reasons or because of imminent danger to their lives. If evacuation has been authorized by the Mission Director, the contractor will receive payments during evacuation for himself/herself and authorized dependents evacuated from their post of assignment in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 600, and the Federal Travel Regulations, as from time to time amended.

(7) *Educational allowance.* Educational allowance is an allowance to assist the contractor in meeting the extraordinary and necessary expenses, not otherwise compensated for, incurred by reason of his/her service in a foreign area in providing adequate elementary and secondary education for his/her children. The contractor will receive educational allowance payments for his/her dependent children in amounts not to exceed those set forth in Standardized Regulations (Government Civilians, Foreign Areas), Chapter 270, as from time to time amended.

(8) *Separate maintenance allowance.* Separate maintenance allowance is an allowance to assist an employee who is compelled by reason of dangerous, notably unhealthful, or excessively adverse living conditions at his/her post of assignment in a foreign area, or for the convenience of the Government, to meet the additional expense of maintaining his/her dependents elsewhere than at such post. The contractor will receive separate maintenance allowance payments not to exceed that made to USAID employees in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 260, as from time to time amended.

(9) *Danger pay allowance.* Danger pay allowance is an allowance to provide additional compensation above basic compensation to employees in foreign areas where civil insurrection, civil war, terrorism or wartime conditions threaten physical harm or imminent danger to the health or well-being of the employee. The danger pay allowance is in lieu of that part of the post differential which is attributable to political violence. Consequently, the post differential may be reduced while danger pay is in effect to avoid dual crediting for political violence. The contractor shall be allowed danger pay allowance not to exceed that paid USAID employees in the Cooperating Country, in accordance with the Standardized Regulations (Government Civilians, Foreign Areas), Chapter 650, as from time to time amended.

(10) *Educational travel.* Educational travel is travel to and from a school in the United States for secondary education (in lieu of an educational allowance) and for college education. The contractor will receive educational travel payments for his/her dependent children provided such payment does not exceed that which would be payable in accordance with the Standardized Regulations (Government Civilians, Foreign Areas),

Chapter 280, as from time to time amended. Educational travel shall not be authorized for contractors whose assignment is less than two years.

(b) The allowances provided in paragraphs (a) (1) through (10) of this provision shall be paid to the contractor in dollars or in the currency of the Cooperating Country in accordance with practice prevailing at the Mission, or the Mission Director may direct that the contractor be paid a per diem in lieu thereof as prescribed by the Standardized Regulations (Government Civilians, Foreign Areas), as from time to time amended.

7. Social Security, Federal Income Tax, and Foreign Earned Income (June 1990)

(a) Since the contractor is an employee, F.I.C.A. contributions and U.S. Federal Income Tax withholding shall be deducted in accordance with regulations and rulings of the Social Security Administration and the U.S. Internal Revenue Service, respectively.

(b) As an employee, the contractor is not eligible for the ''foreign earned income'' exclusion under the IRS Regulations (see 26 CFR 1.911–3(c)(3)).

8. Advance of Dollar Funds (APR 1997)

If requested by the contractor and authorized in writing by the Contracting Officer, USAID will arrange for an advance of funds to defray the initial cost of travel, travel allowances, authorized precontract expenses, and shipment of personal property. The advance shall be granted on the same basis as to a USAID U.S.-citizen direct-hire employee in accordance with USAID Handbook 22, Chapter 4 or superseding ADS Chapter.

9. Insurance (APR 1997)

(a) *Worker's compensation benefits.* The contractor shall be provided worker's compensation benefits in accordance with the Federal Employees' Compensation Act.

(b) *Health and life insurance.* (1) The contractor shall be provided a maximum contribution of up to 50% against the actual costs of the contractor's annual health insurance costs, provided that such costs may not exceed the maximum U.S. Government contribution for direct-hire personnel as announced annually by the Office of Personnel Management.

(2) The contractor shall be provided a contribution of up to 50% against the actual costs of annual life insurance not to exceed $500.00 per year.

(3) Retired U.S. Government employees shall not be paid additional contributions for health or life insurance under their contracts. The Government will normally have already paid its contribution for the retiree unless the employee can prove to the satisfaction of the Contracting Officer that his/her health and life insurance does not provide or specifically excludes coverage overseas. In such case, the contractor would be eligible for contributions under paragraphs (b) (1) or (2) as appropriate.

(4) Proof of health and life insurance coverage shall be submitted to the Contracting Officer before any contribution is paid. On assignments of less than one year, costs for health and life insurance shall be prorated and paid accordingly.

(5) A contractor who is a spouse of a current or retired Civil Service, Foreign Service, or Military Service member and who is covered by their spouse's Government health or life insurance policy is ineligible for the contribution under paragraphs (b)(1) or (b)(2) of this provision.

(c) *Insurance on private automobiles.* If the contractor or his/her dependents transport, or cause to be transported, privately owned automobile(s) to the Cooperating Country, or any of them purchase an automobile within the Cooperating Country, the contractor agrees to ensure that all such automobile(s) during such ownership within the Cooperating Country will be covered by a current, i.e., not in arrears, insurance policy issued by a reliable company providing the following minimum coverage, or such other minimum coverage as may be set by the Mission Director, payable in U.S. dollars or its equivalent in the currency of the Cooperating Country: injury to persons, $10,000/$20,000; property damage, $5,000. The contractor further agrees to deliver, or cause to be delivered to the Mission Director, the insurance policies required by this clause or satisfactory proof of the existence thereof, before such automobile(s) operated within the Cooperating Country. The premium costs for such insurance shall not be a reimbursable cost under this contract.

10. Travel and Transportation Expenses (July 1993)

(a) *General.* (1) USAID/Washington Office of Administrative Services, or such other office as may be designated by that office, may furnish Transportation Requests (TR's) to the contractor for transportation authorized by this contract originating in the United States, and the executive or administrative officer at the Mission may furnish TR's for such authorized transportation which is payable in local currency or is to originate overseas. When transportation is not provided by the Government-issued TR, the contractor shall procure his/her own transportation, the costs of which will be reimbursed in accordance with the terms of this contract.

(2) The contractor will be reimbursed for reasonable, allocable and allowable travel and transportation expenses incurred under and for the performance of this contract. Determination of reasonableness, allocability and allowability will be made by the Contracting Officer in accordance with USAID's

established policies and procedures for USAID direct-hire employees, and the particular needs of the activity being implemented by this contract. The following paragraphs provide specific guidance and limitations on particular items of cost.

(b) *U.S. travel and transportation.* The contractor shall be reimbursed for actual transportation costs and travel allowances in the United States as authorized in the Contract Schedule or approved in advance by the Contracting Officer or the Mission Director. Transportation costs and travel allowances shall not be reimbursed in any amount greater than the cost of, and time required for, economy-class commercially scheduled air travel by the most expeditious route except as otherwise provided in paragraph (g) of this provision unless economy air travel is not available and the contractor certifies to this in his/her voucher or other documents submitted for reimbursement.

(c) *International travel.* For travel to and from post of assignment, the contractor shall be reimbursed for travel costs and travel allowances from place of residence in the United States (or other location provided that the cost of such travel does not exceed the cost of the travel from the contractor's residence in the United States) to the post of duty in the Cooperating Country and return to place of residence in the United States (or other location provided that the cost of such travel does not exceed the cost of travel from the post of duty in the Cooperating Country to the contractor's residence) upon completion of services by the individual. Reimbursement for travel will be in accordance with USAID's established policies and procedures for its direct-hire employees and the provisions of this contract, and will be limited to the cost of travel by the most direct and expeditious route. If the contract is for longer than one year and the contractor does not complete one full year at post of duty (except for reasons beyond his/her control), the costs of going to and from the post of duty for the contractor and his/her dependents are not reimbursable hereunder. If the contractor serves more than one year but less than the required service in the Cooperating Country (except for reasons beyond his/her control) the costs of going to the post of duty are reimbursable hereunder but the costs of going from post of duty to the contractor's permanent, legal place of residence at the time he or she was employed for work under this contract, or other location as approved by the Contracting Officer, are not reimbursable under this contract for the contractor and his/her dependents. When travel is by economy class accommodations, the contractor will be reimbursed for the cost of transporting up to 10 kilograms/22 pounds of accompanied personal baggage per traveler in addition to that regularly allowed with the economy ticket provided that the total number of pounds of baggage does not exceed that regularly allowed for first class travelers. Travel allowances for travelers shall not be in excess of the rates authorized in the Standardized Regulations (Government Civilians, Foreign Areas)-hereinafter referred to as the Standardized Regulations—as from time to time amended, for not more than the travel time required by scheduled commercial air carrier using the most expeditious route. One stopover enroute for a period of not to exceed 24 hours is allowable when the traveler uses economy class accommodations for a trip of 14 hours or more of scheduled duration. Such stopover shall not be authorized when travel is by indirect route or is delayed for the convenience of the traveler. Per diem during such stopover shall be paid in accordance with the Federal Travel Regulations as from time to time amended.

(d) *Local travel.* Reimbursement for local travel in connection with duties directly referable to the contract shall not be in excess of the rates established by the Mission Director for the travel costs of travelers in the Cooperating Country. In the absence of such established rates the contractor shall be reimbursed for actual travel costs in the Cooperating Country or the Mission, including travel allowances at rates not in excess of those prescribed by the Standardized Regulations.

(e) *Indirect travel for personal convenience.* When travel is performed by an indirect route for the personal convenience of the traveler, the allowable costs of such travel will be computed on the basis of the cost of allowable air fare via the direct usually traveled route. If such costs include fares for air or ocean travel by foreign flag carriers, approval for indirect travel by such foreign flag carriers must be obtained from the Contracting Officer or the Mission Director before such travel is undertaken, otherwise only that portion of travel accomplished by the United States-flag carriers will be reimbursable within the above limitation of allowable costs.

(f) *Limitation on travel by dependents.* Travel costs and allowances will be allowed for authorized dependents of the contractor and such costs shall be reimbursed for travel from place of abode to assigned station in the Cooperating Country and returned, only if the dependent remains in the Cooperating Country for at least 9 months or one-half of the required tour of duty of the contractor, whichever is greater, except as otherwise authorized hereunder for education, medical or emergency visitation travel. If the dependent is eligible for educational travel pursuant to the ''Differential and Allowances'' clause of this contract, time spent away from post resulting from educational travel will be counted as time at post.

(g) *Delays enroute.* The contractor may be granted reasonable delays enroute while in

travel status when such delays are caused by events beyond the control of the contractor and are not due to circuitous routine. It is understood that if delay is caused by physical incapacitation, he/she shall be eligible for such sick leave as provided under the ''Leave and Holidays'' clause of this contract.

(h) *Travel by Privately Owned Automobile (POV).* If travel by POV is authorized in the contract schedule or approved by the Contracting Officer, the contractor shall be reimbursed for the cost of travel performed in his/her POV at a rate not to exceed that authorized in the Federal Travel Regulations plus authorized per diem for the employee and for each of the authorized dependents traveling in the POV, if the POV is being driven to or from the Cooperating Country as authorized under the contract, provided that the total cost of the mileage and the per diem paid to all authorized travelers shall not exceed the total constructive cost of fare and normal per diem by all authorized travelers by surface common carrier or authorized air fare, whichever is less.

(i) *Emergency and Irregular Travel and Transportation.* Emergency transportation costs and travel allowances while enroute, as provided in this section, will be reimbursed not to exceed amounts authorized by the Foreign Service Travel Regulations for USAID-direct hire employees in like circumstances under the following conditions:

(1) The costs of going from post of duty in the Cooperating Country to the employee's permanent, legal place of residence at the time he or she was employed for work under this contract or other location for contractor employees and dependents and returning to the post of duty, subject to the prior written approval of the Mission Director that such travel is necessary for one of the following reasons.

(i) Need for medical care beyond that available within the area to which the employee is assigned, or serious effect on physical or mental health if residence is continued at assigned post of duty. The Mission Director may authorize a medical attendant to accompany the employee at contract expense if, based on medical opinion, such an attendant is necessary.

(ii) Death, or serious illness or injury of a member of the immediate family of the employee or the immediate family of the employee's spouse.

(2) When, for any reason, the Mission Director determines it is necessary to evacuate the contractor or contractor's dependents, the contractor will be reimbursed for travel and transportation expenses and travel allowance while enroute, for the cost of the individuals going from post of duty in the Cooperating Country to the employee's permanent, legal place of residence at the time he or she was employed for work under this contract or other approved location. The return of such employees and dependents may also be authorized by the Mission Director when, in his/her discretion, he/she determines it is prudent to do so.

(3) The Mission Director may also authorize emergency or irregular travel and transportation in other situations, when in his/her opinion, the circumstances warrant such action. The authorization shall include the kind of leave to be used and appropriate restrictions as to time away from post, transportation of personal and household effects, etc.

(j) *Home Leave Travel.* To the extend that home leave has been authorized as provided in the ''Leave and Holidays'' clause of this contract, the cost of travel for home leave is reimbursable for travel costs and travel allowances of travelers from the post of duty in the Cooperating Country to place of residence in the United States (or other location provided that the cost of such travel does not exceed the cost of travel to the contractor's residence in the United States) and return to the post of duty in the Cooperating Country. Reimbursement for travel will be in accordance with the Uniform State/USAID/USIA Foreign Service Travel Regulations, as from time to time amended, and will be limited to the cost of travel by the most direct and expeditious route. Travel allowances for travelers shall be in accordance with the rates authorized in the Standardized Regulations as from time to time amended, for not more than the travel time required by scheduled commercial air carrier using the most expeditious route using economy class. One stopover enroute for a period of not to exceed 24 hours is allowable when the traveler uses economy class accommodations for a trip of 14 hours or more of scheduled duration. Such stopover shall not be authorized when travel is by indirect route or is delayed for the convenience of the traveler or the traveler uses other than economy class. Per diem during such stopover shall be paid in accordance with the Standardized Regulations.

(k) *Rest and Recuperations Travel.* If approved in writing by the Mission Director, the contractor and his/her dependents shall be allowed rest and recuperation travel on the same basis as authorized USAID direct-hire Mission employees and their dependents.

(l) *Transportation of Motor Vehicles, Personal Effects and Household Goods.* (1) Transportation costs will be paid on the same basis as for USAID direct-hire employees serving the same length tour of duty, as authorized in the schedule. Transportation, including packing and crating costs, will be paid for shipping from the point of origin in the United States (or other location as approved by the Contracting Officer) to post of duty in the Cooperating Country and return to point

of origin in the United States (or other location as approved by the Contracting Officer) of one privately-owned vehicle for the contractor, personal effects of the contractor and authorized dependents, and household goods of the contractor not to exceed the limitations in effect for such shipments for USAID direct-hire employees in accordance with the Foreign Service Travel Regulations in effect at the time shipment is made. These limitations may be obtained from the Contracting Officer.

(2) The cost of transporting motor vehicles and household goods shall not exceed the cost of packing, crating, and transportation by surface common carrier. In the event that the carrier does not require boxing or crating of motor vehicles for shipment to the Cooperating Country, the cost of boxing or crating is not reimbursable. The transportation of a privately owned motor vehicle for a contractor may be authorized as a replacement of the last such motor vehicle shipped under this contract for such contractor when the Mission Director determines, in advance, and so notifies the contractor in writing, that the replacement is necessary for reasons not due to the negligence or malfeasance of the contractor. The determination shall be made under the same rules and regulations that apply to authorized Mission U.S. citizen direct-hire employees.

(m) *Unaccompanied Baggage.* Unaccompanied baggage is considered to be those personal belongings needed by the traveler immediately upon arrival of the contractor and dependents, and consideration should be given to advance shipments of unaccompanied baggage. The contractor will be reimbursed for costs of shipment of unaccompanied baggage (in addition to the weight allowance for household effects) not to exceed the limitations in effect for USAID direct-hire employees in accordance with the Foreign Service Travel Regulations as in effect when shipment is made. These limitations are available from the Contracting Officer. This unaccompanied baggage may be shipped as air freight by the most direct route between authorized points of origin and destination regardless of the modes of travel used. This provision is applicable to home leave travel when authorized by the terms of this contract.

(n) *International Ocean Transportation*—(1)(i) *Transportation of things.* Where U.S. flag vessels are not available, or their use would result in a significant delay, the contractor may obtain a release from the requirement to use U.S. flag vessels from the Transportation Division, Office of Acquisition and Assistance, U.S. Agency for International Development, Washington, D.C. 20523–1419, or the Mission Director, as appropriate, giving the basis for the request.

(ii) *Transportation of persons.* Where U.S. flag vessels are not available, or their use would result in a significant delay, the contractor may obtain a release from the requirement to use U.S. flag vessels from the Contracting Officer or the Mission Director, as appropriate.

(2) *Transportation of foreign-made vehicles.* Reimbursement of the costs of transporting a foreign-made motor vehicle will be made in accordance with the provisions of the Foreign Service Travel Regulations.

(3) Reduced rates on U.S.-flag carriers are in effect for shipments of household goods and personal effects of USAID contractors between certain locations. These reduced rates are available provided the shipper furnishes to the carrier at the time of the issuance of the Bill of Lading documentary evidence that the shipment is for the account of USAID. The Contracting Officer will, on request, furnish to the contractor current information concerning the availability of a reduced rate with respect to any proposed shipment. The contractor will not be reimbursed for shipments of household goods or personal effects in amounts in excess of the reduced rates which are available in accordance with the foregoing.

(o) *Storage of household effects.* The cost of storage charges (including packing, crating, and drayage costs) in the U.S. of household goods of the contractor will be permitted in lieu of transportation of all or any part of such goods to the Cooperating Country under paragraph (l) above provided that the total amount of effects shipped to the Cooperating Country or stored in the U.S. shall not exceed the amount authorized for USAID direct-hire employees under the Uniform Foreign Service Travel Regulations. These amounts are available from the Contracting Officer.

11. Payment (AUG 1996)

(a) Once each month, or at more frequent intervals, if approved by the paying office indicated on the Cover Page, the contractor may submit to such office form SF 1034 ''Public Voucher for Purchases and Services Other Than Personal'' (original) and SF 1034–A (three copies), or whatever other form is locally required or accepted. Each voucher shall be identified by the USAID contract number and properly executed in the amount of dollars claimed during the period covered. The voucher forms shall be supported by:

(1) The contractor's detailed invoice, in original and two copies, indicating for each amount claimed the paragraph of the contract under which payment is to be made, supported when applicable as follows:

(i) For compensation—a statement showing period covered, days worked, and days when contractor was in authorized travel, leave, or stopover status for which compensation is claimed. All claims for compensation will be accompanied by, or will incorporate, a certification signed by the

Project Officer covering days or hours worked, or authorized travel or leave time for which compensation is claimed.

(ii) For travel and transportation—a statement of itinerary with attached carrier's receipt and/or passenger's coupons, as appropriate.

(iii) For reimbursable expenses—an itemized statement supported by original receipts.

(2) The first voucher submitted shall account for, and liquidate the unexpended balance of any funds advanced to the contractor.

(b) A final voucher shall be submitted by the contractor promptly following completion of the duties under this contract but in no event later than 120 days (or such longer period as the Contracting Officer may in his/her discretion approve in writing) from the date of such completion. The contractor's claim, which includes his/her final settlement of compensation, shall not be paid until after the performance of the duties required under the terms of this contract has been approved by USAID. On receipt and approval of the voucher designated by the contractor as the ''final voucher'' submitted on Form SF 1034 (original) and SF 1034–A (three copies), together with a refund check for the balance remaining on hand of any funds which may have been advanced to the contractor, the Government shall pay any amounts due and owing the contractor.

(c) If approved by the paying office time and attendance may be submitted for PSCs in the same manner as is approved for direct-hire personnel.

12. Conversion of U.S. Dollars to Local Currency (DEC 1985)

Upon arrival in the Cooperating Country, and from time to time as appropriate, the contractor shall consult with the Mission Director or his/her authorized representative who shall provide, in writing, the policy the contractor shall follow in the conversion of U.S. dollars to local currency. This may include, but not be limited to the conversion of said currency through the cognizant U.S. Disbursing Officer, or Mission Controller, as appropriate.

13. Post of Assignment Privileges (JUL 1993)

Privileges such as the use of APO, PX's, commissaries and officers clubs are established at posts abroad under agreements between the U.S. and host governments. These facilities are intended for and usually limited to members of the official U.S. establishment including the Embassy, USAID Mission, U.S. Information Service and the Military. Normally, the agreements do not permit these facilities to be made available to non-official Americans. However, in those cases where facilities are open to non-official Americans, they may be used.

14. Security Requirements (June 1990)

(a) This entire provision shall apply to the extent that this contract involves access to classified information (''Confidential'', ''Secret'', or ''Top Secret'') or access to administratively controlled information (''Limited Official Use''). Contractors that are not U.S. citizens shall not have access to classified or administratively controlled information.

(b) The contractor (1) shall be responsible for safeguarding all classified or administratively controlled information in accordance with appropriate instructions furnished by the USAID Office of Security (IG/SEC), as referenced in paragraph (d) of this provision and shall not supply, disclose, or otherwise permit access to classified information or administratively controlled information to any unauthorized person; (2) shall not make or permit to be made any reproductions of classified information or administratively controlled information except with the prior written authorization of the Contracting Officer or Mission Director; (3) shall submit to the Contracting Officer, at such times as the Contracting Officer may direct, an accounting of all reproductions of classified or administratively controlled information; and (4) shall not incorporate in any other project any matter which will disclose classified and/or administratively controlled information except with the prior written authorization of the Contracting Officer.

(c) The contractor shall follow the procedures for classifying, marking, handling, transmitting, disseminating, storing, and destroying official material in accordance with the regulations in the Foreign Affairs Manual, Chapter 5 (5 FAM 900), a copy of which will be furnished by the Contracting Officer or Mission Director.

(d) The contractor agrees to submit immediately to the Mission Director or Contracting Officer a complete detailed report, appropriately classified, of any information which the contractor may have concerning existing or threatened espionage, sabotage, or subversive activity.

(e) The Government agrees that, when necessary, it shall indicate by security classification or administratively controlled designation, the degree of importance to the national defense of information to be furnished by the contractor to the Government or by the Government to the contractor, and the Government shall give written notice of such security classification or administratively controlled designation to the contractor and of any subsequent changes thereof. The contractor is authorized to rely on any letter or other written instrument signed by the Contracting Officer changing a security classification or administratively controlled designation of information.

(f) The contractor agrees to certify after completion of his/her assignment under this contract that he/she has surrendered or disposed of all classified and/or administratively controlled information in his/her custody in accordance with applicable security instructions.

15. Contractor-Mission Relationships (DEC 1985)

(a) The contractor acknowledges that this contract is an important part of the U.S. Foreign Assistance Program and agrees that his/her duties will be carried out in such a manner as to be fully commensurate with the responsibilities which this entails.

(b) While in the Cooperating Country, the contractor is expected to show respect for the conventions, customs, and institutions of the Cooperating Country and not interfere in its political affairs.

(c) If the contractor's conduct is not in accordance with paragraph (b) of this provision, the contract may be terminated under General Provision 16 of this contract. The Contractor recognizes the right of the U.S. Ambassador to direct his/her immediate removal from any country when, in the discretion of the Ambassador, the interests of the United States so require.

(d) The Mission Director is the chief representative of USAID in the Cooperating Country. In this capacity, he/she is responsible for the total USAID Program in the Cooperating Country including certain administrative responsibilities set forth in this contract and for advising USAID regarding the performance of the work under the contract and its effect on the U.S. Foreign Assistance Program. The contractor will be responsible for performing his/her duties in accordance with the statement of duties called for by the contract. However, he/she shall be under the general policy guidance of the Mission Director, and shall keep the Mission Director or his/her designated representative currently informed of the progress of the work under this contract.

16. Termination (NOV 2020)

(This is an approved deviation to be used in place of the clause specified in FAR 52.249–12.)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part:

(1) For cause, which may be effected immediately after establishing the facts warranting the termination, by giving written notice and a statement of reasons to the contractor in the event (i) the Contractor commits a breach or violation of any obligations herein contained, (ii) a fraud was committed in obtaining this contract, or (iii) the contractor is guilty (as determined by USAID) of misconduct in the Cooperating Country. Upon such a termination, the contractor's right to compensation shall cease when the period specified in such notice expires or the last day on which the contractor performs services hereunder, whichever is earlier. No costs of any kind incurred by the contractor after the date such notice is delivered shall be reimbursed hereunder except the cost of return transportation (not including travel allowances), if approved by the Contracting Officer. If any costs relating to the period subsequent to such date have been paid by USAID, the contractor shall promptly refund to USAID any such prepayment as directed by the Contracting Officer.

(2) For the convenience of USAID, by giving not less than 15 calendar days advance written notice to the contractor. Upon such a termination, contractor's right to compensation shall cease when the period specified in such notice expires except that the contractor shall be entitled to any unused annual leave, return transportation costs and travel allowances and transportation of unaccompanied baggage costs at the rate specified in the contract and subject to the limitations which apply to authorized travel status.

(3) For the convenience of USAID, when the contractor is unable to complete performance of his/her services under the contract by reason of sickness or physical or emotional incapacity based upon a certification of such circumstances by a duly qualified doctor of medicine approved by the Mission. The contract shall be deemed terminated upon delivery to the Contractor of a termination notice. Upon such a termination, the contractor shall not be entitled to compensation except to the extent of any unused annual or sick leave but shall be entitled to return transportation, travel allowances, and unaccompanied baggage costs at rates specified in the contract and subject to the limitations which apply to authorized travel status.

(b) 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.

17. Release of Information (DEC 1985)

All rights in data and reports shall become the property of the U.S. Government. All information gathered under this contract by the Contractor and all reports and recommendations hereunder shall be treated as confidential by the Contractor and shall not, without the prior written approval of the Contracting Officer, be made available to any person, party, or government, other than USAID, except as otherwise expressly provided in this contract.

18. Notices (DEC 1985)

Any notice, given by any of the parties hereunder, shall be sufficient only if in writing and delivered in person or sent by telegraph, telegram, registered, or regular mail as follows:

To USAID: Administrator, U.S. Agency for International Development, Washington, D.C. 20523–0001, Attention: Contracting Officer.

(name of the cognizant Contracting Officer with a copy to the appropriate Mission Director).

To Contractor:

At his/her post of duty while in the Cooperating Country and at the Contractor's address shown on the Cover Page of this contract or to such other address as either of such parties shall designate by notice given as herein required. Notices hereunder shall be effective in accordance with this clause or on the effective date of the notice, whichever is later.

19. Reports (June 1987)

(a) The Contractor shall prepare and submit 2 copies of each technical report required by the schedule of this contract to the Bureau for Program and Policy Coordination, Center for Development Information and Evaluation, Development Information Division (PPC/CDIE/DI). All documents should be mailed to:

PPC/CDIE/DI, Acquisitions, Room 209, SA–18, U.S. Agency for International Development, Washington, D.C. 20523–1802.

The title page of all reports forwarded to PPC/CDIE/DI pursuant to this paragraph shall include a descriptive title, the author's name(s), contract number, project number and title, contractor's name, name of the USAID project office, and the publication or insurance date of the report.

(b) When preparing reports, the contractor shall refrain from using elaborate art work, multicolor printing and expensive paper/binding, unless it is specifically authorized in the Contract Schedule. Wherever possible, pages should be printed on both sides using single spaced type.

20. Use of Pouch Facilities (July 1993)

(a) Use of diplomatic pouch is controlled by the Department of State. The Department of State has authorized the use of pouch facilities for USAID contractors and their employees as a general policy, as detailed in paragraphs (a)(1) through (a)(6) of this provision. However, the final decision regarding use of pouch facilities rests with the Embassy or USAID Mission. In consideration of the use of pouch facilities as hereinafter stated, the Contractor agrees to indemnify and hold harmless the Department of State and USAID for loss or damage occurring in pouch transmission.

(1) Contractors are authorized use of the pouch for transmission and receipt of up to a maximum of 0.90 kilogram/2 pounds per shipment of correspondence and documents needed in the administration of foreign assistance programs.

(2) U.S. citizen contractors are authorized use of the pouch for personal mail up to a maximum of 0.45 kilogram/one pound per shipment (but see (a)(3) below). Non-U.S. citizen Contractors are not permitted use of the pouch for personal mail except to the extent that such use may be authorized by the Chief of Mission.

(3) Merchandise, parcels, magazines, or newspapers are not considered to be personal mail for purpose of this clause, and are not authorized to be sent or received by pouch.

(4) Official and personal mail under paragraphs (a) (1) and (2) of this provision, sent by pouch, should be addressed as follows:

Individual's Name (C), U.S. Agency for International Development, Washington, D.C. 20523–0001.

(5) Mail sent via the diplomatic pouch may not be in violation of U.S. Postal laws and may not contain material ineligible for pouch transmission.

(6) Use of military postal facilities (APO/FPO) is authorized to U.S. contractors on the same basis as approved for direct-hire employees at the USAID Mission. Posts having access to APO/FPO facilities and using such for diplomatic pouch dispatch, may, however, accept official and personal mail for the pouch provided, of course, adequate postage is affixed when onward transmission (mail to other than USAID/W) through U.S. postal channels is required.

(b) The contractor shall be responsible for compliance with these guidelines and limitations on use of pouch facilities.

(c) Specific additional guidance on use of pouch facilities in accordance with this clause is available from the Post Communication Center at the Embassy or USAID Mission.

21. Biographical Data (June 1990)

(a) The contractor agrees to furnish biographical information to the Contracting Officer on forms (SF 171 and 171As) provided for that purpose.

(b) Emergency locator information. The contractor agrees to provide the following information to the Mission Administrative Officer on arrival in the host country regarding himself/herself and dependents:

(1) Contractor's full name, home address, and telephone number including any afterhours emergency number(s).

(2) The name and number of the contract, and whether the individual is the contractor or the contractor's dependent.

(3) The name, address, and home and office telephone number(s) of each individual's next of kin.

(4) Any special instructions pertaining to emergency situations such as power of attorney designees or alternate contact persons.

22. U.S. Resident Hire Personal Services Contractor (June 1990)

A contractor meeting the definition of a U.S. Resident Hire PSC contained in Section 12, General Provisions, Clause 1, Definitions, shall be subject to U.S. Federal Income Tax, but shall not be eligible for any fringe benefits (except contributions for FICA, health insurance and life insurance), allowances, or differentials, including but not limited to travel and transportation, medical, orientation, home leave, etc., unless such individual can demonstrate to the satisfaction of the Contracting Officer that he/she has received similar benefits/allowances from their immediately previous employer in the Cooperating Country, or the Mission Director determines that payment of such benefits would be consistent with the Mission's policy and practice and would be in the best interest of the U.S. Government.

23. Orientation and Language Training (July 1993)

(a) Except as set forth in paragraph (b)(4) below, the Contractor shall receive a maximum of 2 weeks USAID orientation before travel overseas. The dates of orientation shall be selected by the Contractor and approved by the Contracting Officer from the orientation schedule provided by USAID.

(b) As either set forth in the Contract Schedule, or provided in writing by the Contracting Officer, the following may be authorized taking into consideration specific job requirements, contractor's prior overseas experience, or unusual circumstances, in connection with orientation of individual Contractors:

(1) Modified orientation,

(2) Language training,

(3) Orientation for Contractor's dependents at contract expense.

(4) Waiver of orientation for individual contractor.

(c) Transportation costs and travel allowances not to exceed one round trip from the Contractor's residence to place of orientation and return will be reimbursed, pursuant to Clause 10 of the General Provisions, entitled ''Travel and Transportation Expenses,'' if the orientation is more than 80 kilometers/50 miles from the contractor's residence.

Allowable salary costs during the period of orientation are also reimbursable.

24. Conditions for Contracting Prior to Receipt of Security Clearance (July 1993)

(a) U.S. Resident Hire PSC. The contractor may commence work prior to the completion of the security clearance. However, until such time as clearance is received, the contractor shall have no access to classified or administratively controlled materials. Further, failure to obtain clearance will constitute cause for contract termination in accordance with paragraph (a)(2) of General Provision 16 of this contract.

(b) U.S. PSC—Non-Resident Hire. The contractor may elect to commence travel to post immediately to begin work prior to completion of the security clearance. However, until such time as security clearance is received, the contractor shall:

(1) Have no access to classified or administratively controlled materials;

(2) Be authorized to travel to post himself/herself only; and

(3) Be authorized no entitlements other than those normally authorized for short term (less than a year) employees at post. Even if the contract is for one year or more, dependents may not accompany contractor unless at his/her expense, and transportation/storage of household/personal effects and motor vehicle will not be financed by USAID prior to the receipt of the security clearance. Upon receipt of clearance, the Contracting Officer will authorize reimbursement of any such costs borne at contractor's expense prior to clearance provided they are reasonable, allocable and allowable. If appropriate given the length of time remaining, the Contracting Officer will authorize dependent travel and shipment/storage of motor vehicle and effects. Allowances which would not be provided to short term employees will be authorized after clearance is received provided that the contractor is otherwise entitled to such benefits. Failure to obtain the security clearance will constitute cause for contract termination in accordance with paragraph (a)(2) of General Provision 16 of this contract.

25. Medical Evacuation (MEDEVAC) Services (JUL 2007)

(a) The PSC must obtain MEDEVAC service coverage including coverage for authorized dependents while performing personal services abroad.

USAID will reimburse the total cost of MEDEVAC insurance to the PSC. The PSC must provide proof of coverage to the CO in order to receive reimbursement.

(b) *Exceptions.* (1) A PSC and authorized dependents with a health insurance program that includes sufficient MEDEVAC coverage as approved by the Contracting Officer are not required to obtain MEDEVAC service coverage.

(2) The Mission Director at the post of assignment may make a written determination to waive the requirement for such coverage. The determination must be based on findings that the quality of local medical services or other circumstances obviate the need for such coverage for PSCs and their dependents located at post.

26. Governing Law (NOV 1996)

This contract is established under the procurement authorities of the United States Government and shall be interpreted in accordance with the body of Federal Procurement Law in the United States. This contract is a complete statement of the duties, compensation, benefits, leave, notice, termination, and the like; therefore, the laws of the country of performance with respect to labor and contract matters shall not apply to either the carrying out of the obligations of the parties or to the interpretation of this agreement.

27–28 [Reserved]

29. Incentive Awards

[Insert the following clause in all USPSC contracts.]

Incentive Awards (DEC 2019)

The contractor is eligible to receive certain monetary and non-monetary USAID incentive awards in accordance with the AIDAR and USAID internal policy.

13. *FAR Clauses to be Incorporated in Full Text in Personal Services Contracts.*

The following FAR Clauses are always to be used along with the General Provisions. They are required in full text.

1. Covenant Against Contingent Fees 52.203–5
2. Electronic Funds Transfer Payment Methods 52.232–28
3. Disputes 52.233–1 (Alternate 1)
4. Preference for U.S. Flag Air Carriers 52.247–63

14. *FAR Clauses to be Incorporated by Reference in Personal Services Contracts*

The following FAR Clauses are to be used along with the General Provisions, and when appropriate, be incorporated in each personal services contract by reference:

1. Anti-Kickback Procedures 52.203–7
2. Limitation on Payments to Influence Certain Federal Transactions 52.203–12
3. Audit and Records—Negotiation 52.215–2
4. Privacy Act Notification 52.224–1
5. Privacy Act 52.224–2
6. Taxes—Foreign Cost Reimbursement Contracts 52.229–8
7. Interest 52.232–17
8. Limitation of Cost 52.232–20
9. Limitation of Funds 52.232–22
10. Assignment of Claims 52.232–23
11. Protection of Government Buildings, Equipment, and Vegetation 52.237–2
12. Notice of Intent to Disallow Costs 52.242–1
13. Inspection 52.246–5
14. Limitation of Liability—Services 52.246–25

(Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435)

[62 FR 39453, July 23, 1997, as amended at 64 FR 42040, Aug. 3, 1999; 72 FR 19670, Apr. 19, 2007; 84 FR 61834, Nov. 14, 2019; 85 FR 11861, Feb. 28, 2020; 85 FR 65738, Oct. 16, 2020; 86 FR 494, Jan. 6, 2021]

EDITORIAL NOTE: At 85 FR 65738, Oct. 16, 2020, appendix D to chapter 7 was amended by adding a parenthetical authority citation at the end. However, the authority citation to the appendix already exists, so the new one could not be added.

APPENDIX E TO CHAPTER 7 [RESERVED]

APPENDIX F TO CHAPTER 7—USE OF COLLABORATIVE ASSISTANCE METHOD FOR TITLE XII ACTIVITIES

1. Introduction

This appendix provides a detailed description of the collaborative assistance method of contracting. This is a specialized contracting system which may be used for contracting with educational institutions eligible under, and for activities authorized under, Title XII of the Foreign Assistance Act of 1961, as amended, under the circumstances described in AIDAR 715.613–71.

2. Purpose

The collaborative assistance system is designed to:

(a) Increase the joint implementation authority and responsibility of the contractor and the LDC;

(b) Encourage more effective collaboration between all participating parties (USAID, host country, and contractor) at important stages, including the design stage of a technical assistance project.

3. Policy

The collaborative assistance approach represents an alternative method for long-term technical assistance which involves professional collaboration with eligible Title XII institutions and LDC counterparts for a problem-solving type activity to develop new institutional forms and capabilities, to devise operating systems and policies, and to conduct joint research and development—including training. In such an activity, the difficulty in defining, in advance, precise and objectively verifiable contractor inputs and long-term project content as a basis for payment usually requires a flexible approach to

project design, contracting, and project implementation. Such flexibility is also essential to the collaborative style which is responsive to LDC desires in problem areas of great complexity and varying uncertainty. Other types of technical assistance, which are usually shorter in term are amenable to more precise definition in advance, or involve closely defined and relatively standardized services, or are otherwise more analogous to commodity resource transfers, may be suitable for other contracting methods, e.g., certain forms of institution building, on-the-job training, resource surveys, etc. The collaborative assistance method is an approved method for providing technical assistance when used in accordance with the circumstances outlined above, and with the guidelines set forth in paragraph 4, below.

4. Implementation Procedures

(a) *Introduction.* This paragraph 4, provides background information, guidelines and procedures to effect the implementation of the policy set forth in paragraph 3 of this appendix.

(b) *Conditions and practices.* In order for this policy to work effectively even when the proposed activity fits the criteria described under Policy, there must also be:

(1) Acceptance of the notion that the host country, in consultation with the contractor, is in the best position to make tactical, day-to-day decisions on project inputs within agreed-upon limitations and output expectations;

(2) Sufficient trust and respect between the Agency and the contractor to allow this flexible implementation authority;

(3) A direct-hire project monitor with appropriate background to be knowledgeable of progress and to assist in an advisory and facilitative capacity, both during and between periodic reviews. In addition, the following important conditions must be met:

(i) Adequate preproject communication between, and identification of assistance required by, the host government and USAID;

(ii) Full joint planning and improved project design (''Joint'' as used herein refers to the primary parties, i.e., the collaborating institutions, as well as the host government and USAID. In some instances, it can also include other donors.);

(iii) Careful contractor selection, i.e., matching of the contractor's technical and managerial capabilities to the anticipated requirements of the overseas activity;

(iv) Establishment of relationships between host country, USAID and contractor staff to include host country leadership, flexible implementation authority, and effective management by the contractor;

(v) Improved joint project evaluation, feedback, and replanning; and

(vi) Simplified administrative procedures and greater reliance on in-country logistical support.

(c) *Project Stages and Contractor Involvement.* In the long-term technical assistance projects as described above, there are four discrete but sometimes overlapping decision stages which take place—with the principal contractor usually involved in the last three.

(1) *Problem analysis and project identification.* After the host government has indicated a desire for U.S. collaboration on a particular problem and the USAID field mission has determined that the proposed activity is consistent with its program goals and priorities, considerable effort is usually necessary to refine further the project purpose and type of assistance required and provide a basis for contractor selection. This is a crucial step and is focused on results sought—on what the prospective contractor is expected to produce in relation to resources to be used and to project purpose. It should result in a clear understanding of what the LDC wants, and an overall plan which includes agreement on specific objectives or outputs, acceptable types of activities and inputs and an initial budget—resulting in project documentation. At this step, USAID makes decisions it cannot delegate on what it will support and at what cost. If needed to supplement its direct-hire expertise, USAID can use outside consultants for analysis and advice but retains the ultimate decision for itself in collaboration with, but independent of, the requesting host government. (Normally, the proposed contractor for project definition and subsequent implementation should not have been involved in the problem analysis and project identification stage as a consultant to either the host country government, host institution, or USAID. If a potential contractor has been so involved, particular care must be taken to prevent actual or apparent organizational conflicts of interest in the procurement that follows. This could require at a minimum, a careful assessment and complete documentation of reasons for selection.)

Normally, there will need to be some mutual interaction between the overall planning stage outlined here and the detailed planning and design work which follows in the next phase. There will usually be some overlap, with preliminary decisions in this stage providing a basis for selection of implementing agents for stage (2) which in turn proceeds through some preliminary planning to guide completion of stage (1) as a basis for long-term contracting.

(2) *Project definition.* At this stage, having selected the implementing agent, the U.S. and LDC organizations which will be collaborating in carrying out the project are encouraged to work out, to their mutual ¾satisfaction, the particulars of what to do and how to do it (i.e., detailed project design)

within the context of LDC leadership and responsibility and the general agreements and budget reached in stage (1). The emphasis here is on the technical approach to be utilized and the scheduling and management of project inputs. This may involve a short-term reconnaissance and/or an extensive period of detailed joint planning and feeling out of what is feasible during a preliminary operating phase of the project, possibly lasting as much as a year or more. This stage recognizes the importance, for the problem-solving or ground breaking types of technical assistance, of involving the U.S. and LDC implementing organizations together as soon as the detailed design work begins. USAID's role here is to facilitate, not direct, the joint planning, assure consistency with prior agreements or concur in changes, affirm that the implementing parties have agreed on a reasonable project design, and prepare or cause to be prepared the documentation required for stage (3), including any amendments that might be required to the project documentation. If and when a decision is made by the host government and USAID to proceed into the operating phase with the same contractor, the U.S. intermediary should be treated as a cooperating partner in the negotiation of the subsequent long-term operating agreement(s) with the host government, host institution and USAID.

(3) *Implementation.* The results of the approach outlined in the stage above should include, in addition to a better understanding and more meaningful commitment by all parties, the following specific products:

(i) A jointly developed life-of-project design which reflects the commitment of all parties and includes clear statements of purpose, principal outputs, eligible types of activity and expenditure limits, critical assumptions, and major progress indicators;

(ii) A workplan and input schedule for the first two years or at least as long as the expenditure period for the next obligation of project funds;

(iii) Provisions for any administrative support, special services or other inputs by the host country, contractor, and/or USAID; and

(iv) A plan for periodic joint evaluation and review or progress and subsequent workplans, normally annually, with the participation of all parties.

Appropriate elements of these agreements and understandings are now embodied in a contract for project implementation, as described in paragraph (d)(3)(i) of the section on Contracting Implications. This contract allows the U.S. intermediary to apply its judgment, reflecting close collaboration with its LDC colleagues, in adjusting the flow of USAID-financed inputs and in making other operational decisions with a minimum of requirements for prior USAID approvals or contract amendments as long as the contractor stays within the bounds of the approved overall plan and budget. In this phase, USAID will give technical assistance contractors the authority and responsibility for using their specialized expertise to the fullest extent in the scheduling and managing of project inputs.

(4) *Monitoring, joint evaluation and replanning.* With increased flexibility and responsibility for implementation placed with the technical assistance contractor, the host government, and/or institutional collaborator, improved and timely progress reporting and periodic, joint, and structured reviews of results and evolving plans are imperative as a basis for monitoring and evaluating contractor performance, revalidating or adjusting project design, and for determining future funding levels and commitments.

Both the contractor's annual report and the joint review should be structured within the framework of purpose, outputs, performance indicators, etc., originally established in the project indentification phase—as modified by detailed project design—and reflected in the Project Agreement and other pertinent documentation. The field review will normally serve as the occasion for discussing changes in or additions to previously agreed-to workplans as well as proposing changes in purpose, types of activities authorized and budgets which require contract amendment. Obviously, the appropriate host government, host institution, and senior contractor officials should be thoroughly involved in the process, which will have to be adapted to the conditions within specific projects and countries. An important USAID responsibility is to assure that there is appropriate host country participation in developing and improving project plans prior to new obligations of funds. The special requirements and responsibilities of the various parties shall also be reflected in the project agreement and contract terms and in guidelines on the content of annual reports, evaluation procedures, etc.

Standard checking on services actually delivered as a basis for reimbursement will be continued including appropriate audit of expenditures.

(d) *Contracting implications.* The principal elements of change in present contracting practices, as detailed below, are earlier selection and involvement of the prime contractor, contracting by major stages of project design and operations, minimizing the need for precontract negotiations and contract amendments and USAID approvals, and providing technical assistance contractors with the authority and responsibility needed to manage implementation within the approved program bounds.

(1) *Selection.* The early involvement of the contractor in the definition stage of a long-term technical assistance project, after

USAID decides what it wants to undertake in stage (1), does not alter the Agency's responsibility to select its contractors carefully and in full compliance with appropriate contracting regulations and selection procedures. What is required here is that contractor selection be carried out at an earlier stage than has sometimes been the Agency practice in the past or with other types of contracts and in anticipation that the contractor, assuming adequate performance, will participate in all subsequent phases until final completion.

(2) *Contracting stages.* In contracting, the initial design stage should be separated from the longer term implementation stage without any USAID commitment to undertake the second until it has exercised its independent judgment based on the product of the first plus any outside expert appraisal it and the host country want to use.

The long-term implementation stage itself may be further subdivided into contract periods which permit time between predetermined events for analysis, determination of new project requirements, and evaluation of performance prior to initiating the next phase by contract amendment/extension. If, for any reason, such an examination does not appear to warrant project continuation, then termination of the project and/or contract would be the next step.

(3) *Flexible implementation authority.* While good project design will eliminate or diminish many operational problems, the very nature of long-term technical assistance requires flexible implementation within agreed purposes, ultimate outputs, types of activity and available financing. With these key variables for USAID management control established, contracts should be written so as to minimize the need for amendments and USAID approval of changes in input particulars. This can be facilitated, both for the USAID, host country, institution, and the contractor by:

(i) *Retention of operational plan in contract and removal of workplan.* The contract narrative will contain the life-of-the-project Operational Plan, consistent with the project design as developed in stage (2) and reflected in the project documentation (and subsequent amendments thereto). The Operational Plan includes a statement of the purpose to be achieved, the outputs to be produced by the contractor and the types of activities to be undertaken, the more significant indicators of progress, a general description of the type of inputs that are authorized and intended to be provided during the life of the project, and the overall budget.

In order to allow adjustments at the implementation level without going through the contract amendment process, the detailed but short-term workplan containing specific descriptions and scheduling of all inputs such as numbers and types of staff, participants, commodities, etc., and specific activities, will not be a part of the contract. It is a working document to be modified in the field when the situation demands. The latest version will be available as a supporting document to justify proposed new obligation levels. Normally, the workplan and derived budget will cover a rolling two year period, i.e., each year another yearly increment is added after review and approval.

(ii) *Budget flexibility.* To support this implementation flexibility, contract budget or fiscal controls will be shifted from fixed line items for each input category to program categories, permitting the technical assistance contractor to adjust amounts and timing to achieve previously approved types of activity. This same type of flexibility should apply to any local currency supplied for project operations and/or contractor staff support. While an essential corollary to eliminating the workplan from the contract, this is not a unique procedure under cost reimbursement type contracts when the contractor has demonstrated adequate management capability.

(iii) *Negotiation of advance understandings.* To permit university and international research center contractors to manage their activities in accordance with their own policies and procedures and thereby sharpen their management responsibility while achieving substantial savings in time and reduced documentation, USAID may negotiate advance understandings with its technical assistance contractors on dollar costs and administrative procedures that would be included by reference in its subsequent contracts. Upon receipt of a request from the contractor that their policies be reviewed and approved for usage in their contract in lieu of the standard terms and conditions, OP/PS/OCC, USAID/W will initiate negotiations of such policies in an expeditious manner. The approved policies will be used in all relevant relations involving the Agency and respective contractors in lieu of traditional contract standard provisions, whenever this may be appropriate. This does not apply to local currency costs and host government procedures which must be negotiated in each case.

The purpose of the practices listed above is not only to give a qualified contractor the authority to adjust the composition and timing of inputs but to assign to it clear responsibility for managing such resources, as the evolving circumstances require, to achieve the agreed-upon outputs on a cost efficient basis. It should also reduce the delay and paperwork involved in frequent but minor contract amendments, and approvals. For the agency as a whole, both in the Mission and in USAID/W, these have involved a large workload and cost.

(e) *Role of USAID*. Nothing in this appendix is intended to delegate, diminish or otherwise modify USAID's final responsibility for the prudent management of public funds and its own programs. Rather in withdrawing from the day-to-day involvement in and responsibility for the management of adjustment of the flow of inputs during the implementation, the best use of limited agency staff and time can be devoted to protecting the public interest in gaining maximum results from the funds appropriated for technical assistance by:

(1) Seeking optimum identification in terms of LDC priorities and U.S. capabilities;

(2) Mobilizing and selecting the best U.S. professional talent to design and carry out the project;

(3) Monitoring what is happening to assure adequacy of processes, get a feel of results, assure actual delivery of inputs being financed;

(4) Assuring that the attention of USAID's implementation agents and LDC colleagues stay well focused on project purpose and results to be achieved (outputs) and the relation to these of what is being done and actual results;

(5) Providing intermediaries adequate authority and responsibility to adjust inputs promptly and sensitively to the evolving project situations.

Attention to these considerations, and to achievements of the preimplementation conditions prescribed above, should greatly increase the chances for successful project completion and impact on a cost effective basis, which is the final measurement of prudent management.

ATTACHMENT TO APPENDIX F—GUIDELINES FOR REQUESTS FOR EXPRESSIONS OF INTEREST

A. Length and Level of Detail

A Request for Expression of Interest (REI) should include more than just a short letter expressing interest, but should not be in the detail of a technical proposal (RFTP). The REI is not the only source of information that can or should be used for selection, but at least a minimum level of information should be contained in each document. A ten page paper that responds to the selection criteria included in every REI should be sufficient for evaluation purposes. The selection criteria should specify the technical inputs required for successful execution of the project and normally require a response in three general areas:

1. A description of the institution's capability to address the problem described in the REI.

2. Any related experience, whether in the country or region or in the problem area.

3. A demonstrable commitment of the institution to support the project.

The responses should address the capability, experience, and commitment to the particular project.

B. Specific Personnel Information

The response should specify within the areas set out in the selection criteria the following planning and personnel factors.

1. The design team plan and the scope of work for each member.

2. A list of candidates for the design team and their credentials.

3. A list of possible candidates for long-term assignment to the project. (Since there has been no project design, the specific technical assistance slots and technical responsibilities are vague. But it is expected that at least half of the personnel needs can be estimated early in the project. The institution should make its best guess for the team and present to the Agency the persons or types of persons with whom they are likely to contract.)

C. Multiple Institution Submissions

Joint effort on the part of several institutions is encouraged when appropriate. A single institution may submit an expression of interest for part of the project without knowledge of other collaborators or it may submit information in response to A and B of this attachment as part of a suggested collection of institutions. In either case, a proposed plan for cooperation is necessary.

However, such joint efforts must specify the division of responsibilities for the planning and personnel factors indicated in B of this attachment. Often USAID will identify the need for cooperation and suggest such an effort in the REI. Even if USAID does not suggest collaboration, joint efforts with a description of the cooperation would be an appropriate way to respond to an REI.

(Authority: Section 621 of Public Law. 87–195, 75 Stat. 445, (Section 2381 of Title 22 of the U.S.C.), as amended; E.O. 12163, Sept. 29, 1979, 44 FEDERAL REGISTER 56673; and Title 3 of the CFR, 1979 Comp., p. 435)

[49 FR 13301, Apr. 3, 1984, as amended at 49 FR 33669, Aug. 24, 1984; 50 FR 16089, Apr. 24, 1985; 51 FR 20652, June 6, 1986; 52 FR 6160, Mar. 2, 1987]

APPENDIXES G–H TO CHAPTER 7 [RESERVED]

APPENDIX I TO CHAPTER 7—USAID'S ACADEMIC PUBLICATION POLICY

1. Statement of Policy

This is a statement of USAID policy on publication, or release to parties other than those specifically authorized, of unclassified materials gathered or developed under contracts with academic institutions.

2. Underlying Principles

USAID favors and encourages the publication of scholarly research as well as the maximum availability, distribution, and use of knowledge developed in its program.

This policy statement does not deal with material that is classified for security reasons. It does deal with considerations of national interest, not of sufficient gravity to warrant security classification, but serious enough to affect adversely the conduct of U.S. assistance programs. Consequently, in addition to the requirements of courtesy, propriety, and confidence which normally guide scholars in their work, there should also be consideration of the potential repercussions of publication on the successful execution of development and other cooperative programs in which the United States and foreign countries are involved.

3. Operational Definitions

The Agency draws a distinction between two kinds of manuscripts which a scholar may wish to publish:

(a) A report which is prepared and delivered to the Agency under the terms of the contract (a ''contract manuscript''); and

(b) An article or book based upon experience and information gained under an USAID contract but not prepared or delivered under the contract (a ''non-contract manuscript'').

There are two kinds of actions, to be specified in the contract, which the Agency can take upon notification of a contractor's desire to publish:

(a) Comment only, under which USAID and the foreign government involved may review the manuscript, and have their comments considered seriously by the contractor prior to publication; and

(b) Authorization for release, which USAID may withhold if reconciliation between the national interest and the author's interest is impossible.

4. Policy Statements

(a) USAID, as a general rule, will not require an academic institution to obtain permission to publish the written work produced under a contract. It will ask for the opportunity to review the manuscript for comment only, prior to publication.

In the case of a contract manuscript, USAID reserves the right to disclaim endorsement of the opinions expressed; if it is a noncontract manuscript, USAID reserves the right to disassociate itself from sponsorship or publication.

(b) On the other hand, USAID may reserve the right of authorization for release in those exceptional cases where conditions exist making it reasonably foreseeable, in light of the contract's scope of work and the manner and place of performance, that the written work to be prepared and delivered under the contract may have adverse repercussions on the relations and programs of the United States. Where this right is reserved, it must be so specified in the contract. In determining where to reserve such right, USAID will consider all relevant factors, including:

(1) The extent to which prompt and full performance of the contract will require access, facilitated by reason of the contract, to information not generally available to scholars;

(2) The extent to which the work involves matters of political concern to foreign countries, particularly where any substantial part of the work is to be performed therein;

(3) The extent to which, by reason of USAID's close involvement and cooperation in the performance of the contract, the work product may be so identified with USAID itself as to prevent effective disclaimer of USAID endorsement thereof;

(4) The extent to which the objective of the contract is to provide advice to USAID or to a foreign government of immediate operational significance in the conduct of the USAID program or the implementation of governmental programs in the host country;

(5) The desires of the host country.

5. Implementation

The successful implementation of this policy on publication rests on a thorough understanding and acceptance of these principles by USAID and the prospective contractor. The actual publications provision for a particular contract, then, would be so worded as to reflect the agreement reached in the contract negotations.

USAID's concern with noncontract manuscripts is related to the identification of a manuscript with the U.S. Government. This concern will be modified by the passage of time following termination of the contract.

In the normal case of prepublication review for USAID comment, the institution will submit a copy of the manuscript not later than the date of submission to the publisher. This gives the Agency time to comment if it is deemed appropriate. However, in the case of review for authorization, timely notification of USAID's response will be given, consistent with the size of the manuscript and the number and location of the parties involved.

The Agency will make every effort to expedite this review procedure in accordance with the underlying principle described at the beginning of this policy statement.

(Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR, 1979 Comp., p. 435)

[49 FR 13304, Apr. 3, 1984]

APPENDIX J TO CHAPTER 7—DIRECT USAID CONTRACTS WITH A COOPERATING COUNTRY NATIONAL AND WITH A THIRD COUNTRY NATIONAL FOR PERSONAL SERVICES ABROAD

1. General

(a) *Purpose.* This appendix sets forth the authority, policy, and procedures under which USAID contracts with cooperating country nationals or third country nationals for personal services abroad.

(b) *Definitions.* For the purpose of this appendix:

(1) *Personal services contract* (PSC) means a contract that, by its express terms or as administered, make the contractor personnel appear, in effect, Government employees (see FAR 37.104).

(2) *Employer-employee relationship* means an employment relationship under a service contract with an individual which occurs when, as a result of (i) the contract's terms or (ii) the manner of its administration during performance, the contractor is subject to the relatively continuous supervision and control of a Government officer or employee.

(3) *Non-personal services contract* means a contract under which the personnel rendering the services are not subject either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.

(4) *Independent contractor relationship* means a contract relationship in which the contractor is not subject to the supervision and control prevailing in relationships between the Government and its employees. Under these relationships, the Government does not normally supervise the performance of the work, or the manner in which it is to be performed, control the days of the week or hours of the day in which it is to be performed, or the location of performance.

(5) *Contractor* means a cooperating country national or a third country national who has entered into a contract pursuant to this appendix.

(6) *Cooperating country* means the country in which the employing USAID Mission is located.

(7) *Cooperating country national (CCN)* means an individual who is a cooperating country citizen or a non-cooperating country citizen lawfully admitted for permanent residence in the cooperating country.

(8) *Third Country National (TCN)* means an individual

(i) Who is neither a citizen nor a permanent legal resident alien of the United States nor of the country to which assigned for duty, and

(ii) Who is eligible for return to his/her home country or country of recruitment at U.S. Government expense [see Section 12, General Provision 9 paragraph (n)].

2. Legal Basis

(a) Section 635(b) of the Foreign Assistance Act of 1961, as amended, hereinafter referred to as the ''FAA'', provides the Agency's contracting authority.

(b) Section 636(a)(3) of the FAA authorizes the Agency to enter into personal services contracts with individuals for personal services abroad and provides further that such individuals ''* * * shall not be regarded as employees of the U.S. Government for the purpose of any law administered by the Civil Service Commission.'' [1]

3. Applicability

(a) This appendix applies to all personal services contracts with CCNs or TCNs to provide assistance abroad under Section 636(a)(3) of the FAA.

(b) This appendix does not apply to:

(1) Contracts for non-personal services with TCNs or CCNs; such contracts are covered by the basic text of the FAR and AIDAR.

(2) Personal services contracts with U.S. citizens or U.S. resident aliens for personal services abroad; such contracts are covered by appendix D of this chapter.

(3) Appointments of experts and consultants as USAID direct-hire employees; such appointments are covered by USAID Handbook 25, Employment and Promotion or superseding Chapters of the Automated Directive System (ADS).

4. Policy

(a) *General.* USAID may finance, with either program or operating expense (OE) funds, the cost of personal services as part of the Agency's program of foreign assistance by entering into a direct contract with a CCN or a TCN for personal services abroad.

(1) *Program funds.* Under the authority of Section 636(h) of the FAA, program funds may be obligated for periods up to five years where necessary and appropriate to the accomplishment of the tasks involved.

(2) *Operating expense funds.* Pursuant to USAID budget policy, OE funded salaries and other recurrent cost items may be forward funded for a period of up to three (3) months beyond the fiscal year in which these funds were obligated. Non-recurring cost items may be forward funded for periods not to exceed twenty-four (24) months where necessary and appropriate to accomplishment of the work. [2]

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[1] The Civil Service Commission is now the Federal Office of Personnel Management.

[2] If there is a need, these contracts may be written for 5 years but only funded as outlined above.

(b) *Limitations on Personal Services Contracts.* (1) Personal services contracts may only be used when adequate supervision is available.

(2) Personal services contracts may be used for commercial activities. Commercial activities provide a product or service which could be obtained from a commercial source. See Attachment A of OMB Circular A–76 for a representative list of such activities.

(3) Notwithstanding any other provision of USAID directives, regulations or delegations, Cooperating Country or Third Country Nationals may be delegated or assigned any authority, duty or responsibility, delegated or assigned U.S. citizen direct-hire employees (USDH employees) except that:

a. They may not supervise USDH employees of USAID or other U.S. Government agencies. They may supervise USPSCs and non-U.S. citizen employees.

b. They may not be delegated authority to sign obligating or subobligating documents except when a cooperating country national personal services contractor is specifically designated as a contracting officer or an agreement officer in accordance with FAR subpart 1.6 and the Agency's applicable warrant program.

c. They may represent the agency, except that communications that reflect a final policy, planning or budget decision of the agency must be cleared by a USDH employee.

d. They may participate in personnel selection matters but may not be delegated authority to make a final decision on personnel selection.

e. Services which involve security classified material.

(4) *Exceptions.* The Assistant Administrator, Bureau for Management (AA/M) must approve exceptions to the limitations in (b)(3). Approval of an exception by the AA/M is not required when the Director, Bureau for Management, Office of Acquisition and Assistance (M/OAA Director) designates a cooperating country national personal services contractor as a contracting officer or an agreement officer.

(c) *Conditions of Employment.* (1) *General.* For the purpose of any law administered by the U.S. Office of Personnel Management (OPM), USAID personal services contractors are not to be regarded as employees of the U.S. Government, are not included under any retirement or pension program of the U.S. Government, and are not eligible for the Incentive-Awards Program covered by Uniform Department of State/USAID regulations. Each USAID Mission is expected to participate in an interagency Mission incentive awards program. Additionally, CCN and TCN personal services contractors are eligible to receive certain USAID monetary and nonmonetary incentive awards as authorized under this section. See paragraph (3) of this section for incentive awards.

(2) *Compensation.* (i) It is USAID's general policy (see AIDAR 722.170) that PSC compensation may not, without the approval of the Mission Director or Assistant Administrator, exceed the prevailing compensation paid to personnel performing comparable work in the cooperating country. Compensation for CCN or TCN personal services contractors set in accordance with the provisions of 4(c)(2)(ii) below satisfies this requirement.

(ii) In accordance with Section 408(a)(1) of the Foreign Service Act of 1980, a local compensation plan forms the basis for all compensation payments to CCNs and TCNs. The plan is each post's official system of position classification and pay, which consists of the local salary schedule including salary rates, statements that authorize fringe benefit payments, and other pertinent facets of compensation for CCNs and TCNs. Compensation for PSCs will be in accordance with the local compensation plan, to the extent that it covers employees of the type or category being employed, unless the Mission Director determines otherwise. If the Mission Director determines that compensation in accordance with the local plan would be inappropriate in a particular instance, then compensation will be set in accordance with (in order of preference):

(A) Any other Mission policies on CCN or TCN personal services contractor compensation; or

(B) Section 4 of Appendix D of this chapter, entitled, ''Policy,'' sections (c) ''Withholdings and Fringe Benefits,'' (d) ''Resident Hire U.S. Personal Services Contractors,'' (e) ''Determining Salary for Personal Services Contractors,'' (f) ''Incentive Awards,'' (g) ''Annual Salary Increase,'' (h) ''Pay Comparability Adjustment,'' and (i) ''Subcontracting. When compensation is set in accordance with this exception, the record shall be documented in writing with a justification prepared by the requesting office and approved by the Mission Director.

(iii) The earning of leave (annual and sick), allowances and differential (if applicable), salaries and all other related benefits cannot be enumerated in this appendix as they vary from Mission to Mission and are based upon the local compensation plan for each Mission.

(iv) Unless otherwise authorized, the currency in which compensation is paid to contractors shall be in accordance with the prevailing local compensation practice of the post.

(v) CCN and TCN personal services contractors are eligible for allowances and differentials as provided under the post's local compensation plan.

(vi) A USAID PSC who is a spouse of a current or retired U.S. Civil Service, U.S. Foreign Service, or U.S. military service member, and who is covered by their spouse's

government health or life insurance policy, is ineligible for a contribution towards the costs of annual health and life insurance.

(vii) CCNs and TCNs retired from the U.S. Government may be awarded personal services contracts without any reduction in, or offset against, their U.S. Government annuity.

(3) *Incentive Awards.* (i) All CCN and TCN personal services contractors of the Foreign Affairs Community are eligible for an interagency Mission incentive awards program. The Joint Country Awards Committee administers each post's (Embassy) awards program, including the establishment of procedures for submission, review, and approval of proposed awards.

(ii) CCN and TCN personal services contractors are also eligible to receive certain monetary and non-monetary USAID incentive awards. The list of incentive awards, eligibility, nomination, and approval processes are specified in internal Agency policies in ADS Chapter 309, available on the USAID website. These awards will be funded from the authorizations used to fund the PSC contract, and not from funds allocated for the OPM-administered awards program for USAID U.S. direct-hire employees.

(iii) Meritorious step increases for USAID CCN and TCN personal services contractors may be authorized provided the granting of such increases is the general practice locally.

(4) *Training.* CCN and TCN personal services contractors, are eligible for most of the training courses offered in the Training Course Schedule. However, applications will be processed on a case-by-case basis and are required to be approved by the contracting officer.

5. Soliciting for Personal Services Contracts

(a) *Technical Officer's Responsibilities.* The Technical Officer will prepare a written detailed statement of duties and a statement of minimum qualifications to cover the position being recruited for; the statement shall be included in the procurement request. The procurement request shall also include the following additional information as a minimum:

(1) The specific foreign location(s) where the work is to be performed, including any travel requirements (with an estimate of frequency);

(2) The length of the contract, with beginning and ending dates, plus any options for renewal or extension;

(3) The basic education, training, experience, and skills required for the position;

(4) A certification from the officer in the Mission responsible for the LEPCH or equivalent that the position has been reviewed and is properly classified as to a title, series and grade in accordance with the LEPCH. If the position does not fall within the LEPCH or equivalent system, and estimate of compensation based on subparagraphs 4(c)(2)(ii)(A) or (B) of this Appendix after consultations or in coordination with the contract officer or executive officer;

(5) A list of Government or host country furnished items (e.g., housing).

(b) *Contracting Officer's Responsibilities.* (1) The Contracting Officer will prepare the solicitation for personal services which shall contain:

(i) Three sets of certified biographical data and salary history. (Upon receipt, one copy of the above information shall be forwarded to the Project Officer);

(ii) A detailed statement of duties or a completed position description for the position being recruited for;

(iii) A copy of the prescribed contract Cover Page, Contract Schedule, and General Provisions as well as the FAR Clause to be included in full text and a list of those to be incorporated by reference; and

(iv) A copy of General Notice entitled ''Employee Review of the New Standards of Conduct'' dated October 30, 1992.

(2) The Contracting Officer shall comply with the limitations of AIDAR 706.302–70(c) as detailed in paragraph 5(c) below.

(c) *Competition.* (1) Under AIDAR 706.302–70(b)(1), Personal Services Contracts are exempt from the requirements for full and open competition with two limitations that must be observed by Contracting Officers:

(i) Offers are to be requested from as many potential offerors as is practicable under the circumstances, and

(ii) A justification supporting less than full and open competition must be prepared in accordance with FAR 6.303.

(2) A class justification was approved by the USAID Procurement Executive to satisfy the requirements of AIDAR 706.302–70(c)(2) for a justification in accordance with FAR 6.303. Use of this class justification for Personal Services Contracts with Cooperating Country Nationals and Third Country Nationals is subject to the following conditions:

(i) New contracts are publicized consistent with Mission/Embassy practice on announcement of direct hire FSN positions. Renewals or extensions with the same individual for continuing service do not need to be publicized.

(ii) A copy of the class justification (which was distributed to all USAID Contracting Officers via Contract Information Bulletin) must be included in the contract file, together with a written statement, signed by the Contracting Officer, that the contract is being awarded pursuant to AIDAR 706.302–70(b)(1); that the conditions for use of this class justification have been met; and that the cost of the contract is fair and reasonable. If the conditions in paragraphs (2)(i)

and (ii) are not followed, the Contracting Officer must prepare a separate justification as required under AIDAR 706.302–70(c)(2).

(3) Since the award of a personal services contract is based on technical qualifications, not price, and since the biographical data and salary history are used to solicit for such contracts, FAR Subparts 15.4 and 15.5 are inappropriate and shall not be used. Instead, the solicitation and selection procedures outlined in this appendix shall govern.

6. Negotiating a Personal Services Contract

Negotiating a Personal Services Contract is significantly different from negotiating a nonpersonal services contract because it establishes an employer-employee relationship; therefore, the selection and negotiations procedures are more akin to the personal selection procedures.

(a) *Technical Officer's Responsibilities.* The Technical Officer shall be responsible for reviewing and evaluating the applications received in response to the solicitation issued by the Contracting Officer. If deemed appropriate, interviews may be conducted with the applicants before the final selection is submitted to the Contracting Officer.

(b) *Contracting Officer's Responsibilities.* (1) The Contracting Officer shall forward a copy of biographical data and salary history received under the solicitation to the Technical Officer for evaluation.

(2) On receipt of the Technical Officer's recommendation, the Contracting Officer shall conduct negotiations with the recommended applicant. The terms and conditions of the contract will normally be in accordance with the local compensation plan which forms the basis for all compensation on payments paid to FSNs which includes CCNs and TCNs.

(3) The Contracting Officer shall use the certified salary history on the certified statement of biographical data and salary history as the basis for salary negotiations, along with the Technical Officer's cost estimate.

(4) The Contracting Officer will obtain necessary data for a security and suitability clearance to the extent required by USAID Handbook 6, Security or superseding ADS Chapters.

7. Executing a Personal Services Contract

Contracting activities, whether USAID/W or Mission, may execute Personal Services Contracts, provided that the amount of the contract does not exceed the contracting authority that has been redelegated to them. See AIDAR 701.601. In executing a personal service contract, the Contracting Officer is responsible for insuring that:

(a) The proposed contract is within his/her delegated authority;

(b) A written detailed statement of duties covering the proposed contract has been received;

(c) The proposed scope of work is contractible, contains a statement of minimum qualifications from the technical office requesting the services, and is suitable for a personal services contract in that:

(1) Performance of the proposed work requires or is best suited for an employer-employee relationship, and is thus not suited to the use of a non-personal services contract;

(2) The scope of work does not require performance of any function normally reserved for direct-hire Federal employees (under paragraph 4(b) of this appendix); and

(3) There is no apparent conflict of interest involved (if the Contracting Officer believes that a conflict of interest may exist, the question should be referred to the cognizant legal counsel);

(d) Selection of the contractor is documented and justified (AIDAR 706.302–70(b)(1) provides an exception to the requirement for full and open competition for Personal Services Contracts abroad; see paragraph 5(c) of this appendix);

(e) The standard contract format prescribed for a Cooperating Country National and a Third Country National personal services contract (Sections 9, 10, 11, 12, and 13 of this appendix as appropriate) is used, or that any necessary deviations are processed as required by AIDAR 701.470;

(f) The contractor has submitted the names, addresses, and telephone numbers of at least two persons who may be notified in the event of an emergency (this information is to be retained in the contract file);

(g) The contract is complete and correct and all information required on the contract Cover Page (USAID form 1420–36B) has been entered;

(h) The contract has been signed by the Contracting Officer and the contractor, and fully executed copies are properly distributed;

(i) The following clearances, approvals and forms have been obtained, properly completed, and placed in the contract file before the contract is signed by both parties:

(1) Security clearance to the extent required by USAID Handbook 6, *Security* or other superseding Chapters of the Automated Directives System;

(2) Mission, host country, and technical office clearance, as appropriate;

(3) Medical clearance(s) based on a full medical examination(s) and statement of medical opinion by a licensed physician. The physician's medical opinion must be in the possession of the Contracting Officer prior to signature of contract. If a TCN is recruited, medical clearance requirements apply to the contractor and each dependent who is authorized to accompany the contractor;

(4) The approval for any salary in excess of ES–6, in accordance with appendix G of this chapter;

(5) A copy of the class justification or other appropriate explanation and support required by AIDAR 706.302–70, if applicable;

(6) Any deviation to the policy or procedures of this appendix, processed and approved under AIDAR 701.470;

(7) The memorandum of negotiation;

(j) The position description is classified in accordance with the LEPCH, and the proposed salary is consistent with the local compensation plan or the alternate procedures established in 4(c)(2)(ii) above;

(k) Funds for the contract are properly obligated to preclude violation of the Anti-Deficiency Act, 31 U.S.C. 134 (the Contracting Officer ensures that the contract has been properly recorded by the appropriate accounting office prior to its release for the signature of the selected contractor);

(l) The contractor receives and understands USAID General Notice entitled ''Employee Review of the New Standards of Conduct'' dated October 30, 1992 and a copy is attached to each contract, as provided for in paragraph (c) of General Provision 2, Section 12;

(m) Agency conflict of interest requirements, as set out in the above notice are also met by the contractor prior to his/her reporting for duty;

(n) A copy of a Checklist for Personal Services Contractors which may be in the form set out above or another form convenient for the contracting officer, provided that a form containing all of the information described in this paragraph 7 shall be prepared for each PSC and placed in the contract file;

(o) In consultation with the regional legal advisor and/or the regional contracting officer, the contract is modified by deleting from the General Provisions (Sections 12 and 13 of this Appendix) the inapplicable clause(s) by a listing in the Schedule; and

(p) The block entitled, ''Acquisition and Assistance Request Document'' on the Cover Page of the contract format is completed by inserting the four-segment technical number as prescribed in USAID Handbook 18, the USAID Code Book appendix D or superseding ADS Chapter if the PSC is project-funded.

8. Contracting Format

The prescribed Contract Cover Page, Contract Schedules, General Provisions and FAR Clauses for personal service contracts for TCNs and CCNs covered by this Appendix are included as follows:

9. *''Cover Page'' for a Contract with a Cooperating Country National or with a Third Country National for Personal Services.*

10. *''Schedule'' for a Contract with a Cooperating Country National or Third Country National Personal Services Contracts.*

11. *''Optional Schedule'' for a Contract with a Cooperating Country National or Third Country National Personal Services Contracts.*

[Use of the Optional Schedule is intended to serve as an alternate procedure for OE funded Foreign Service National PSCs. The schedule was developed for use when the Contracting Officer anticipates incremental recurring cost funded contracts. It should be noted that the Optional Schedule eliminates the need to amend the contract each time funds are obligated. However, the Contracting Officer is required to amend each contract not less than twice during a 12 month period to ensure that the contract record of obligations is up to date and agrees with the figures in the master funding document.]

12. *''General Provisions'' for a Contract With a Cooperating Country National or With a Third Country National for Personal Services.*

13. *FAR Clauses to be incorporated in full text as well as by reference in Personal Services Contracts.*

9. ''Cover page'' for a Contract With a Cooperating Country National or With a Third Country National for Personal Services.

—AID Form 1420–36B (11/96)

U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523

CONTRACT WITH A COOPERATING COUNTRY NATIONAL FOR PERSONAL SERVICES ABROAD [ ]
CONTRACT WITH A THIRD COUNTRY NATIONAL FOR PERSONAL SERVICES ABROAD [ ]

Ethics Code *("X" Appropriate Box)* ☐ N ☐ C ☐ P

Negotiated Pursuant to Section 636(a)(3) of the Foreign Assistance Act of 1961, as amended, and Executive Order 11223	Contract Number	
Country of Performance	Amount Obligated This Action	Total Estimated Contract Cost $
Contract For Technical Services	Request Document Number	
For	Contractor *(Name, Street, City, State, Postal Zone)*	
Contracting Office *(Name and Address)*		
Administered By *(If other than Contracting Office)*	Effective Date	Estimated Completion Date
Cognizant Scientific/Technical Office *(Name, Office Symbol, Address)*	Accounting and Appropriation Data Resource Category _____ Organization _____ Request ID _____ Activity _____ Fund _____ Fund Account _____ Allotment Symbol _____	
Supervising Officer		
Payment Will be Made By	Type of Advance *("X" Appropriate Box)* ☐ INITIAL ☐ NONE AUTHORIZED	

The United States of America, hereinafter called the Government, represented by the Contracting Office executing this contract, and the Contractor agree that the Contractor shall perform all the services set forth in the attached Schedule, for the consideration stated therein. The rights and obligations of the parties to this contract shall be subject to and governed by the Schedule and the General Provisions. To the extent of any inconsistency between the Schedule or the General Provisions and any specifications or other provisions which are made a part of this contract, by reference or otherwise, the Schedule and the General Provisions shall control. To the extent of any inconsistency between the Schedule and the General Provisions, the Schedule shall control.

This Contract consists of this Cover Pager, the Schedule of _____pages, including the Table of Contents,

The General Provisions Section 12 and Section 13 FAR Clauses by reference.

	UNITED STATES OF AMERICA AGENCY FOR INTERNATIONAL DEVELOPMENT
Signature of Contractor	By *(Signature of Contracting Officer)*
Typed or Printed Name	Typed or Printed Name
Date	Date

AID 1420-36B (11/96)

10. "Schedule" for a Contract With a Cooperating Country National or Third Country National Personal Services Contracts

Contract No._____

Table of Contents

The Schedule on pages _____ through _____ consists of this Table of Contents, the following Articles, and General Provisions:

Article I Statement of Duties

Article II Period of Service
Article III Contractor's Compensation and Reimbursement
Article IV Costs Reimbursable and Logistic Support
Article V Precontract Expenses
Article VI Additional Clauses

General Provisions

The following provisions, numbered as shown below, omitting number(s) _____, are the General Provisions (GPs) of this Contract:

1. Definitions
2. Compliance with Applicable Laws and Regulations
3. Physical Fitness
4. Security
5. Workweek
6 Leave and Holidays
7. Social Security and Cooperating Country Taxes
8. Insurance
9. Travel and Transportation
10. Payment
11. Contractor-Mission Relationships
12. Termination
13. Allowances
14. Advance of Dollar Funds
15. Conversion of U.S. Dollars to Local Currency
16. Post of assignment Privileges
17. Release of Information
18. Notices
19. Incentive Awards
20. Training
21. Medical Evacuation Services

Schedule

NOTE: Use of the following Schedule is not mandatory.

The Schedule is intended to serve as a guideline and as a checklist for contracting offices in drafting contract schedules. Article language shall be changed to suit the needs of the particular contract. Special attention should be given to the financial planning sections where unnecessary line items should be eliminated.

ARTICLE I—STATEMENT OF DUTIES

[The statement of duties shall include:

A. General statement of the purpose of the contract.

B. Statement of duties to be performed.

C. Orientation or training to be provided by USAID.]

ARTICLE II—PERIOD OF SERVICE

Within _____ days after written notice from the Contracting Officer that all clearances, including the statement of medical opinion required under General Provision Clause 3, have been received, unless another date is specified by the contracting officer in writing, the contractor shall proceed to _____ and shall promptly commence performance of the duties specified above. The contractor's period of service shall be approximately _____ in _____. (Specify time of duties in each location.)

ARTICLE III—CONTRACTOR'S COMPENSATION AND REIMBURSEMENT

A. Except as reimbursement may be specifically authorized by the Mission Director or contracting officer, USAID shall pay the contractor compensation after it has accrued and make reimbursements, if any are due, in currency of the post or for necessary and reasonable costs actually incurred in the performance of this contract within the categories listed in Paragraph D, below, and subject to the conditions and limitations applicable thereto as set out herein and in the attached General Provisions (GPs).

B. The amount budgeted and available as personal compensation to the contractor is calculated to cover a calendar period of approximately _____ (days) (weeks) (months) (years) (which is to include) (1) vacation and sick leave which may be earned during contractor's tour of duty (GP Clause No. 6), (2) _____ days for authorized travel (GP Clause 9), and (3) _____ days for orientation and consultation if required by the Statement of Duties.

C. The contractor shall earn vacation leave at the rate of _____ days per year under the contract (provided the contract is in force for at least 90 days) and shall earn sick leave at the rate of _____ days per year under the contract.

D. Allowable Costs.

1. Compensation at the rate of LC _____ per (year) (month) (week) (day), equivalent to Grade FSN–_____/_____ in accordance with the Mission's Local Compensation Plan. If during the effective period of this contract the Local Compensation Plan is revised, contractor's compensation will be revised accordingly and contractor will be notified in writing by the contracting officer. Adjustments in compensation for periods when the contractor is not in compensable pay status shall be calculated as follows: Rate of LC _____ per (day) (hour).

LC _____

2. Overtime (Unless specifically authorized in the Schedule of this contract, no overtime hours shall be allowed hereunder.)

3. Travel and Transportation (Ref. GP Clause 9). (Includes the value of TRs furnished by the Government, not payable to contractor).

a. United States—$_____
b. International—$_____
c. Cooperating and Third Country—$_____, LC _____

Subtotals Item 3—$_____, LC _____

4. Subsistence or Per Diem (Ref. GP Clause 9).

a. United States—$_____

b. International—$_____
c. Cooperating and Third Country—$_____, LC_____
Subtotals Item 4—$_____, LC_____

5. Other Direct Costs

a. Physical Examination (Ref. GP Clause 3)—LC_____
b. Miscellaneous—LC_____
Subtotal Item—LC_____

Total Estimated Costs (Lines 1 thru 5) $_____ LC _____

E. Maximum U.S. Dollar and Local Currency Obligation.

In no event shall the maximum U.S. Dollar obligation under this contract exceed $_____ nor shall the maximum local currency obligation exceed LC _____. Contractor shall keep a close account of all obligations incurred and accrued hereunder and promptly notify the contracting officer whenever it appears that the said maximum is not sufficient to cover all compensation and costs reimbursable which are anticipated under the contract.

F. Under the Joint Incentive Awards Program for FSN monetary awards will be made pending availability of funds. The increase for the award will be effected by the execution of an SF–1126 which will be attached to the contract and will form a part of the contract. In no event may costs under the contract exceed the total amount obligated.

Meritorious Step Increases for FSN PSCs may be authorized provided the granting of such increase is the general practice locally.

ARTICLE IV—COSTS REIMBURSABLE AND LOGISTIC SUPPORT

A. General.

The contractor shall be provided with or reimbursed in local currency

(_____) for the following: [Complete]

B. Method of Payment of Local Currency Costs.

Those contract costs which are specified as local currency costs in Paragraph A, above, if not furnished in kind by the cooperating government or the Mission, shall be paid to the contractor in a manner adapted to the local situation, based on vouchers submitted in accordance with GP Clause 10. The documentation for such costs shall be on such forms and in such manner as the Mission Director shall prescribe.

C. Cooperating or U.S. Government Furnished Equipment and Facilities.

[List any logistical support, equipment, and facilities to be provided by the cooperating government or the U.S. Government at no cost to this contract; e.g., office space, supplies, equipment, secretarial support, etc., and the conditions, if any, for use of such equipment.]

ARTICLE V—PRECONTRACT EXPENSES

No expense incurred before signing of this contract will be reimbursed unless such expense was incurred after receipt and acceptance of a precontract expense letter issued to the contractor by the Contracting Officer, and then only in accordance with the provisions and limitations contained in such letter. The rights and obligations created by such letter shall be considered as merged into this contract.

ARTICLE VI—ADDITIONAL CLAUSES

[Additional Schedule Clauses may be added to meet specific requirements of an individual contract.]

11. Optional Schedule for a Contract With a Cooperating Country National or Third Country National Personal Services Contracts

Contract No. _____
Table of Contents
(Optional Schedule)

[Use of the Optional Schedule is not mandatory. It is intended to serve as an alternate procedure for OE funded Cooperating Country National and Third Country National PSCs. The schedule was developed for use when the Contracting Officer anticipates incremental recurring cost funded contracts.

It should be noted that use of the Optional Schedule eliminates the need to amend the contract each time funds are obligated. However, Contracting Officer is required to amend each contract not less than twice during a 12 month period to ensure that the contract record of obligations is up to date and agrees with the figures in the master funding document.]

The Schedule on pages _____ through _____ consists of this Table of Contents and the following Articles:

Article I Statement of Duties
Article II Period of Service
Article III Contractor's Compensation and Reimbursement
Article IV Costs Reimbursable and Logistic Support
Article V Precontract Expenses
Article VI Additional Clauses

General Provisions

The following provisions, numbered as shown below, omitting number(s) _____, are the General Provisions (GPs) of this contract.

1. Definitions
2. Compliance with Applicable Laws and Regulations
3. Physical Fitness
4. Security
5. Workweek
6. Leave and Holidays
7. Social Security and Cooperating Country Taxes
8. Insurance

9. Travel and Transportation
10. Payment
11. Contractor-Mission Relationships
12. Termination
13. Allowances
14. Advance of Dollar Funds
15. Conversion of U.S. Dollars to Local Currency
16. Post of Assignment Privileges
17. Release of Information
18. Notices
19. Incentive Awards
20. Training
21. Medical Evacuation Services

ARTICLE I—STATEMENT OF DUTIES

[The statement of duties shall include:

A. General statement of the purpose of the contract.

B. Statement of duties to be performed.

C. Orientation or training to be provided by USAID.]

ARTICLE II—PERIOD OF SERVICE

Employment under this contract is of a continuing nature. Its duration is expected to be part of a series of sequential contracts; all contract provisions and clauses and regulatory requirements concerning availability of funds and the specific duration of this contract shall apply.

Within 10 days after written notice from the Contracting Offices that all clearances have been received, unless another date is specified by the Contracting Officer in writing, the contractor shall proceed to (name place) and shall promptly commence performance of the duties specified in Article I of this contract. The contractor's period of service shall be approximately (specify duration from date to date).

ARTICLE III—CONTRACTOR'S COMPENSATION AND REIMBURSEMENT

A. Except as reimbursement may be specifically authorized by the Mission Director or Contracting Officer, USAID shall pay the contractor compensation after it has accrued and make reimbursements, if any are due in currency of the cooperating country (LC) in accordance with the prevailing practice of the post or for necessary and reasonable costs actually incurred in the performance of this contract within the categories listed in paragraph E, below, and subject to the conditions and limitations applicable thereto as set out herein and in the attached General Provisions (GPs).

B. The amount budgeted and available as personal compensation to the contractor is calculated to cover a calendar period of approximately _____ (days) (weeks) (months) (years) (which is to include) (1) vacation and sick leave which may be earned during the contractor's tour of duty (GP Clause No. 6), (2) _____ days for authorized travel (GP Clause 9), and (3) _____ days for orientation and consultation if required by the Statement of Duties.

C. The contractor shall earn vacation leave at the rate of _____ days per year under the contract (provided the contract is in force for at least 90 days) and shall earn sick leave at the rate of _____ days per year under the contract.

D. All employee rights and benefits from the previous contract or employment, i.e., accumulated annual and sick leave balances, original service computation dates, reserve fund contributions, accumulated compensatory time, social security contributions, seniority and longevity bonuses are considered allowable costs and as a continuation as long as the break in service does not exceed three days.

E. Allowable Costs.

1. The following illustrative budget details allowable costs under this contract and provides estimated incremental recurrent cost funding in the total amount shown. Additional funds for the full term of this contract will be provided by the preparation of a master PSC funding document issued by the Mission Controller for the purpose of providing additional funding for a specific period. The master PSC funding document will be attached to this contract and will form a part of the executed contract while also serving to amend the budget.

2. Overtime (Unless specifically authorized in the Schedule of this contract, no overtime hours shall be allowed hereunder.)

LC_____

3. Travel and Transportation (Ref. GP Clause 9). (Includes the value of TRs furnished by the Government, not payable to contractor).

a. United States—$_____
b. International—$_____
c. Cooperating and Third Country—$_____, LC _____
Subtotals Item 3—$_____, LC _____

4. Subsistence or Per Diem (Ref. GP Clause 9.)

a. United States—$_____
b. International—$_____
c. Cooperating and Third Country—$_____, LC _____
Subtotals Item 4—$_____, LC _____

5. Other Direct Costs.

a. Physical Examination (Ref. GP Clause 3)—$_____, LC _____
b. Miscellaneous—$_____, LC _____
Subtotals Item 5—$_____, LC _____

Total Estimated Costs (Lines 1 thru 5) $_____, LC _____

F. Allowable costs compensation and all terms and benefits of employment under this contract will be in accordance with the Mission's local compensation plan. Salary

changes and personnel-related contract actions will be made by processing the same forms as used in making such changes and actions for direct-hire FSN employees. When issued by the Contracting Officer, the forms utilized will be attached to the contract and will form a part of the contract terms and conditions.

Any adjustment or increase in the compensation granted to direct-hire employees under the local compensation plan will be allowed for in PSCs subject to the availability of funds. Such an adjustment will be effected by a mass pay adjustment notice from the Contracting Officer, which will be attached to the contract and form a part of the executed contract.

At the end of each year of satisfactory service, PSC contractors will be eligible to receive an increase equal to one annual step increase as shown in the local compensation plan, pending availability for funds. Such increase will be effected by the execution of an SF–1126, Payroll Change Slip which is to be attached to each contract and each action forms a part of the official contract file.

Under the Joint Inventive Awards Program for FSNs, monetary awards will be made pending availability of funds. The increase for the award will be effected by the execution of an SF–1126 which will be attached to the contract and will form a part of the contract. In no event may costs under the contract exceed the total amount obligated.

Meritorious Step Increases for FSN PSCs may be authorized provided the granting of such increase is the general practice locally.

The master PSC funding document may not exceed the term or estimated total cost of this contract. Notwithstanding that additional funds are obligated under this contract through the issuance and attachment of the master PSC funding document, all other contract terms and conditions remain in full effect.

ARTICLE IV—COSTS REIMBURSABLE AND LOGISTIC SUPPORT

A. General.

The contractor shall be provided with or reimbursed in local currency

_____ for the following: [Complete]

B. Method of Payment of Local Currency Costs.

Those contract costs which are specified as local currency costs in Paragraph A, above, if not furnished in kind by the cooperating government or the Mission, shall be paid to the contractor in a manner adapted to the local situation, based on vouchers submitted in accordance with GP Clause 10. The documentation for such costs shall be on such forms and in such manner as the Mission Director shall prescribe.

C. Cooperating or U.S. Government Furnished Equipment and Facilities.

[List any logistical support, equipment, and facilities to be provided by the cooperating government or the U.S. Government at no cost to this contract; e.g., office space, supplies, equipment, secretarial support, etc., and the conditions, if any, for use of such equipment.]

ARTICLE V—PRECONTRACT EXPENSES

No expense incurred before signing of this contract will be reimbursed unless such expense was incurred after receipt and acceptance of a precontract expense letter issued to the contractor by the Contracting Officer, and then only in accordance with the provisions and limitations contained in such letter. The rights and obligations created by such letter shall be considered as merged into this contract.

ARTICLE VI—ADDITIONAL CLAUSES

[Additional Schedule Clauses may be added to meet specific requirements of an individual contract.]

12. General Provisions for a Contract With a Cooperating Country National or With a Third Country National for Personal Services

To be used to contract with cooperating country nationals or third country nationals for personal services.

Index of Clauses

1. Definitions
2. Compliance with Applicable Laws and Regulations
3. Physical Fitness
4. Security
5. Workweek
6. Leave and Holidays
7. Social Security and Cooperating Country Taxes
8. Insurance
9. Travel and Transportation
10. Payment
11. Contractor-Mission Relationships
12. Termination
13. Allowances
14. Advance of Dollar Funds
15. Conversion of U.S. Dollars to Local Currency
16. Post of Assignment Privileges
17. Release of Information
18. Notices
19. Incentive Awards
20. Training
21. Medical Evacuation Services

1. Definitions (JUL 1993)

[For use in both Cooperating Country National (CCN) and Third Country National (TCN) Contracts].

(a) *USAID* shall mean the U.S. Agency for International Development.

(b) *Administrator* shall mean the Administrator or the Deputy Administrator of the U.S. Agency for International Development.

(c) *Contracting Officer* shall mean a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the Contracting Officer acting within the limits of their authority as delegated by the Contracting Officer.

(d) *Cooperating Country National* shall mean the individual engaged to serve in the Cooperating Country under this contract.

(e) *Cooperating Country* shall mean the foreign country in or for which services are to be rendered hereunder.

(f) *Cooperating Government* shall mean the government of the Cooperating Country.

(g) *Government* shall mean the United States Government.

(h) *Economy Class* air travel shall mean a class of air travel which is less than business or first class.

(i) *Local Currency* shall mean the currency of the cooperating country.

(j) *Mission* shall mean the United States USAID Mission to, or principal USAID office in, the Cooperating Country.

(k) *Mission Director* shall mean the principal officer in the Mission in the Cooperating Country, or his/her designated representative.

(l) *Third Country National* shall mean an individual (i) who is neither a citizen of the United States nor of the country to which assigned for duty, and (ii) who is eligible for return travel to the TCN's home country or country from which recruited at U.S. Government expenses, and (iii) who is on a limited assignment for a specific period of time.

(m) *Tour of Duty* shall mean the contractor's period of service under this contract and shall include, authorized leave and international travel.

(n) *Traveler* shall mean the contractor or dependents of the contractor who are in authorized travel status.

(o) *Dependents* shall mean spouse and children (including step and adopted children who are unmarried and under 21 years of age or, regardless of age, are incapable of self-support.

2. Compliance With Laws and Regulations Applicable Abroad (JUL 1993)

[For use in both CCN and TCN Contracts].

(a) *Conformity to Laws and Regulations of the Cooperating Country.*

Contractor agrees that, while in the cooperating country, he/she as well as authorized dependents will abide by all applicable laws and regulations of the cooperating country and political subdivisions thereof.

(b) *Purchase or Sale of Personal Property or Automobiles.* [For TCNs Only].

To the extent permitted by the cooperating country, the purchase, sale, import, or export of personal property or automobiles in the cooperating country by the contractor shall be subject to the same limitations and prohibitions which apply to Mission U.S.-citizen direct-hire employees.

(c) *Code of Conduct.* The contractor shall, during his/her tour of duty under this contract, be considered an ''employee'' (or if his/her tour of duty is for less than 130 days, a ''special Government employee'') for the purposes of, and shall be subject to, the provisions of 18 U.S.C. 202(a) the AID General Notice entitled Employee Review of the New Standards of Conduct. The contractor acknowledges receipt of a copy of these documents by his/her acceptance of this contract.

3. Physical Fitness (JUL 1993)

[For use in both CCN and TCN Contracts].

(a) *Cooperating Country National.* The contractor shall be examined by a licensed doctor of medicine, and shall obtain a statement of medical opinion that, in the doctor's opinion, the contractor is physically qualified to engage in the type of activity for which he/she is to be employed under the contract. A copy of the medical opinion shall be provided to the Contracting Officer before the contractor starts work under the contract. The contractor shall be reimbursed for the cost of the physical examination based on the rates prevailing locally for such examinations in accordance with Mission practice.

(b) *Third Country National.* (i) The contractor shall obtain a physical examination for himself/herself and any authorized dependents by a licensed doctor of medicine. The contractor shall obtain a statement of medical opinion from the doctor that, in the doctor's opinion, the contractor is physically qualified to engage in the type of activity for which he/she is to be employed under the contract, and the contractor's authorized dependents are physically qualified to reside in the cooperating country. A copy of that medical opinion shall be provided to the Contracting Officer prior to the dependents' departure for the cooperating country.

(ii) The contractor shall be reimbursed for the cost of the physical examinations mentioned above as follows: (1) based on those rates prevailing locally for such examinations in accordance with Mission practice or (2) if not done locally, not to exceed $100 per examination for the contractor's dependents of 12 years of age and over and not to exceed $40 per examination for contractor's dependents under 12 years of age. The contractor shall also be reimbursed for the cost of all immunizations normally authorized and extended to FSN employees.

4. Security (JUL 1993)

[For use in both CCN and TCN Contracts].

(a) The contractor is obligated to notify immediately the Contracting Officer if the contractor is arrested or charged with any offense during the term of this contract.

(b) The contractor shall not normally have access to classified or administratively controlled information and shall take conscious steps to avoid receiving or learning of such information. However, based on contractor's need to know, Mission may authorize access to administratively controlled information for performance of assigned scope of work on a case-by-case basis in accordance with USAID Handbook 6 or superseding ADS Chapters.

(c) The contractor agrees to submit immediately to the Mission Director or Contracting Officer a complete detailed report, marked ''Privileged Information'', of any information which the contractor may have concerning existing or threatened espionage, sabotage, or subversive activity against the United States of America or the USAID Mission or the cooperating country government.

5. Workweek (OCT 1987)

[For use in both CCN and TCN Contracts].

The contractor's workweek shall not be less than 40 hours, unless otherwise provided in the Schedule, and shall coincide with the workweek for those employees of the Mission or the cooperating country agency must closely associated with the work of this contract. If approved in advance in writing, overtime worked by the contractor shall be paid in accordance with the procedures governing premium compensation applicable to direct-hire foreign service national employees. If the contract is for less than full time (40 hours weekly), the leave earned shall be prorated.

6. Leave and Holidays (OCT 1987)

[For use in both CCN and TCN Contracts].

(a) *Vacation Leave*. The contractor may accrue, accumulate, use and be paid for vacation leave in the same manner as such leave is accrued, accumulated, used and paid to foreign service national direct-hire employees of the Mission. No vacation leave shall be earned if the contract is for less than 90 days. Unused vacation leave may be carried over under an extension or renewal of the contract as long as it conforms to Mission policy and practice. With the approval of the Mission Director, and if the circumstances warrant, a contractor may be granted advance vacation leave in excess of that earned, but in no case shall a contractor be granted advance vacation leave in excess of that which he/she will earn over the life of the contract. The contractor agrees to reimburse USAID for leave used in excess of the amount earned during the contractor's assignment under the contract.

(b) *Sick Leave*. The contractor may accrue, accumulate, and use sick leave in the same manner as such leave is accrued, accumulated and used by foreign service national direct-hire employees of the Mission. Unused sick leave may be carried over under an extension of the contract. The contractor will not be paid for sick leave earned but unused at the completion of this contract.

(c) *Leave Without Pay*. Leave without pay may be granted only with the written approval of the Contracting Officer or Mission Director.

(d) *Holidays*. The contractor shall be entitled to all holidays granted by the Mission to direct-hire cooperating country national employees who are on comparable assignments.

7. Social Security and Cooperating Country Taxes (DEC 1986)

[For use in both CCN and TCN Contracts].

Funds for Social Security, retirement, pension, vacation or other cooperating country programs as required by local law shall be deducted and withheld in accordance with laws and regulations and rulings of the cooperating country or any agreement concerning such withholding entered into between the cooperating government and the United States Government.

8. Insurance (JUL 1993)

[For use in both CCN and TCN Contracts].

(a) *Worker's Compensation Benefits*. The contractor shall be provided worker's compensation benefits under the Federal Employees Compensation Act.

(b) *Health and Life Insurance*. The contractor shall be provided personal health and life insurance benefits on the same basis as they are granted to direct-hire CCNs and TCN employees at the post under the Post Compensation Plan.

(c) *Insurance on Private Automobiles—Contractor Responsibility* [For use in TCN contracts]. If the contractor or dependents transport, or cause to be transported, any privately owned automobile(s) to the cooperating country, or any of them purchase an automobile within the cooperating country, the contractor agrees to ensure that all such automobile(s) during such ownership within the cooperating country will be covered by a paid-up insurance policy issued by a reliable company providing the following minimum coverages, or such other minimum coverages as may be set by the Mission Director, payable in U.S. dollars or its equivalent in the currency of the cooperating country: injury to persons, $10,000/$20,000; property damage, $5,000. The contractor further agrees to deliver, or cause to be delivered to the Mission Director, copies of the insurance policies required by this clause or satisfactory proof of the existence thereof, before such automobile(s) is operated within the cooperating country. The premium costs for such insurance shall not be a reimbursable cost under this contract.

(d) *Claims for Private Personal Property Losses* [For use in TCN contracts]. The contractor shall be reimbursed for private personal property losses in accordance with USAID Handbook 23, ''Overseas Support'', Chapter 10, or superseding ADS Chapter.

9. Travel and Transportation Expenses (JUL 1993)

[For use in both CCN and TCN Contracts as appropriate].

(a) *General.* The contractor will be reimbursed in currency consistent with the prevailing practice at post and at the rates established by the Mission Director for authorized travel in the cooperating country in connection with duties directly referable to work under this contract. In the absence of such established rates, the contractor shall be reimbursed for actual costs of authorized travel in the cooperating country if not provided by the cooperating government or the Mission in connection with duties directly referable to work hereunder, including travel allowances at rates prescribed by USAID Handbook 22, ''Foreign Service Travel Regulations'' or superseding ADS Chapters as from time to time amended. The Executive or Administrative Officer at the Mission may furnish Transportation Requests (TR's) for transportation authorized by this contract which is payable in local currency or is to originate outside the United States. When transportation is not provided by Government issued TR, the contractor shall procure the transportation, and the costs will be reimbursed. The following paragraphs provide specific guidance and limitations on particular items of cost.

(b) *International Travel.* For travel to and from post of assignment the TCN contractor shall be reimbursed for travel costs and travel allowances from place of residence in the country of recruitment (or other location provided that the cost of such travel does not exceed the cost of the travel from the place of residence) to the post of duty in the cooperating country and return to place of residence in the country of recruitment (or other location provided that the cost of such travel does not exceed the cost of travel from the post of duty in the cooperating country to the contractor's residence) upon completion of services by the individual. Reimbursement for travel will be in accordance with USAID's established policies and procedures for its CCN and TCN direct-hire employees and the provisions of this contract, and will be limited to the cost of travel by the most direct and expeditious route. If the contract is for longer than one year and the contractor does not complete one full year at post of duty (except for reasons beyond his/her control), the cost of going to and from the post of duty for the contractor and his/her dependents are not reimbursable hereunder. If the contractor serves more than one year but less than the required service in the cooperating country (except for reasons beyond his/her control) costs of going to the post of duty are reimbursable hereunder but the cost of going from post of duty to the contractor's permanent, legal place of residence at the time he or she was employed for work under this contract are not reimbursable under this contract for the contractor and his/her dependents. When travel is by economy class accommodations, the contractor will be reimbursed for the cost of transporting up to 10 kilograms/22 pounds of accompanied personal baggage per traveler in addition to that regularly allowed with the economy ticket provided that the total number of pounds of baggage does not exceed that regularly allowed for first class travelers. Travel allowances for travelers shall not be in excess of the rates authorized in the Standardized Regulations (Government Civilians, Foreign Areas) hereinafter referred to as the Standardized Regulations—as from time to time amended, for not more than the travel time required by scheduled commercial air carrier using the most expeditious route. One stopover enroute for a period of not to exceed 24 hours is allowable when the traveler uses economy class accommodations for a trip of 14 hours or more of scheduled duration. Such stopover shall not be authorized when travel is by indirect route or is delayed for the convenience of the traveler. Per diem during such stopover shall be paid in accordance with the Federal Travel Regulations as from time to time amended.

(c) *Local Travel.* Reimbursement for local travel in connection with duties directly referable to the contract shall not be in excess of the rates established by the Mission Director for the travel costs of travelers in the Cooperating Country. In the absence of such established rates the contractor shall be reimbursed for actual travel costs in the Cooperating Country by the Mission, including travel allowances at rates not in excess of those prescribed by the Standardized Regulations.

(d) *Indirect Travel for Personal Convenience of a TCN.* When travel is performed by an indirect route for the personal convenience of the traveler, the allowable costs of such travel will be computed on the basis of the cost of allowable air fare via the direct usually traveled route. If such costs include fares for air or ocean travel by foreign flag carriers, approval for indirect travel by such foreign flag carriers must be obtained from the Contracting Officer or the Mission Director before such travel is undertaken, otherwise only that portion of travel accomplished by the United States-flag carriers will be reimbursable within the above limitation of allowable costs.

(e) *Limitation on Travel by TCN Dependents.* Travel costs and allowances will be allowed for authorized dependents of the contractor and such costs shall be reimbursed for travel from place of abode in the country of recruitment to the assigned station in the Cooperating Country and return, only if the dependent remains in the Cooperating Country for

at least 9 months or one-half of the required tour of duty of the contract, whichever is greater, except as otherwise authorized hereunder for education, medical, or emergency visitation travel. Dependents of the TCN contractor must return to the country of recruitment or home country within thirty days of the termination or completion of the contractor's employment, otherwise such travel will not be reimbursed under this contract.

(f) *Delays Enroute.* The contractor may be granted reasonable delays enroute while in travel status when such delays are caused by events beyond the control of the contractor and are not due to circuitous routing. It is understood that if delay is caused by physical incapacitation, he/she shall be eligible for such sick leave as provided under the ''Leave and Holidays'' clause of this contract.

(g) *Travel by Privately Owned Automobile (POV).* If travel by POV is authorized in the contract schedule or approved by the Contracting Officer, the contractor shall be reimbursed for the cost of travel performed in his/her POV at a rate not to exceed that authorized in the Federal Travel Regulations plus authorized per diem for the employee and, if the POV is being driven to or from the cooperating country as authorized under the contract, for each of the authorized dependents traveling in the POV, provided that the total cost of the mileage and per diem paid to all authorized travelers shall not exceed the total constructive cost of fare and normal per diem by all authorized travelers by surface common carrier or authorized air fare, whichever is less.

(h) *Emergency and Irregular Travel and Transportation.* [For TCNs only]. Emergency transportation costs and travel allowances while enroute, as provided in this section, will be reimbursed not to exceed amounts authorized by the Foreign Service Travel Regulations for FSN direct-hire employees in like circumstances under the following conditions:

(1) The costs of going from post of duty in the cooperating country to another approved location for the contractor and authorized dependents and returning to post of duty, subject to the prior written approval of the Mission Director, when such travel is necessary for one of the following reasons:

(i) Need for medical care beyond that available within the area to which contractor is assigned.

(ii) Serious effect on physical or mental health if residence is continued at assigned post of duty.

(iii) Serious illness, injury, or death of a member of the contractor's immediate family or a dependent, including preparation and return of the remains of a deceased contractor or his/her dependents.

(2) Emergency evacuation when ordered by the principal U.S. Diplomatic Officer in the cooperating country. Transportation and travel allowances at safe haven and the transportation of household effects and automobile or storage thereof when authorized by the Mission Director, shall be payable in accordance with established Government regulations.

(3) The Mission Director may also authorize emergency or irregular travel and transportation in other situations when in his/her opinion the circumstances warrant such action. The authorization shall include the kind of leave to be used and appropriate restrictions as to time away from post, transportation of personal and household effects, etc.

(i) *Country of Recruitment Travel and Transportation.* [For TCNs only]. The contractor shall be reimbursed for actual transportation costs and travel allowances in the country of recruitment as authorized in the Schedule or approved in advance by the Contracting Officer or the Mission Director. Transportation costs and travel allowances shall not be reimbursed in any amount greater than the cost of, and time required for, economy-class commercial-scheduled air travel by the most expeditious route except as otherwise provided in paragraph (h) above, unless economy air travel is not available and the contractor adequately documents this to the satisfaction of the Contracting Officer in documents submitted with the voucher.

(j) *Rest and Recuperation Travel.* [For TCNs only].

If approved in writing by the Mission Director, the contractor and his/her dependents shall be allowed rest and recuperation travel on the same basis as direct-hire TCN employees and their dependents at the post under the local compensation plan.

(k) *Transportation of Personal Effects (Excluding Automobiles and Household Goods).* [For TCNs only].

(1) *General.* Transportation costs will be paid on the same basis as for direct-hire employees at post serving the same length tour of duty, as authorized in the schedule. Transportation, including packing and crating costs, will be paid for shipping from contractor's residence in the country of recruitment or other location, as approved by the Contracting Officer (provided that the cost of transportation does not exceed the cost from the contractor's residence) to post of duty in the cooperating country and return to the country of recruitment or other location provided the cost of transportation of the personal effects of the contractor not to exceed the limitations in effect for such shipments for USAID direct-hire employees in accordance with the Foreign Service Travel Regulations in effect at the time shipment is made. These limitations may be obtained from the Contracting Officer. The cost of

transporting household goods shall not exceed the cost of packing, crating, and transportation by surface common carrier.

(2) *Unaccompanied Baggage.* Unaccompanied baggage is considered to be those personal belongings needed by the traveler immediately upon arrival of the contractor and dependents. To permit the arrival of effects to coincide with the arrival of the contractor and dependents, consideration should be given to advance shipments of unaccompanied baggage. The contractor will be reimbursed for costs of shipment of unaccompanied baggage (in addition to the weight allowance for household effects) not to exceed the limitations in effect for USAID direct-hire employees in accordance with the Foreign Service Travel Regulations in effect when shipment is made. These limitations are available from the Contracting Officer. This unaccompanied baggage may be shipped as air freight by the most direct route between authorized points of origin and destination regardless of the modes of travel used.

(l) *Reduced Rates on U.S.-Flag Carriers.* Reduced rates on U.S.-flag carriers are in effect for shipments of household goods and personal effects of USAID contractors between certain locations. These reduced rates are available provided the shipper furnishes to the carrier at the time of the issuance of the Bill of Lading documentary evidence that the shipment is for the account of USAID. The Contracting Officer will, on request, furnish to the contractor current information concerning the availability of a reduced rate with respect to any proposed shipment. The contractor will not be reimbursed for shipments of household goods or personal effects in amounts in excess of the reduced rates which are available in accordance with the foregoing.

(m) *Transportation of things.* [For TCNs Only]. Where U.S. flag vessels are not available, or their use would result in a significant delay, the contractor may obtain a release from the requirement to use U.S. flag vessels from the Transportation Division, Office of Acquisition and Assistance, U.S. Agency for International Development, Washington, DC 20523–1419, or the Mission Director, as appropriate, giving the basis for the request.

(n) *Repatriation Travel.* [For TCNs Only]. Notwithstanding other provisions of this Clause 9, a TCN must return to the country of recruitment or to the TCN's home country within 30 days after termination or completion of employment or forfeit all right to reimbursement for repatriation travel. The return travel obligation [repatriation travel] assumed by the U.S. Government may have been the obligation of another employer in the area of assignment if the employee has been in substantially continuous employment which provided for the TCN's return to home country or country from which recruited.

(o) *Storage of household effects.* [For TCNs Only]. The cost of storage charges (including packing, crating, and drayage costs) in the country of recruitment of household goods of regular employees will be permitted in lieu of transportation of all or any part of such goods to the Cooperating Country under paragraph (k) above provided that the total amount of effects shipped to the Cooperating Country or stored in the country of recruitment shall not exceed the amount authorized for USAID direct-hire employees under the Foreign Service Travel Regulations. These amounts are available from the Contracting Officer.

10. Payment (MAY 1997)

[For use in both CCN and TCN Contracts].

(a) Payment of compensation shall be based on written documentation supporting time and attendance which may be (1) maintained by the Mission in the same way as for direct-hire CCNs and TCNs or (2) the contractor may submit such written documentation in a form acceptable to Mission policy and practice as required for other personal services contractors and as directed by the Mission Controller or paying office. The documentation will also provide information required to be filed under cooperating country laws to permit withholding by USAID of funds, if required, as described in the clause of these General Provisions entitled Social Security and Cooperating Country Taxes.

(b) Any other payments due under this contract shall be as prescribed by Mission policy for the type of payment being made.

11. Contractor-Mission Relationships (DEC 1986)

[For use in both CCN and TCN Contracts].

(a) The contractor acknowledges that this contract is an important part of the U.S. Foreign Assistance Program and agrees that his/her duties will be carried out in such a manner as to be fully commensurate with the responsibilities which this entails. Favorable relations between the Mission and the Cooperating Government as well as with the people of the cooperating country require that the contractor shall show respect for the conventions, customs, and institutions of the cooperating country and not become involved in any illegal political activities.

(b) If the contractor's conduct is not in accordance with paragraph (a), the contract may be terminated pursuant to the General Provision of this contract, entitled ''Termination.'' If a TCN, the contractor recognizes the right of the U.S. Ambassador to direct his/her immediate removal from any country when, in the discretion of the Ambassador, the interests of the United States so require.

(c) The Mission Director is the chief representative of USAID in the cooperating

country. In this capacity, he/she is responsible for the total USAID Program in the cooperating country including certain administrative responsibilities set forth in this contract and for advising USAID regarding the performance of the work under the contract and its effect on the U.S. Foreign Assistance Program. The contractor will be responsible for performing his/her duties in accordance with the statement of duties called for by the contract. However, he/she shall be under the general policy guidance of the Mission Director and shall keep the Mission Director or his/her designated representative currently informed of the progress of the work under this contract.

12. Termination (NOV 1989)

[For use in both CCN and TCN Contracts].

(This is an approved deviation to be used in place of the clause specified in FAR 52.249–12.)

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part:

(1) For cause, which may be effected immediately after establishing the facts warranting the termination, by giving written notice and a statement of reasons to the contractor in the event (i) the contractor commits a breach or violation of any obligations herein contained, (ii) a fraud was committed in obtaining this contract, or (iii) the contractor is guilty (as determined by USAID) of misconduct in the cooperating country. Upon such a termination, the contractor's right to compensation shall cease when the period specified in such notice expires or the last day on which the contractor performs services hereunder, whichever is earlier. No costs of any kind incurred by the contractor after the date such notice is delivered shall be reimbursed hereunder except the cost of return transportation (not including travel allowances), if approved by the Contracting Officer. If any costs relating to the period subsequent to such date have been paid by USAID, the contractor shall promptly refund to USAID any such prepayment as directed by the Contracting Officer.

(2) For the convenience of USAID, by giving not less than 15 calendar days advance written notice to the contractor. Upon such a termination, contractor's right to compensation shall cease when the period specified in such notice expires except that the contractor shall be entitled to any accrued, unused vacation leave, return transportation costs and travel allowances and transportation of unaccompanied baggage costs at the rates specified in the contract and subject to the limitations which apply to authorized travel status.

(3) For the convenience of USAID, when the contractor is unable to complete performance of his/her services under the contract by reason of sickness or physical or emotional incapacity based upon a certification of such circumstances by a duly qualified doctor of medicine approved by the Mission. The contract shall be deemed terminated upon delivery to the contractor of a termination notice. Upon such a termination, the contractor shall not be entitled to compensation except to the extent of any accrued, unused vacation leave, but shall be entitled to return transportation, travel allowances, and unaccompanied baggage costs at rates specified in the contract and subject to the limitations which apply to authorized travel status.

(b) 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.

13. Allowances (DEC 1986)

[For TCNs only].

Allowances will be granted to the contractor and authorized dependents on the same basis as to direct-hire TCN employees at the post under the Post Compensation Plan. The allowances provided shall be paid to the contractor in the currency of the cooperating country or in accordance with the practice prevailing at the Mission.

14. Advance of Dollar Funds (DEC 1986)

[For TCNs only].

If requested by the contractor and authorized in writing by the Contracting Officer, USAID will arrange for an advance of funds to defray the initial cost of travel, travel allowances, authorized precontract expenses, and shipment of personal property. The advance shall be granted on the same basis as to an USAID U.S.-citizen direct-hire employee in accordance with USAID Handbook 22, Chapter 4 or superseding ADS Chapters.

15. Conversion of U.S. Dollars to Local Currency (DEC 1986)

[For TCNs only].

Upon arrival in the cooperating country, and from time to time as appropriate, the contractor shall consult with the Mission Director or his/her authorized representative who shall provide, in writing, the policy the contractor shall follow in the conversion of one currency to another currency. This may include, but not be limited to, the conversion of said currency through the cognizant U.S. Disbursing Officer, or Mission Controller, as appropriate.

16. Post of Assignment Privileges (DEC 1986)

[For TCNs only].

Privileges such as the use of APO, PX's, commissaries and officer's clubs are established at posts abroad pursuant to agreements between the U.S. and host governments. These facilities are intended for and usually limited to U.S. citizen members of the official U.S. Mission including the Embassy, USAID, Peace Corps, U.S. Information Services and the Military. Normally, the

agreements do not permit these facilities to be made available to non-U.S. citizens if they are under contract to the United States Government. However, in those cases where the facilities are open to TCN contractor personnel, they may be used.

17. Release Of Information (DEC 1986)

[For use in both CNN and TCN Contracts].

All rights in data and reports shall become the property of the U.S. Government. All information gathered under this contract by the contractor and all reports and recommendations hereunder shall be treated as privileged information by the contractor and shall not, without the prior written approval of the Contracting Officer, be made available to any person, party, or government, other than USAID, except as otherwise expressly provided in this contract.

18. Notices (DEC 1986)

[For use in both CNN and TCN Contracts].

Any notice, given by any of the parties hereunder, shall be sufficient only if in writing and delivered in person or sent by telegraph, telegram, registered, or regular mail as follows:

(a) TO USAID: To the Mission Director of the Mission in the Cooperating Country with a copy to the appropriate Contracting Officer.

(b) TO THE CONTRACTOR: At his/her post of duty while in the Cooperating Country and at the contractor's address shown on the Cover Page of this contract or to such other address as either of such parties shall designate by notice given as herein required.

Notices hereunder shall be effective when delivered in accordance with this clause or on the effective date of the notice, whichever is later.

19. Incentive Awards

[Insert the following clause in all CCN and TCN contracts paid under the local compensation plan.]

Incentive Awards (DEC 2019)

(a) CCN and TCN personal services contractors of the Foreign Affairs Community are eligible for an interagency Mission incentive awards program. The program is administered by each post's (Embassy) Joint Country Awards Committee.

(b) CCN and TCN personal services contractors are also eligible to receive certain monetary and non-monetary USAID incentive awards in accordance with the AIDAR and USAID internal policy.

(c) Meritorious Step Increases.

CCNs and TCN personal services contractors paid under the local compensation plan are eligible to receive meritorious step increases provided the granting of such increases is the general practice locally.

20. Training (JUL 1993)

[For CNN and TCN Contracts].

The contractor may be provided job related training to develop growth potential, expand capabilities and increase knowledge and skills. The training may be funded under the personal services contract.

21. Medical Evacuation (MEDEVAC) Services (JUL 2007)

[For TCN Contracts Only].

(a) The PSC must obtain MEDEVAC service coverage including coverage for authorized dependents while performing personal services abroad.

(b) *Exceptions.* (1) A PSC and authorized dependents with a health insurance program that includes sufficient MEDEVAC coverage as approved by the Contracting Officer are not required to obtain MEDEVAC service coverage.

(2) The Mission Director at the post of assignment may make a written determination to waive the requirement for such coverage. The determination must be based on findings that the quality of local medical services or other circumstances obviate the need for such coverage for PSCs and their dependents located at post.

13. FAR Clauses

The following FAR Clauses are always to be used along with the General Provisions. They are required in full text.

1. Covenant Against Contingent Fees 52.203–5
2. Disputes 52.233–1 (Alternate 1)
3. Preference for U.S. Flag Air Carriers 52.247–63

The following FAR Clauses are to be used along with the General Provisions, and when appropriate, be incorporated in each personal services contract by reference:

1. Anti-Kickback Procedures 52.203–7
2. Limitation on Payments to Influence Certain Federal Transactions 52.203–12
3. Audit and Records—Negotiation 52.215–2
4. Privacy Act Notification 552.224–1
5. Privacy Act 52.224–2
6. Taxes—Foreign Cost Reimbursement Contracts 52.229–8
7. Interest 52.232–17
8. Limitation of Cost 52.232–20
9. Limitation of Funds 52.232–22
10. Assignment of Claims 52.232–23
11. Protection of Government Buildings, Equipment, and Vegetation 52.237–2
12. Notice of Intent to Disallow Costs 52.242–1
13. Inspection 52.246–5

14. Limitation of Liability—Services 52.246–25

(Authority: Sec. 621, Pub. L. 87–195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; and 3 CFR 1979 Comp., p. 435)

[62 FR 42929, Aug. 11, 1997, as amended at 72 FR 19670, Apr. 19, 2007; 84 FR 61834, Nov. 14, 2019; 85 FR 11861, Feb. 28, 2020]

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801.601 General.
801.602–3 Ratification of unauthorized commitments.
801.604 Contracting Officer's Representative (COR).

AUTHORITY: 38 U.S.C. 8123; 38 U.S.C. 8153; 38 U.S.C. 8303; 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 70744, Nov. 21, 2022, unless otherwise noted.

801.000 Scope of part.

This part includes general Department of Veterans Affairs (VA) Acquisition Regulation (VAAR) policies, including information regarding the maintenance and administration of the VAAR, acquisition policies and practices, and procedures for deviation from the VAAR and the Federal Acquisition Regulation (FAR).

Subpart 801.1—Purpose, Authority, Issuance

801.101 Purpose.

(a) VA established the VAAR to codify and publish uniform policies and procedures for VA's acquisition of supplies and services, including construction.

(b) The VAAR implements and supplements the FAR.

801.103 Authority.

The VA issues the VAAR under the authority of 41 U.S.C. 1707 and 48 CFR 1.301 through 1.304, and other authorities as cited.

801.104 Applicability.

The FAR and the VAAR apply to all FAR-based VA actions using appropriated funds unless otherwise specified in this regulation. Supply Fund monies (38 U.S.C. 8121) and General Post Funds (38 U.S.C. 8302) are appropriated funds.

801.104–70 Exclusions.

(a) *Restricted gifts.* The FAR and VAAR do not apply to purchases and contracts that use General Post Funds if using the FAR and the VAAR would infringe upon a donor's right to specify the exact item to be purchased and/or the source of supply (38 U.S.C. 8303).

(b) *Procurement of prosthetic appliances.* The VA may procure prosthetic appliances and necessary services required in the fitting, supplying, and training and use of prosthetic appliances by purchase, manufacture, contract, or in such other manner as the VA may determine to be proper, without regard to any other provision of law (38 U.S.C. 8123).

(c) *Sharing of health-care resources.* (1) To secure health-care resources which otherwise might not be feasibly available, or to effectively utilize certain other health-care resources, the VA may, when the VA determines it to be in the best interest of the prevailing standards of the Department medical care program, make arrangements, by contract or other form of agreement for the mutual use, or exchange of use,

of health-care resources between Department health-care facilities and any health-care provider, or other entity or individual.

(2) The VA may enter into a contract or other agreement under paragraph (c)(1) of this section if such resources are not, or would not be, used to their maximum effective capacity.

(3)(i) If the health-care resource required is a commercial service, the use of medical equipment or space, or research, and is to be acquired from an institution affiliated with the Department in accordance with 38 U.S.C. 7302, including medical practice groups and other entities associated with affiliated institutions, blood banks, organ banks, or research centers, the VA may make arrangements for acquisition of the resource without regard to any law or regulation (including any Executive order, circular, or other administrative policy) that would otherwise require the use of competitive procedures for acquiring the resource.

(ii) If the health-care resource required is a commercial service or the use of medical equipment or space, and is not to be acquired from an entity described in paragraph (c)(3)(i) of this section, any procurement of the resource may be conducted without regard to any law or regulation that would otherwise require the use of competitive procedures for procuring the resource, but only if the procurement is conducted in accordance with the simplified procedures prescribed in part 873. (38 U.S.C. 8153).

801.106 OMB approval under the Paperwork Reduction Act.

See VA Acquisition Manual (VAAM) M801.106 for a list of the information collection and recordkeeping requirements contained in this part that have been approved by the Office of Management and Budget.

Subpart 801.3—Agency Acquisition Regulations

801.301 Policy.

(a)(1) VA implementation and supplementation of the FAR is issued in the Veterans Affairs Acquisition Regulation (VAAR) under authorization and subject to the authority, direction, and control of the Secretary of Veterans Affairs. The VAAR contains—

(i) Requirements of law;

(ii) Agency policies;

(iii) Delegations of FAR authorities;

(iv) Deviations from FAR requirements; and

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

(2) Relevant internal procedures, guidance, and information (PGI) that do not meet the criteria in paragraph (a)(1) of this section are issued in the Veterans Affairs Acquisition Manual (VAAM).

(b) [Reserved]

801.304 Agency control and compliance procedures.

The Principal Executive Director of VA's Office of Acquisition, Logistics and Construction is designated as the Department's Chief Acquisition Officer. The Executive Director for the Office of Acquisition and Logistics (OAL) is designated as the Department's Senior Procurement Executive (SPE). The SPE is responsible for amending the VAAR for compliance with FAR 1.304.

Subpart 801.4—Deviations From the FAR

801.403 Individual deviations.

The SPE may authorize individual deviations from the FAR and VAAR in accordance with FAR 1.403 when an individual deviation is in the best interest of the Government.

801.404 Class deviations.

The SPE may authorize class deviations from the FAR and VAAR when a class deviation is in the best interest of the Government.

Subpart 801.6—Career Development, Contracting Authority, and Responsibilities

801.601 General.

(a) The Senior Procurement Executive is granted the authority to appoint and terminate contracting officers. This authority is further delegated to the heads of the contracting activities (HCA) and others as appropriate. The SPE may also delegate authority to execute, award, and administer contracts, purchase orders, and other agreements to other VA officials, such as HCAs and contracting officers. All delegations of authority will be made in writing.

(b) HCAs may authorize the use of ordering officers to order supplies and services in accordance with the ordering limits identified in the contract or agreement or the specific ordering guide. Ordering officers shall be delegated in writing. The written delegation must be specific to the contract or agreement and articulate the limitations of the delegated authority. Ordering officers shall only place orders against the contract or agreement if it is awarded to a single awardee. Ordering officers may not negotiate contract terms and conditions, determine price reasonableness, or determine best value. If the contracting officer determines prior to award that ordering officers will be authorized to place orders against a contract or agreement, the contracting officer will furnish the contractor with the names of individuals delegated ordering officer authority by separate letter upon issuance of the contract.

801.602–3 Ratification of unauthorized commitments.

(a) This section applies to unauthorized commitments, including any commitment made by a contracting officer that exceeds that contracting officer's contracting authority and unauthorized commitments made by a Government representative who lacked the authority to enter into that agreement on behalf of the Government.

(b) The approving authority and ratification official for unauthorized commitments is the HCA. This authority may be delegated to the chief of the contracting office or the equivalent for unauthorized commitments below $25,000.

801.604 Contracting Officer's Representative (COR).

When the contracting officer intends to designate a Contracting Officer's Representative for a solicitation or contract, the contracting officer must include the clause in 852. 201–70, Contracting Officer's Representative, in the solicitation and contract.

PART 802—DEFINITIONS OF WORDS AND TERMS

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 802.1—Definitions

802.101 Definitions.

A/E means architect/engineer.

Business associate (or *associate*) means an entity, including an individual (other than a member of the workforce of a covered entity), company, organization, or another covered entity, as defined by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104–191) Privacy Rule (45 CFR part 160), that performs or assists in the performance of a function or activity on behalf of the Veterans Health Administration (VHA) that involves the creating, receiving, maintaining, transmitting of, or having access to, protected health information (PHI), or that provides to or for VHA, certain services as specified in the HIPAA Privacy Rule that involve the disclosure of PHI to a contractor by VHA. The term also includes a subcontractor of a business associate that creates, receives, maintains, or transmits PHI or that stores, generates, accesses, exchanges, processes, or utilizes such PHI on behalf of the business associate.

Business Associate Agreement (BAA) means the agreement, as dictated by the HIPAA Privacy Rule (45 CFR part 160), between VHA and a business associate, which must be entered into in addition to the underlying contract for

services and before any release of PHI can be made to the business associate, in order for the business associate to perform certain functions or activities on behalf of VHA.

Chief Acquisition Officer (CAO) means the Principal Executive Director, Office of Acquisition, Logistics, and Construction.

COR means Contracting Officer's Representative.

FAR means the Federal Acquisition Regulation.

GAO means the Government Accountability Office.

Gray market items means original equipment manufacturer goods intentionally or unintentionally sold outside an authorized sales territory or sold by non-authorized dealers in an authorized sales territory.

HCA means the Head of the Contracting Activity, an individual appointed in writing by the SPE.

Information system means, pursuant to 38 U.S.C. 5727, a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information whether automated or manual.

Information technology (*see* FAR 2.101) also means Information and Communication Technology (ICT).

Information technology-related contracts means those contracts which include services (including support services) and related resources for information technology as defined in this section.

OGC means the Office of the General Counsel.

Ordering officer means the VA official authorized to order supplies and services against a FAR-based contract or agreement in accordance with the ordering limits identified in the contract or agreement or the specific ordering guide in accordance with 801.601(b).

Privacy officer means the VA official with responsibility for implementing and oversight of privacy related policies and practices that impact a given VA acquisition.

Public Law (Pub. L.) 109–461 means the Veterans Benefits, Health Care and Information Technology Act of 2006, as codified in 38 U.S.C. 8127 and 8128.

SDVOSB/VOSB when used as an initialism means a service-disabled veteran-owned small business (SDVOSB) and/or veteran-owned small business (VOSB) that has been found by VA eligible to participate in the Veterans First Contracting Program implemented at subpart 819.70 and listed in the Vendor Information Pages. The term is synonymous with VA or VIP-verified small business concerns owned and controlled by Veterans.

Security plan means a formal document that provides an overview of the security requirements for an information system or an information security program and describes the security controls in place or planned for meeting those requirements.

Sensitive personal information means, with respect to an individual, any information about the individual maintained by VA, including but not limited to the following:

(1) Education, financial transactions, medical history, and criminal or employment history.

(2) Information that can be used to distinguish or trace the individual's identity, including but not limited to name, Social Security Number, date and place of birth, mother's maiden name, or biometric records.

Service-disabled veteran-owned small business (SDVOSB) or small business concern owned and controlled by Veterans with service-connected disabilities has the same meaning as *service-disabled veteran-owned small business concern* defined in FAR 2.101, except that for acquisitions authorized by 38 U.S.C. 8127 and 8128 for the Veterans First Contracting Program, these businesses must be listed as verified in the VIP database. In addition, some SDVOSB listed in the VIP database may be owned and controlled by a surviving spouse. See definition of *surviving spouse* in this section.

Small business concern has the same meaning as defined in FAR 2.101.

SPE means the Senior Procurement Executive who is also the Executive Director, Office of Acquisition and Logistics. The SPE is responsible for the management direction of the VA acquisition system.

Surviving spouse means an individual who has been listed in the Department

of Veterans Affairs' (VA) Veterans Benefits Administration (VBA) database of veterans and family members. To be eligible for inclusion in the VetBiz.gov VIP database, the following conditions must apply:

(1) If the death of the veteran causes the small business concern to be less than 51 percent owned by one or more service-disabled veterans, the surviving spouse of such veteran who acquires ownership rights in such small business shall, for the period described below, be treated as if the surviving spouse were that veteran for the purpose of maintaining the status of the small business concern as a service-disabled veteran-owned small business.

(2) The period referred to above is the period beginning on the date on which the veteran dies and ending on the earliest of the following dates:

(i) The date on which the surviving spouse remarries;

(ii) The date on which the surviving spouse relinquishes an ownership interest in the small business concern;

(iii) The date that is 10 years after the date of the veteran's death; or

(iv) The date on which the business concern is no longer small under federal small business size standards.

(3) The veteran must have had a 100 percent service-connected disability rating or the veteran died as a direct result of a service-connected disability.

VA means the Department of Veterans Affairs.

VAAR means the Department of Veterans Affairs Acquisition Regulation.

VA Information Security Rules of Behavior for Organizational Users/VA National Rules of Behavior means a set of VA rules that describes the responsibilities and expected behavior of users of VA information or information systems.

VA Rule of Two means the determination process mandated in 38 U.S.C. 8127(d)(1) whereby a contracting officer of the Department shall award contracts on the basis of competition restricted to small business concerns owned and controlled by veterans if the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by Veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States. For purposes of this VA specific rule, a service-disabled veteran-owned small business (SDVOSB) or a veteran-owned small business (VOSB), must meet the eligibility requirements in 38 U.S.C. 8127(e), (f) and VAAR 819.7003 and be listed as verified in the Vendor Information Pages (VIP) database.

VA sensitive information means all VA data, on any storage media or in any form or format, which requires protection due to the risk of harm that could result from inadvertent or deliberate disclosure, alteration, or destruction of the information and includes sensitive personal information. The term includes information where improper use or disclosure could adversely affect the ability of VA to accomplish its mission, proprietary information, records about individuals requiring protection under various confidentiality provisions such as the Privacy Act and the HIPAA Privacy Rule, and information that can be withheld under the Freedom of Information Act. Examples of VA sensitive information include the following: individually-identifiable medical, benefits, and personnel information; financial, budgetary, research, quality assurance, confidential commercial, critical infrastructure, investigatory, and law enforcement information; information that is confidential and privileged in litigation such as information protected by the deliberative process privilege, attorney work-product privilege, and the attorney-client privilege; and other information which, if released, could result in violation of law or harm or unfairness to any individual or group, or could adversely affect the national interest or the conduct of Federal programs.

Vendor Information Pages (VIP) or *VIP database* means the Department of Veterans Affairs Office of Small and Disadvantaged Business Utilization (OSDBU) Center for Verification and Evaluation (CVE) Vendor Information Pages (VIP) database at *https://www.vetbiz.va.gov/vip/*. This site's database lists businesses that VA CVE has determined eligible for the Veterans First Contracting Program.

Veteran-owned small business (VOSB) has the same meaning as v*eteran-owned*

small business concern defined in FAR 2.101, except that for acquisitions authorized by 38 U.S.C. 8127 and 8128 for the Veterans First Contracting Program, these businesses must be listed as verified in the VIP database. SDVOSBs, including businesses whose SDVOSB status derive from ownership and control by a surviving spouse, are also considered VOSBs, as long as they are listed as eligible in VIP.

Veterans First Contracting Program means the program authorized by Public Law 109–461 (38 U.S.C. 8127 and 8128), as implemented in subpart 819.70. This program applies to all VA contracts (see FAR 2.101 for the definition of contracts) as well as Blanket Purchase Agreements (BPAs), Basic Ordering Agreements (BOAs), and orders against the Federal Supply Schedules (FSS), unless otherwise excluded by law.

VISN means Veterans Integrated Service Network, an integrated network of VA facilities that are focused on pooling and aligning resources to best meet local needs in the most cost-effective manner and provide greater access to care.

[73 FR 2717, Jan. 15, 2008, as amended at 74 FR 64629, Dec. 8, 2009; 83 FR 16208, Apr. 16, 2018; 85 FR 60074, Sept. 24, 2020; 86 FR 54403, Oct. 1, 2021; 87 FR 63002, Nov. 17, 2022; 87 FR 70748, Nov. 21, 2022; 88 FR 4744, Jan. 25, 2023]

PART 803—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 803.1 [Reserved]

Subpart 803.2—Contractor Gratuities to Government Personnel

Sec.

803.203 Reporting suspected violations of the Gratuities clause.
803.204 Treatment of violations.

Subparts 803.3—803.4 [Reserved]

Subpart 803.5—Other Improper Business Practices

803.570 Commercial advertising.
803.570–1 Policy.
803.570–2 Contract clause.

Subparts 803.6—803.8 [Reserved]

Subpart 803.11—Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

803.1103 Procedures.

Subpart 803.70 [Reserved]

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C.1702; and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 803.1 [Reserved]

Subpart 803.2—Contractor Gratuities to Government Personnel

803.203 Reporting suspected violations of the Gratuities clause.

(a) Any VA employee must report a suspected violation of the Gratuities clause to the contracting officer or a higher level VA official.

(b) The report must identify the contractor and the personnel involved, provide a summary of the pertinent evidence and circumstances that indicate a violation, and include any other available supporting documentation.

(c) The contracting officer or higher level official must supplement the file with appropriate information and promptly forward the report to the DSPE, with copies to the VA Office of the Inspector General and the Assistant Secretary for Management.

803.204 Treatment of violations.

In providing the notice and hearing required by FAR 3.204, the following applies—

(a) The SDO shall determine whether or not a violation of the Gratuities clause, 52.203–3 has occurred and what action will be taken under FAR 3.204(c).

(c) When the SDO determines that a violation has occurred and that debarment is being considered, he or she shall follow procedures at 809.406–3.

[83 FR 16208, Apr. 16, 2018]

Subparts 803.3—803.4 [Reserved]

Subpart 803.5—Other Improper Business Practices

803.570 Commercial advertising.

803.570–1 Policy.

VA policy prohibits contractors from making references in its commercial advertising to VA contracts in a manner that states or implies the Government approves or endorses the product or service or considers it superior to other products or services. The intent of this policy is to preclude the appearance of bias toward any product or service.

[83 FR 16208, Apr. 16, 2018]

803.570–2 Contract clause.

The contracting officer shall insert the clause at 852.203–70, Commercial advertising, in solicitations and contracts expected to equal or exceed the micro-purchase threshold.

Subparts 803.6—803.8 [Reserved]

Subpart 803.11—Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions

803.1103 Procedures.

(a) By use of the contract clause at 52.203–16, Preventing Personal Conflicts of Interest, the contracting officer shall require each contractor whose employees perform acquisition functions closely associated with inherently Governmental functions to obtain from each covered employee a signed non-disclosure agreement to prohibit disclosure of non-public information accessed through performance of a Government contract. See FAR 3.1103(a)(2)(iii).

[83 FR 16208, Apr. 16, 2018]

Subpart 803.70 [Reserved]

PART 804—ADMINISTRATIVE AND INFORMATION MATTERS

Subpart 804.1 [Reserved]

Subpart 804.13—Personal Identity Verification

Sec.
804.1303 Contract clause.

Subpart 804.19—Basic Safeguarding of Covered Contractor Information Systems

804.1900–70 Scope of this subpart.
804.1902 Applicability.
804.1970 Information security policy—contractor general responsibilities.
804.1903 Contract clause.

AUTHORITY: 38 U.S.C. 5723–5724, 5725(a)–(c); 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 804.1 [Reserved]

Subpart 804.13—Personal Identity Verification

804.1303 Contract clause.

The contracting officer shall insert the clause at 852.204–70, Personal Identity Verification of Contractor Personnel, in solicitations and contracts that require contractor employees to have routine access to a VA facility or to VA information systems. This clause is used in conjunction with FAR clause 52.204–9, Personal Identity Verification of Contractor Personnel.

[85 FR 36349, June 16, 2020]

Subpart 804.19—Basic Safeguarding of Covered Contractor Information Systems

SOURCE: 88 FR 4745, Jan. 25, 2023, unless otherwise noted.

804.1900–70 Scope of this subpart.

This subpart prescribes policies and procedures for information security and protection of VA information, information systems, and VA sensitive information, including sensitive personal information.

804.1902 Applicability.

This subpart applies to all VA 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 VA information.

804.1970 Information security policy—contractor general responsibilities.

Contractors, subcontractors, business associates, and their employees who are users of VA information or information systems, or have access to VA information and VA sensitive information shall—

(a) Comply with all VA information security and privacy program policies, procedures, practices, and related contract requirements, specifications, and clauses, this includes complying with VA privacy and confidentiality laws and implementing VA and Veterans Health Administration (VHA) regulations (*see* 38 U.S.C. 5701, 5705, 5721–5728, and 7332; 38 CFR 1.460 through 1.496, 1.500 through 1.527, and 17.500 through 17.511), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub. L. 104–191), and the Privacy Act of 1974 (as amended) (5 U.S.C. 522a);

(b) Complete VA security awareness training on an annual basis;

(c) Complete VHA's Privacy and HIPAA Training on an annual basis when access to protected health information (PHI) is required;

(d) Report all actual or suspected security/privacy incidents and report the information to the contracting officer and contracting officer's representative (COR), as identified in the contract or as directed in the contract, within one hour of discovery or suspicion;

(e) Comply with VA policy as it relates to personnel security and suitability program requirements for background screening of both employees and non-employees who have access to VA information systems and data;

(f) Comply with directions that may be issued by the contracting officer or COR, or from the VA Assistant Secretary for Information and Technology or a designated representative through the contracting officer or COR, directing specific activities when a security/privacy incident occurs;

(g) Sign an acknowledgment that they have read, understand, and agree to abide by the VA Information Security Rules of Behavior (VA National Rules of Behavior) as required by 38 U.S.C. 5723, FAR 39.105, and the clause at 852.204–71, Information and Information Systems Security, on an annual basis. The VA Information Security Rules of Behavior describe the responsibilities and expected behavior of contractors, subcontractors, business associates, and their employees who are users of VA information or information systems, information assets and resources, or have access to VA information;

(h) Maintain records and compliance reports regarding HIPAA Security and Privacy Rules (see 45 CFR part 160) compliance in order to provide such information to VA upon request to ascertain whether the business associate is complying with all applicable provisions under both rules' regulatory requirements; and

(i) Flow down requirements in all subcontracts and Business Associate Agreements (BAAs), at any level, as provided in the clause at 852.204–71, Information and Information Systems Security.

804.1903 Contract clause.

When the clause at FAR 52.204–21, Basic Safeguarding of Covered Contractor Information Systems is required to be included in accordance with FAR 4.1903, the contracting officer shall insert the clause at 852.204–71, Information and Information Systems Security.

SUBCHAPTER B—ACQUISITION PLANNING

PART 805 [RESERVED]

PART 806—COMPETITION REQUIREMENTS

Sec.

806.004–70 Definition.

Subpart 806.1—Full and Open Competition

806.102 Use of competitive procedures.

Subpart 806.2—Full and Open Competition After Exclusion of Sources

806.203 Set-asides for small business concerns.
806.270 Set-asides for verified Veteran-owned small businesses.

Subpart 806.3—Other Than Full and Open Competition

806.302 Circumstances permitting other than full and open competition.
806.302–5 Authorized or required by statute.
806.302–570 Noncompetitive procedures for verified Veteran-owned small businesses.
806.302–571 Authorized or required by statute—VA unique authorities.

Subpart 806.5—Advocates for Competition

806.501 Requirement.

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1303; 41 U.S.C. 1702; 41 U.S.C. 3304; and 48 CFR 1.301 through 1.304.

SOURCE: 86 FR 54115, Sept. 29, 2021, unless otherwise noted.

806.004–70 Definition.

As used in this part—

Health-care resources has the same definition as that provided in 873.102.

Subpart 806.1—Full and Open Competition

806.102 Use of competitive procedures.

(d)(3) Awards made using General Services Administration (GSA) or Department of Veterans Affairs (VA) Federal Supply Schedules (FSS) are considered competitive when awarded in accordance with the procedures specified in FAR part 8 and this part.

Subpart 806.2—Full and Open Competition After Exclusion of Sources

806.203 Set-asides for small business concerns.

(c) Subparts 819.5 and 819.70 prescribe the policies and procedures that shall be followed with respect to set-asides for small business and Veteran-owned small business concerns.

806.270 Set-asides for verified Veteran-owned small businesses.

(a) To fulfill the statutory requirements relating to Public Law 109–461, the Veterans Benefits, Health Care and Information Technology Act of 2006 (38 U.S.C. 8127–8128), contracting officers shall set aside solicitations in accordance with subpart 819.70 and the VA Rule of Two for Vendor Information Pages (VIP) verified service-disabled Veteran-owned small businesses (SDVOSBs) first, then Veteran-owned small businesses (VOSBs) (see 819.7005 and 819.7006). (38 U.S.C. 8127–8128)

(b) The requirement in this section to set aside procurements for VIP verified SDVOSBs and VOSBs applies to all types of contracts, including orders placed under GSA's Federal Supply Schedules (FSS) and indefinite-delivery contracts. (38 U.S.C. 8127–8128)

Subpart 806.3—Other Than Full and Open Competition

806.302 Circumstances permitting other than full and open competition.

806.302–5 Authorized or required by statute.

806.302–570 Noncompetitive procedures for verified Veteran-owned small businesses.

(a) *Sole source awards made to a verified SDVOSB or VOSB.* Full and open competition need not be provided for when awarding a sole source contract under paragraph (b) or (c) of this section, to a verified SDVOSB or VOSB in accordance with 819.7007 or 819.7008, respectively, as authorized. Contracts

awarded using the authority in this paragraph (a) shall be supported by the applicable justification and approval requirements of FAR 6.302–5(c)(2)(ii), 6.303, and 6.304.

(b) *Sole source awards below the simplified acquisition threshold.* (Citation: 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 8127(b)). A contracting officer may award a contract under the authority in this paragraph (b) to a VIP verified SDVOSB first, then VOSB if no SDVOSBs can fulfill the need, for an amount less than the simplified acquisition threshold, using procedures other than full and open competition. (38 U.S.C. 8127)

(c) *Sole source awards above the simplified acquisition threshold.* (Citation: 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 8127(c)). A contracting officer may award a contract to a VIP verified SDVOSB first, then VOSB if no SDVOSB can satisfy the need, using procedures other than full and open competition when—

(1) Such concern is determined to be a responsible source with respect to performance of such contract opportunity;

(2) The anticipated award price of the contract (including options) will exceed the simplified acquisition threshold, but will not exceed $5 million; and

(3) Contract award can be made at a fair and reasonable price that offers best value to the United States. (38 U.S.C. 8127)

806.302–571 Authorized or required by statute—VA unique authorities.

(a) *Authority.* (1) *Citation:* 41 U.S.C. 3304(a)(5). Contracting officers shall also cite the specific authorities in paragraph (b) of this section for the statutes related to the products and services procured.

(2) Full and open competition need not be provided for when a statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source.

(b) *Application.* The following products and services are authorized to be acquired from a specified source:

(1) *Prosthetic appliances and services.* Contracting activities may procure prosthetic appliances and necessary services required in the fitting, supplying, and training and use of prosthetic appliances by purchase, manufacture, contract, or in such other manner as determined to be proper, without regard to any other provision of law. (38 U.S.C. 8123)

(2) *Commercial health-care resources, the use of medical equipment or space, or research, and acquired from an institution affiliated with the Department of Veterans Affairs.* Contracting activities may procure health care resources, including resources from medical practice groups and other approved entities associated with affiliated institutions, blood banks, organ banks, or research centers from an institution affiliated with VA in accordance with 38 U.S.C. 7302. Acquisition of resources from medical practice groups and other entities shall be approved when determined by the contracting activity to be legally associated with affiliated institutions in accordance with 38 U.S.C. 7302. The justification and approval requirements of FAR 6.303 and paragraph (c) of this section do not apply. (38 U.S.C. 8153(a)(3)(A))

(3) *Commercial health-care resources, the use of medical equipment or space, and is not to be acquired from an entity described in paragraph (b)(2) of this section.* Contracting activities may procure health care resources from a non-affiliated institution in accordance with the simplified procedures prescribed in part 873. The justification and approval requirements of FAR 6.303 shall apply. (38 U.S.C. 8153(a)(3)(B))

(4) *Commercial health-care resources, the use of medical equipment or space, when not acquired from an affiliated institution described in paragraph (b)(2) of this section and to be conducted on a sole source basis.* The authority in this paragraph (b)(4) applies if not acquired from an affiliated institution in accordance with part 873. The justification and approval requirements of FAR 6.303 shall apply. (38 U.S.C. 8153(a)(3)(C)–(D))

(c) *Written justifications and approvals.* Contracts awarded using an authority in this section, with the exception of acquisitions authorized under paragraph (b)(2) of this section, shall be supported by the written justifications and approvals described in FAR 6.303 and 6.304.

(d) *Citation of specific authorities.* When a contracting officer enters into a contract without providing full and open competition for any of the following items or services, the contracting officer must cite 41 U.S.C. 3304(a)(5) and the following authorities that apply, in the written justifications and approvals as required by FAR 6.303 and 6.304:

(1) *Contracts for scarce medical specialist services.* (Citation: 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 7409.) Contracting officers may enter into contracts with:

(i) Schools and colleges of medicine, osteopathy, dentistry, podiatry, optometry, and nursing;

(ii) Clinics; and

(iii) Any other group or individual capable of furnishing such scarce medical specialist services at VA facilities, to include the services of physicians, dentists, podiatrists, optometrists, chiropractors, nurses, physician assistants, expanded-function dental auxiliaries, technicians, and other medical support personnel. (38 U.S.C. 7409)

(2) *Contracts or agreements to purchase or sell merchandise, equipment, fixtures, supplies and services for the operation of the Veterans Canteen Service.* (*Citation:* 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 7802(f).) Contracts or agreements may be entered into without regard to 41 U.S.C. 6101(b) through (d).

(3) *Contracts or leases for the operation of parking facilities established under authority of 38 U.S.C. 8109(b).* (*Citation:* 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 8109(f).) Contracts or leases may be entered into provided that the establishment, operation, and maintenance of such facilities have been authorized by the Secretary or designee.

(4) *Contracts for laundry and other common services, such as the purchase of steam, negotiated with non-profit, tax-exempt educational, medical, or community institutions.* (*Citation:* 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 8122(c).) Contracts may be entered into when specifically approved by the Secretary or designee and when such services are not reasonably available from private commercial sources.

(5) *Contracts or agreements with private or public agencies or persons for translator services.* (*Citation:* 41 U.S.C. 3304(a)(5), as authorized by 38 U.S.C. 513.)

Subpart 806.5—Advocates for Competition

806.501 Requirement.

The Associate Executive Director, Office of Procurement Policy, Systems and Oversight (AED, PPSO) is designated as the VA Advocate for Competition for the agency. The AED, PPSO may further delegate the authority in this section to appoint an alternate agency advocate for competition and shall designate procuring activity advocates for competition in accordance with FAR 6.501. A complete list of VA procuring activity advocates for competition can be found at*https://www.va.gov/oal/business/pps/competition-advocates.asp.*

PART 807 [RESERVED]

PART 808—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Sec.

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Subpart 808.6—Acquisition From Federal Prison Industries, Inc.

808.603 Purchase priorities.

Subpart 808.8 [Reserved]

AUTHORITY: 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 63002, Nov. 17, 2022, unless otherwise noted.

808.000 Scope of part.

This part deals with prioritizing sources of supplies and services for use by the Government based on unique VA statutory programs, as well as requirements when using the General Services Administration (GSA) Federal Supply Schedules program including the GSA delegated VA Federal Supply Schedule program.

808.001 General.

808.001–70 Definitions.

As used in this part—

Veterans Affairs (VA) Federal Supply Schedule (FSS) or ''VA FSS'' means FSS contracts awarded by the VA National Acquisition Center, under authority delegated by the General Services Administration (GSA) per FAR 8.402(a). VA FSS contracts include medical, dental, pharmacy and veterinary equipment and supplies in Federal Supply Classification (FSC) Group 65, instruments and laboratory equipment in FSC Group 66 and health care services in FSC Group 621.

808.002 Priorities for use of mandatory Government sources.

(a) *Priorities.* Contracting activities shall satisfy requirements for supplies and services from or through the mandatory sources listed in paragraphs (a)(1) and (2) of this section in descending order of priority:

(1) *Supplies.* (i) VA inventories including the VA supply stock program (41 CFR 101–26.704) and VA excess.

(ii) Excess from other agencies (see FAR subpart 8.1).

(iii) Federal Prison Industries, Inc. (see 808.603). Prior to considering award of a contract to Federal Prison Industries, Inc., contracting officers shall apply the VA Rule of Two (see 802.101) to determine whether a requirement should be awarded to veteran-owned small businesses under the authority of 38 U.S.C. 8127–28, by using the preferences and priorities in subpart 819.70. If an award is not made to a VIP-listed and verified service-disabled veteran-owned small business (SDVOSB)/veteran-owned small business (VOSB) as provided in subpart 819.70, FPI remains a mandatory source in accordance with FAR 8.002.

(iv) Supplies that are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled, through the AbilityOne Program (FAR subpart 8.7). Supplies that are on the Procurement List but which do not meet the definition of a covered product in paragraph (a)(1)(iv)(A) of this section are only required to be procured from a mandatory source in accordance with FAR 8.002 if an award is not made to a VIP-listed and verified SDVOSB/VOSB after following the procedures set forth in subpart 819.70.

(A) *Definition.* As used in this paragraph (a)(1)(iv), *covered product* means a product that—

(*1*) Is included on the Procurement List as authorized under 41 U.S.C. 8503(a) (see FAR 8.703) and was included on the Procurement List on or before December 22, 2006; or

(*2*) Meets the following criteria—

(*i*) Is a replacement for a product under this paragraph (a)(1)(iv);

(*ii*) Is essentially the same and meeting the same requirement as the product being replaced; and

(*iii*) The contracting officer determines the product meets the quality standards and delivery schedule requirements of VA.

(B) *Policy.* Except as provided in paragraphs (a)(1)(iv)(C) and (D) of this section, contracting officers shall procure covered products that are on the Procurement List through the AbilityOne Program as set forth in FAR subpart 8.7. Contracting officers shall not procure products that are on the Procurement List, but which do not meet the definition of a covered product using the procedures set forth in FAR subpart 8.7, unless award cannot be made to a VIP-listed and verified SDVOSB/VOSB pursuant to the procedures set forth in subpart 819.70.

(C) *Exception for certain contracts awarded in accordance with the Veterans First Contracting Program in subpart*

819.70. If a contract for a covered product awarded under the authority of 38 U.S.C. 8127(d)(1) to a VIP-listed SDVOSB or VOSB was in effect as of August 7, 2020, the requirement shall continue as an SDVOSB/VOSB set-aside in accordance with 819.7006 and 819.7007.

(D) *Termination or expiration of excepted contracts*. When a contract previously awarded as set forth in paragraph (a)(1)(iv)(C) of this section is terminated or expires, contracting officers shall procure such covered product through the AbilityOne Program as a priority mandatory Government source (see paragraph (a)(1)(iv)(B) of this section), provided the head of the contracting activity or designee determines there is no reasonable expectation that—

(*1*) Two or more SDVOSBs/VOSBs will submit offers; and

(*2*) Award can be made at a fair and reasonable price that offers best value to the United States.

(v) Wholesale supply sources, such as stock programs of the General Services Administration (GSA) (see 41 CFR 101–26.3), the Defense Logistics Agency (see 41 CFR 101–26.6), the Department of Veterans Affairs (see 41 CFR 101–26.704), and military inventory control points.

(2) *Services*. Services that are on the Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled, through the AbilityOne Program (FAR subpart 8.7). For services that are on the Procurement List, but which do not meet the definition of a covered service in paragraph (a)(2)(i) of this section are only required to be procured from a mandatory source in accordance with FAR 8.002 if an award is not made to a VIP-listed and verified SDVOSB/VOSB after following the procedures set forth in subpart 819.70.

(i) *Definition*. As used in this paragraph (a)(2)—

Covered service means a service that—

(*1*) Is included on the Procurement List as authorized under 41 U.S.C. 8503(a) (see FAR 8.703) and was included on the Procurement List on or before December 22, 2006; or

(*2*) Meets the following criteria—

(*i*) Is a replacement for a service under this paragraph (a)(2);

(*ii*) Is essentially the same and meeting the same requirement as the service being replaced; and

(*iii*) The contracting officer determines the service meets the quality standards and delivery schedule requirements of VA.

(ii) *Policy*. Except as provided in paragraphs (a)(2)(iii) and (iv) of this section, contracting officers shall procure covered services that are on the Procurement List through the AbilityOne Program as set forth in FAR subpart 8.7. Contracting officers shall not procure services that are on the Procurement List, but which do not meet the definition of a covered service using the procedures set forth in FAR subpart 8.7, unless award cannot be made to a VIP-listed and verified SDVOSB/VOSB pursuant to the procedures set forth in subpart 819.70.

(iii) *Exception for certain contracts awarded in accordance with the Veterans First Contracting Program in subpart 819.70*. If a contract for a covered service awarded under the authority of 38 U.S.C. 8127(d)(1) to a VIP-listed SDVOSB or VOSB was in effect as of August 7, 2020, the requirement shall continue as an SDVOSB/VOSB set-aside in accordance with 819.7006 and 819.7007.

(iv) *Termination or expiration of certain excepted contracts*. When a contract previously awarded as set forth in paragraph (a)(2)(iii) of this section is terminated or expires, contracting officers shall procure such covered service through the AbilityOne Program as a priority mandatory Government source (see paragraph (a)(2)(ii) of this section), provided the head of the contracting activity or designee determines there is no reasonable expectation that—

(A) Two or more SDVOSBs/VOSBs will submit offers; and

(B) Award can be made at a fair and reasonable price that offers best value to the United States.

(b) *Unusual and compelling urgency*. The contracting officer may use a source other than those listed in paragraph (a) of this section when the need for supplies or services is of an unusual and compelling urgency (see FAR 6.302–2, 8.405–6, and 13.106–1 and part 806 for justification requirements).

808.004 Use of other sources.

808.004–70 Use of other priority sources.

(a) *Veterans contracting priority.* In order to fulfill the requirements of 38 U.S.C. 8127–8128 (see subpart 819.70), contracting officers shall award contracts (see FAR 2.101 for the definition of contracts), as well as Blanket Purchase Agreements (BPAs), and orders against VA and GSA Federal Supply Schedules (FSS), providing priority in the awarding of such contracts to VIP-listed SDVOSBs first, then VOSBs.

(b) *Strategic sourcing priorities and application of the VA Rule of Two.* To provide medical supplies in Federal Supply Classification (FSC) groups 65 and 66 efficiently and effectively the VA, through previous reform initiatives, has implemented key strategic sourcing contract vehicles (*e.g.*, prime-vendor, national contracts, VA FSS). If these strategic sourcing contracts were subject to the VA Rule of Two (see 802.101), they may be determined mandatory by the head of the contracting activity. Contracting officers shall consider these priority contract vehicles before using other existing contract vehicles.

Subpart 808.4—Federal Supply Schedules

808.402 General.

(a) GSA has delegated authority to the VA to procure medical equipment, supplies, services and pharmaceuticals under the VA Federal Supply Schedule (FSS) program. The VA FSS program includes medical supplies in Federal Supply Classification (FSC) Groups 65 and 66 and services in FSC 621 for Professional and Allied Healthcare Staffing Services and Medical Laboratory Testing and Analysis Services.

808.404 Use of Federal Supply Schedules.

808.404–70 Use of Federal Supply Schedules—the Veterans First Contracting Program.

(a) The Veterans First Contracting Program, implemented in subpart 819.70 pursuant to 38 U.S.C. 8127–8128, applies to BPAs, and orders under FAR subpart 8.4 and has precedence over other small business programs.

(b) Contracting officers, when establishing a BPA or placing an order against the FSS, shall ensure that priorities for veteran-owned small businesses are implemented within the VA hierarchy of small business program preferences in subpart 819.70. Specifically, the contracting officer will consider preferences for verified SDVOSBs first, then preferences for verified VOSBs. These priorities will be followed by preferences for other small businesses in accordance with 819.7005.

(c) If unable to satisfy requirements for supplies and services from the mandatory sources in 808.002 and 808.004–70, contracting officers may consider commercial sources in the open market (see FAR 8.004(b)) if an open market acquisition is most appropriate (see FAR 8.004) and a VA Rule of Two (see 802.101) determination is made (see subpart 819.70).

(d) When the servicing agency will award contracts under an interagency agreement on behalf of the VA, the contracting officer shall ensure the interagency acquisition complies with FAR subpart 17.5 and subpart 817.5 and includes terms requiring compliance with the VA Rule of Two (see 817.501).

808.405 Ordering procedures for Federal Supply Schedules.

808.405–70 Set-aside procedures for VA and GSA Federal Supply Schedules.

To satisfy VA legislative requirements, contracting officers shall use the supplemental ordering procedures of this section when establishing a BPA or placing an order for supplies or services under this subpart as follows:

(a) *When market research supports set-asides.* Pursuant to 38 U.S.C. 8127, contracting activities shall set-aside BPAs and orders for VIP-listed SDVOSBs or VOSBs when, based on research, the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by Veterans or owned and controlled by Veterans with service-connected disabilities will submit offers and that award can be made at a fair and reasonable price that offers best value to the United States. When the VA Rule of Two (see 802.101) is met:

(1) The set-aside requirements as provided in 819.7006 and 819.7007 are mandatory.

(2) The requirements in FAR 8.405–1, 8.405–2, and 8.405–3 apply, except only quotes received from verified (*i.e.*, VIP-listed) and eligible SDVOSBs or VOSBs will be considered.

(3) The eligibility requirements of 819.7003, 819.7006, and 819.7007 apply, including the requirement for offerors to be VIP-listed at the time they submit offers/quotes as well as at the time awards are made.

(4) The contracting officer shall notify potential offerors of the unique VA verification requirements by including in the solicitation the applicable set-aside clause prescribed at 819.7011.

(b) *When market research does not support set-asides.* Pursuant to 38 U.S.C. 8128 and to the extent that market research does not support an SDVOSB or VOSB set-aside in either FSS or the open market, the contracting activity shall give priority in the award of orders placed under this part to VIP-listed SDVOSBs/VOSBs through the use of evaluation preferences giving priority to SDVOSBs first, then to a lesser extent VOSBs, and finally to any firm that proposes to use SDVOSBs/VOSBs as subcontractors. Contracting officers must use the clause prescribed in 808.405–570(b).

(c) *SDVOSB/VOSB eligibility requirements.* The SDVOSB and VOSB eligibility requirements in 819.7003 apply, including current SDVOSB and VOSB VIP-listed status at the time of submission of offer/quote and at time of award. The offeror must also represent that it meets the small business size standard for the assigned North American Industry Classification System (NAICS) code as well as other small business requirements (including completing the certification found in 852.219–75 or 852.219–76.

808.405–570 Small business set-asides and preferences—Veterans First Contracting Program clauses.

(a) When setting aside an order pursuant to 808.405–70(a), the applicable clause prescribed in 819.7011 for SDVOSB/VOSB set-asides shall be used.

(b) When an SDVOSB/VOSB set-aside is not feasible, the ordering activity shall use the clause at 852.208–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors—Orders or BPAs, for task orders, delivery orders, or BPAs using evaluation factors other than price alone.

(c) The ordering activity shall insert the clause at 852.208–71, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factor Commitments—Orders or BPAs, in request for quotes and resulting orders that include clause 852.208–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors—Orders or BPAs.

808.470 Ordering Officers.

In accordance with 801.601, when authorized, ordering officers may place orders for supplies and services against agreements or task or delivery orders established by a contracting officer against Federal Supply Schedules within the ordering limits identified in the contract or agreement or the specific ordering guide when funding is available. Ordering officers shall only place orders against the order or agreement if it is awarded to a single awardee. The contracting officer that awarded the Blanket Purchase Agreements (BPA) or order will provide the contractor a list of authorized ordering officers. Any modifications to the agreement or order must be performed by a contracting officer.

[87 FR 70748, Nov. 21, 2022]

Subpart 808.6—Acquisition From Federal Prison Industries, Inc.

808.603 Purchase priorities.

A waiver from Federal Prison Industries is not needed when comparable supplies and services are procured in accordance with subpart 819.70.

Subpart 808.8 [Reserved]

PART 809—CONTRACTOR QUALIFICATIONS

Subpart 809.1—Responsible Prospective Contractors

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809.106 Preaward surveys.
809.106–1 Conditions for preaward surveys.

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Subpart 809.4—Debarment, Suspension, and Ineligibility

809.400 Scope of subpart.
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Subpart 809.5—Organizational and Consultant Conflicts of Interest

809.507 Solicitation provisions and contract clause.
809.507–1 Solicitation provisions.

AUTHORITY: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 809.1—Responsible Prospective Contractors

809.106 Pre-award surveys.

809.106–1 Conditions for pre-award surveys.

(a) Except as provided in paragraphs (b) through (e) of this section, a committee under the direction of the contracting officer and composed of representatives of the medical service or using service chiefs or designees appointed by the facility or VISN director will conduct a pre-award on-site evaluation of the plant, personnel, equipment and processes of the prospective contractor for contracts covering the products and services of the following:

(1) Bakeries.

(2) Dairies.

(3) Ice cream plants.

(4) Laundry and dry cleaning activities.

(b) Before any inspection, the contracting officer will determine whether another VA facility or another Federal agency has recently inspected and approved the plant.

(1) The contracting officer will accept an approved inspection report of another VA facility.

(2) If another Federal agency made a plant inspection not more than 6 months before the proposed VA contract period, the contracting officer may accept an approved inspection report of that other Federal agency as satisfactory evidence that the facilities of the bidder meet the bid requirements.

(c) VA will not conduct a pre-award on-site evaluation of a dairy plant when VA receives an acceptable bid from a supplier of dairy products designated as No.1 in the Federal Specifications if the following conditions are met:

(1) The supplier has received a pasteurized milk rating of 90 percent or more for the type of product being supplied, on the basis of the U.S. Public Health Service milk ordinance and code.

(2) The rating is current (not over 2 years old) and has been determined by a certified State milk sanitation rating officer in the State of origin or by the Public Health Service. The contractor must maintain the rating of 90 percent or more during the period of the contract.

(3) The solicitation specifications must include the requirements in paragraphs (c)(1) and (2) of this section.

(d) A dairy plant that does not meet paragraph (c) of this section may offer only dairy products designated as No. 2 in the Federal Specifications. VA will make an award to such a firm only after it completes a pre-award on-site evaluation conducted under paragraph (a) of this section.

(e) Before it makes an open market purchase of fresh bakery products (such as pies, cakes, and cookies), VA will inspect and evaluate the plant where these products are produced or

prepared under paragraph (a) of this section. VA will make an on-site evaluation at least annually and record the results on VA Form 10–2079, Inspection Report of Bakery.

Subpart 809.4—Debarment, Suspension, and Ineligibility

SOURCE: 85 FR 60074, Sept. 24, 2020, unless otherwise noted.

809.400 Scope of subpart.

This subpart implements FAR subpart 9.4 and prescribes VA's procedures and related actions for the suspension and debarment of contractors.

809.402 Policy.

(b) Statutory debarments pursuant to the authority of 38 U.S.C. 8127(g), Enforcement Penalties for Misrepresentation, are mandatory when the determination is made that a business concern has willfully and intentionally misrepresented its status as a service-disabled, veteran-owned small business (SDVOSB) or veteran-owned small business (VOSB).

809.403 Definitions.

Suspension & Debarment (S&D) Committee means a committee authorized by the SDO to assist the SDO with suspension and debarment related matters.

Suspending and Debarring Official (SDO) means the individual responsible for final decisions regarding suspension and debarment, as appointed by the agency.

809.405 Effect of listing.

The authority under FAR 9.405(a), 9.405(d)(2), and 9.405(d)(3) to determine whether to solicit from, evaluate bids or proposals from, or award contracts to contractors with active exclusions in the System for Award Management (SAM) is delegated to the Suspending and Debarring Official (SDO). This authority is further delegated to the HCAs, who may delegate this authority, in writing, to a designee.

809.405–1 Continuation of current contracts.

(a) Notwithstanding the suspension, proposed debarment, or debarment of a contractor, VA may continue contracts or subcontracts in existence at the time the contractor was suspended, proposed for debarment, or debarred, unless the cognizant head of the contracting activity (HCA) directs otherwise. Examples of factors to be considered include, but are not limited to, potential costs associated with a termination, possible disruption to VA program objectives, and integrity of VA acquisition programs.

(b) Authority to make the determinations under FAR 9.405–1(b) is delegated to the SDO and is further delegated to the HCA, who may delegate this authority, in writing, to a designee. The HCA or their designee must make a written determination of the compelling reasons in accordance with FAR 9.405–1(b). Compelling reasons for the purposes of FAR 9.405–1(b) include, but are not limited to, urgency of the need for new or continued work, lengthy time period to acquire the new work from other sources and meeting estimated quantity for requirements contracts.

809.405–2 Restrictions on subcontracting.

Authority to make the written determination required under FAR 9.405–2 consenting to a contractor's use of a subcontractor who is suspended, proposed for debarment, or debarred is delegated to the SDO. This authority is further delegated to the HCA, who may delegate this authority, in writing, to a designee.

809.406 Debarment.

809.406–1 General.

(a) For the purposes of FAR 9.406–1, the SDO's authority includes debarments pursuant to the Federal Management Regulation at 41 CFR 102–117.295. In addition to the factors listed in FAR 9.406–1, the SDO may consider the following examples before arriving at a debarment decision:

(1) Whether the contractor had a mechanism, such as a hotline, by which

employees could have reported suspected instances of improper conduct, and instructions in place that encouraged employees to make such reports; or

(2) Whether the contractor conducted periodic reviews of company business practices, procedures, policies, and internal controls for compliance with standards of conduct and the special requirements of Government contracting.

(c) As provided in FAR 9.406–1(c), authority to determine whether to continue business dealings between VA and a contractor suspended, proposed for debarment, or debarred is delegated to the SDO.

809.406–2 Causes for debarment.

809.406–270 Additional causes for debarment.

(a) *Discretionary causes.* (1) In addition to the causes listed in FAR 9.406–2 (a) through (c), the SDO may debar contractors, based upon a preponderance of the evidence (as defined at FAR 2.101), for the Government's protection, for—

(i) Any deliberate violation of the limitation on subcontracting clause requirements for acquisitions under subpart 819.70; or

(ii) Failure to observe the material provisions of a voluntary exclusion or an administrative agreement.

(2) The period of debarment shall be commensurate with the seriousness of the action.

(b) *Statutory cause.* (1) Pursuant to 38 U.S.C. 8127(g), Enforcement Penalties for Misrepresentation, the SDO shall debar, from contracting with VA, for a period of not less than five years, any business concern that has willfully and intentionally misrepresented the status of that concern as a small business concern owned and controlled by Veterans or as a small business concern owned and controlled by service-disabled Veterans.

(2) Debarment of a business concern pursuant to 38 U.S.C. 8127(g) shall include the debarment of all principals in the business concern. Debarment shall be for a period of not less than five years.

(3) ''Willful and intentional'' misrepresentations, for the purpose of debarment actions taken pursuant to 38 U.S.C. 8127(g), are defined as deliberate misrepresentations concerning the status of the concern as a small business concern owned and controlled by Veterans or as a small business concern owned and controlled by service-disabled Veterans as supported by the preponderance of evidence. Examples of a preponderance of evidence for deliberate misrepresentation of SDVOSB and/or VOSB status include but are not limited to: Criminal convictions, plea agreements, deferred prosecution agreements, Board of Contract Appeals decisions, and admissions of guilt.

809.406–3 Procedures.

(a) Any individual may submit a referral to debar an individual or contractor to the SDO or to the S&D Committee. The referral for debarment shall be supported with evidence of a cause for debarment listed in FAR 9.406–2, or 809.406–2. The SDO shall forward referrals for debarment to the S&D Committee. If the referring individual is a VA employee and the referral for debarment is based on possible criminal or fraudulent activities, the VA employee shall also refer the matter to the VA Office of Inspector General.

(b) When the S&D Committee finds preponderance of the evidence for a cause for debarment, as listed in FAR 9.406–2 or 809.406–2, it shall prepare a recommendation and draft notice of proposed debarment for the SDO's consideration.

(c) VA shall send the notice of proposed debarment to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery. In the case of a contractor, VA may send the notice of proposed debarment to any partner, principal, officer, director, owner or co-owner, or joint venture. The S&D Committee concurrently shall list the appropriate parties as excluded in the SAM in accordance with FAR 9.404.

(d) If VA does not receive a reply from the contractor within 30 days

after sending the notice of proposed debarment, the S&D Committee shall prepare a recommendation and refer the case to the SDO for a decision on whether or not to debar based on the information available.

(e) If VA receives a reply from the contractor within 30 days after sending the notice of proposed debarment, the S&D Committee shall consider the information in the reply before the S&D Committee makes its recommendation to the SDO.

(f) The S&D Committee, upon the request of the contractor proposed for debarment, shall, as soon as practicable, allow the contractor an opportunity to appear before the S&D Committee to present information or argument personally or through a representative. The contractor may supplement the oral presentation with written information and argument. VA shall conduct the proceeding in an informal manner and without requirement for a transcript.

(g) If the S&D Committee finds the contractor's or individual's submission in opposition to the proposed debarment raises a genuine dispute over facts material to the proposed debarment and the debarment action is not based on a conviction or civil judgment, the S&D Committee shall submit to the SDO the information establishing the dispute of material facts. If the SDO agrees there is a genuine dispute of material facts, the SDO shall refer the dispute to a designee for a resolution pursuant to 809.470, Fact-finding procedures. The S&D Committee shall provide the contractor or individual the disputed material fact(s). Decisions and determinations of VA's Center for Verification and Evaluation (CVE) or Office of Small and Disadvantaged Business Utilization (OSDBU), such as status protest decisions, and size determinations of the SBA shall not be subject to dispute or fact-finding in proposed debarment actions. The S&D Committee and SDO shall accept these decisions and determinations as resolved facts.

(h) If the proposed debarment action is based on a conviction or civil judgment, or if there are no disputes over material facts, or if any disputes over material facts have been resolved pursuant to 809.470, Fact-finding procedures, the SDO shall make a decision on the basis of all information available including any written findings of fact submitted by the designated fact finder, and oral or written agreements presented or submitted to the S&D Committee by the contractor.

(i) In actions processed under FAR 9.406 where no suspension is in place and where fact finding is not required, the VA shall make the final decision on the proposed debarment within 30 working days after receipt of any information and argument submitted by the contractor, unless the SDO extends this period for a good cause.

(j) In actions processed under 809.406–270(b), the SDO notifies the individuals and/or contractors of the determination of willful and intentional misrepresentation in the notice of proposed debarment. VA shall issue the final decision, removing or upholding the determination, within 90 days after SDO's determination of willful and intentional misrepresentation.

809.406–4 Period of debarment.

(a) The SDO will base the period of debarment on the circumstances surrounding the cause(s) for debarment.

(b) The SDO may remove a debarment imposed under FAR 9.406, amend its scope, or reduce the period of debarment based on a S&D Committee recommendation if—

(1) VA has debarred the contractor; and

(2) The debarring official concurs with documentary evidence submitted by or on behalf of the contractor setting forth the appropriate grounds for granting relief. Appropriate grounds include newly discovered material evidence, reversal of a conviction, bona fide change of ownership or management, elimination of the cause for which debarment was imposed, or any other appropriate grounds.

(c) The period of debarment for willful and intentional misrepresentations of SDVOSB or VOSB status pursuant to 809.406–270(b) shall not be less than 5 years.

809.407 Suspension.

809.407–1 General.

(a) As provided in FAR 9.407–1(d), authority to determine whether to continue business dealings between VA and a suspended contractor is delegated to the HCAs. Compelling reasons include, but are not limited to, urgency of the need for new or continued work, lengthy time period to acquire the new work from other sources, and meeting estimated quantities for requirements contracts.

(b) For the purposes of FAR 9.407–1, the SDO is the suspending official under the Federal Management Regulation at 41 CFR 102–117.295.

809.407–3 Procedures.

(a) Any individual may submit a referral to suspend an individual or contractor to the SDO or to the S&D Committee. Referrals shall include supporting evidence of a cause for suspension listed in FAR 9.407–2. The SDO shall forward the referral to the S&D Committee. If the referring individual is a VA employee and the referral for suspension is based on possible criminal or fraudulent activities, the VA employee shall also refer the matter to the VA Office of Inspector General.

(b) When the S&D Committee finds adequate evidence of a cause for suspension, as listed in FAR 9.407–2, it shall prepare a recommendation and draft notice of suspension for the SDO's consideration.

(c) VA shall send the notice of suspension to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery. In the case of a contractor, VA may send the notice of suspension to any partner, principal, officer, director, owner or co-owner, or joint venture. The S&D Committee concurrently shall list the appropriate parties as excluded in SAM in accordance with FAR 9.404.

(d) If VA receives a reply from the contractor within 30 days after receipt of the notice of suspension, the S&D Committee shall consider the information in the reply before the Committee makes further recommendations to the SDO. The S&D Committee, upon the request of a suspended contractor, shall, as soon as practicable, allow the contractor an opportunity to appear before the S&D Committee to present information or argument personally or through a representative. The contractor may supplement the oral presentation with written information and argument. The proceeding will be conducted in an informal manner and without requirement for a transcript.

(e) For the purposes of FAR 9.407–3(b)(2), Decision making process, in actions not based on an indictment, if the S&D Committee finds that the contractor's submission in opposition to the suspension raises a genuine dispute over facts material to the suspension, the S&D Committee shall submit to the SDO the information establishing the dispute of material facts. However, the S&D Committee may first coordinate any further proceeding regarding the material facts in dispute with the Department of Justice or with a State prosecuting authority in a case involving a State jurisdiction. VA shall take no further action to determine disputed material facts pursuant to this section or 809.470 if the Department of Justice or a State prosecuting authority advises VA in writing that additional proceedings to make such a determination would prejudice Federal or State legal proceedings.

(f) If the SDO agrees that there is a genuine dispute of material facts, the SDO shall refer the dispute to the designee for resolution pursuant to 809.470.

809.470 Fact-finding procedures.

The provisions of this section constitute the procedures to be used to resolve genuine disputes of material fact pursuant to 809.406–3 and 809.407–3 of this subpart. The SDO shall appoint a designee to conduct the fact-finding. OGC shall represent VA at any fact-finding hearing and may present witnesses for VA and question any witnesses presented by the contractor. The proceedings before the fact-finder will be limited to a finding of the facts in dispute, as determined by the SDO. The fact-finder shall establish the date for the fact-finding hearing, normally to be held within 30 days after the S&D

Committee notifies the contractor or individual that the SDO has established a genuine dispute of material fact(s) exists.

(a) The Government's representative and the contractor will have an opportunity to present evidence relevant to the material fact(s) identified by the SDO. The contractor or individual may appear in person or through a representative at the fact-finding hearing. The contractor or individual may submit documentary evidence, present witnesses, and confront any person the agency presents.

(b) Witnesses may testify in person. Witnesses will be reminded of the official nature of the proceedings and that any false testimony given is subject to criminal prosecution. Witnesses are subject to cross-examination. Hearsay evidence may be presented and will be given appropriate weight by the fact-finder.

(c) The proceedings shall be transcribed and a copy of the transcript shall be made available at cost to the contractor upon request, unless the contractor and the fact-finder, by mutual agreement, waive the requirement for a transcript.

(d) The fact-finder shall determine the disputed fact(s) by a preponderance of the evidence for proposed debarments, and by adequate evidence for suspensions. Written findings of fact shall be prepared by the fact-finder. A copy of the findings of fact shall be provided to the SDO, the Government's representative, and the contractor or individual. The SDO will consider the written findings of fact in the decision regarding the suspension or proposed debarment.

Subpart 809.5—Organizational and Consultant Conflicts of Interest

809.507 Solicitation provisions and contract clause.

809.507–1 Solicitation provisions.

(a) While conflicts of interest may not presently exist, award of certain types of contracts may create potential future organizational conflicts of interest (see FAR 9.508 for examples). If a solicitation may create a potential future organizational conflict of interest, the contracting officer shall insert a provision in the solicitation imposing an appropriate restraint on the contractor's eligibility for award of contracts in the future. Under FAR 9.507–1, the restraint must be appropriate to the nature of the conflict and may exclude the contractor from award of one or more contracts in the future.

(b) The provision at 852.209–70, Organizational Conflicts of Interest, must be included in any solicitation for the services addressed in FAR 9.502.

[85 FR 60076, Sept.24, 2020]

PART 810—MARKET RESEARCH

Sec.

810.000 Scope of part.
810.001 Policy.
810.001–70 Market research policy—use of VA Vendor Information Pages.

AUTHORITY: 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 63004, Oct. 18, 2022, unless otherwise noted.

810.000 Scope of part.

The Veterans First Contracting Program in subpart 819.70 applies to contract actions under this part and takes precedence over other small business programs referenced in FAR part 10 and FAR part 19.

810.001 Policy.

810.001–70 Market research policy—use of VA Vendor Information Pages.

When performing market research, contracting officers shall review the Vendor Information Pages (VIP) database at *https://www.vetbiz.va.gov/vip/* as required by subpart 819.70. The contracting officer will search the VIP database by applicable North American Industry Classification System (NAICS) codes to determine whether two or more verified service-disabled veteran-owned small businesses (SDVOSBs) and/or veteran-owned small businesses (VOSBs), with the appropriate NAICS code, are listed as verified in the VIP database. The contracting officer will determine, among

other things as the requirement dictates, whether VIP-listed SDVOSBs or VOSBs identified as a result of market research are capable of performing the work, are likely to submit an offer/quote, and whether an award can be made at a fair and reasonable price that offers best value to the Government. The contracting officer shall use the market research for acquisition planning purposes, and as set forth in subpart 819.70, conduct a VA Rule of Two (see 802.101) determination in accordance with the contracting order of priority (see 819.7005 and 819.7006).

PART 811—DESCRIBING AGENCY NEEDS

Subpart 811.0—Definitions

Subpart 811.1—Selecting and Developing Requirements Documents

Sec.
811.107–70 Contract clause.

Subpart 811.2—Using and Maintaining Requirements Documents

811.204–70 Contract clause.

Subpart 811.4 [Reserved]

Subpart 811.5—Liquidated Damages

811.500 Scope.
811.501–70 Policy—statutory requirement.
811.503–70 Contract clause.

Subpart 811.6 [Reserved]

AUTHORITY: 38 U.S.C. 5723–5724, 5725(a)–(c); 40 U.S.C. 121(c); 41 U.S.C. 1303, 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 811.0—Definitions

Subpart 811.1—Selecting and Developing Requirements Documents

811.107–70 Contract clause.

The contracting officer shall insert the clause at 852.211–70, Equipment Operation and Maintenance Manuals, in solicitations and contracts for technical medical equipment, and other technical and mechanical equipment and devices where the requiring activity determines manuals are a necessary requirement for operation and maintenance of the equipment.

[83 FR 49305, Oct. 1, 2018]

Subpart 811.2—Using and Maintaining Requirements Documents

811.204–70 Contract clause.

The contracting officer shall insert the clause at 852.211–72, Technical Industry Standards, in solicitations and contracts requiring conformance to technical industry standards, federal specifications, standards and commercial item descriptions unless comparable coverage is included in the item specification.

[83 FR 49305, Oct. 1, 2018]

Subpart 811.4 [Reserved]

Subpart 811.5—Liquidated Damages

SOURCE: 88 FR 4746, Jan. 25, 2023, unless otherwise noted.

811.500 Scope.

This subpart prescribes policies and procedures for using a liquidated damages clause in solicitations and contracts that involve VA sensitive personal information. This also pertains to any solicitations and contracts involving VA sensitive personal information issued by another agency for or on behalf of VA through an interagency acquisition in accordance with FAR subpart 17.5 and subpart 817.5.

811.501–70 Policy—statutory requirement.

(a) Contracting officers are required to include a liquidated damages clause in contracts for the performance of any Department function which requires access to VA sensitive personal information (*see* the definition in 802.101), in accordance with 38 U.S.C. 5725(b). The liquidated damages are to be paid by the contractor to the Department of Veterans Affairs in the event of a data breach involving sensitive personal information maintained, processed, or

utilized by contractors or any subcontractors.

(b) The purpose of the liquidated damages to be paid for by the contractor in the event of a data breach of personal sensitive information is for VA to provide credit protection services to affected individuals pursuant to 38 U.S.C. 5724(a)–(b).

811.503–70 Contract clause.

(a) Insert the clause at 852.211–76, Liquidated Damages—Reimbursement for Data Breach Costs, in all solicitations, contracts, or orders, where VA requires access to sensitive personal information for the performance of a Department function where—

(1) Sensitive personal information (*see* the definition in 802.101) will be created, received, maintained, or transmitted, or that will be stored, generated, accessed, or exchanged such as protected health information (PHI) or utilized by a contractor, subcontractor, business associate, or an employee of one of these entities; or,

(2) When VA information systems will be designed or developed at non-VA facilities where such sensitive personal information is required to be created, received, maintained, or transmitted, or that will be stored, generated, accessed, exchanged, processed, or utilized.

(b) Insert the clause at 852.211–76 with its Alternate I in all solicitations, contracts, or orders, for commercial products or commercial services acquisitions awarded under the procedures of FAR part 8 or 12.

(c) Insert the clause at 852.211–76 with its Alternate II, in all solicitations, contracts, or orders, in simplified acquisitions exceeding the micro-purchase threshold that are for other than commercial products or commercial services awarded under the procedures of FAR part 13 (*see* FAR 13.302–5(d)(1) and the clause at FAR 52.213–4).

Subpart 811.6 [Reserved]

PART 812—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

Subpart 812.1—Acquisition of Commercial Items—General

Sec.
812.102 Applicability.
812.102–70 Applicability of Veterans preferences.

Subpart 812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Products and Commercial Services

812.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

AUTHORITY: 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1702 and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 812.1—Acquisition of Commercial Items—General

812.102 Applicability.

812.102–70 Applicability of Veterans preferences.

Based on the authority under 38 U.S.C. 8127 and 8128, the Veterans First Contracting Program in subpart 819.70 applies to VA contracts under this part. The provisions and clauses prescribed reflect agency unique statutes applicable to the acquisition of commercial items.

[85 FR 16905, Mar. 25, 2020]

Subpart 812.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Products and Commercial Services

SOURCE: 88 FR 4746, Jan. 25, 2023, unless otherwise noted.

812.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

(f)(1) Contracting officers shall insert the clause at 852.212–71, Gray Market and Counterfeit Items, in solicitations

and contracts for new medical supplies, new medical equipment, new information technology equipment, and maintenance of medical or information technology equipment that includes replacement parts if used, refurbished, or remanufactured parts are unacceptable, when the associated solicitation includes FAR 52.212–1, Instruction to Offerors—Commercial Products and Commercial Services, and 52.212–2, Evaluation—Commercial Products and Commercial Services.

(2) Contracting officers shall insert the clause at 852.212–72, Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts, in solicitations and contracts for the maintenance of information technology equipment that includes replacement parts, if used, refurbished, or remanufactured parts are acceptable, when the associated solicitation includes FAR 52.212–1, Instruction to Offerors—Commercial Products and Commercial Services, and 52.212–2, Evaluation—Commercial Products and Commercial Services.

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 813—SIMPLIFIED ACQUISITION PROCEDURES

Sec.
813.003–70 General policy.

Subpart 813.1—Procedures

813.102 Source list.
813.106 Soliciting competition, evaluation of quotations or offers, award and documentation.
813.106–70 Soliciting competition, evaluation of quotations or offers, award and documentation—the Veterans First Contracting Program.

Subpart 813.2 [Reserved]

Subpart 813.3—Simplified Acquisition Methods

813.305–70 VA's imprest funds and third party drafts policy.

AUTHORITY: 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1702 and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

813.003–70 General policy.

(a) The Veterans First Contracting Program in subpart 819.70 applies to VA contracts, orders and BPAs under this part and has precedence over other small business programs referenced in FAR parts 13 and 19. For VA policy regarding mandatory Government sources, refer to 808.002.

(b) Notwithstanding FAR 13.003(b)(2), the contracting officer shall make an award utilizing the priorities for veteran-owned small businesses as implemented within the VA hierarchy of small business program preferences, the Veterans First Contracting Program in subpart 819.70. Specifically, the contracting officer shall consider preferences for verified service-disabled veteran-owned small businesses (SDVOSBs) first, then preferences for verified veteran-owned small businesses (VOSBs). These priorities will be followed by preferences for other small businesses in accordance with 819.7005.

(c) When using competitive procedures, the preference for restricting competition to verified SDVOSBs/VOSBs in accordance with paragraph (b) of this section is mandatory whenever market research provides a reasonable expectation of receiving two or more offers/quotes from eligible, capable and verified firms, and that an award can be made at a fair and reasonable price that offers best value to the Government.

(1) Pursuant to 38 U.S.C. 8127, contracts under this part shall be set-aside for SDVOSBs/VOSBs, in accordance with 819.7006 or 819.7007 when supported by market research. Contracting officers shall use the applicable set-aside clause prescribed at 819.7011.

(2) Pursuant to 38 U.S.C. 8128 and to the extent that market research does not support an SDVOSB or VOSB set-aside, the contracting officer shall include evaluation factors as prescribed at 815.304–70 and the evaluation criteria clause prescribed at 815.304–71(a).

(d) The SDVOSB and VOSB eligibility requirements in 819.7003 apply, including verification of the SDVOSB and VOSB status of an offeror, and other small business requirements in 13 CFR part 121 and 13 CFR 125.6 (*e.g.*, small business representation, nonmanufacturer rule, and subcontracting limitations (see 819.7004 and 819.7011)).

[87 FR 63005, Oct. 18, 2022]

Subpart 813.1—Procedures

813.102 Source list.

Pursuant to 819.7003, contracting officers shall use the Vendor Information Pages (VIP) database to verify SDVOSB/VOSB status.

[85 FR 16906, Mar. 25, 2020]

813.106 Soliciting competition, evaluation of quotations or offers, award and documentation.

813.106–70 Soliciting competition, evaluation of quotations or offers, award and documentation—the Veterans First Contracting Program.

(a) When using competitive procedures under this part, the contracting officer shall use the Veterans First Contracting Program in subpart 819.70 and the guidance set forth in 813.003–70.

(b) Pursuant to 38 U.S.C 8127(b), contracting officers may use other than competitive procedures to enter into a contract with a verified SDVOSB or VOSB for procurements below the simplified acquisition threshold, as authorized by FAR 6.302–5 and 806.302–570(a) and (b).

(c) For procurements above the simplified acquisition threshold, pursuant to 38 U.S.C. 8127(c), contracting officers may also award a contract under this part to a firm verified under the Veterans First Contracting Program at subpart 819.70, using procedures other than competitive procedures, as authorized by FAR 6.302–5 and 806.302–570(a) and (c), and in accordance with 819.7008 and 819.7009.

[87 FR 63005, Oct. 18, 2022]

Subpart 813.2 [Reserved]

Subpart 813.3—Simplified Acquisition Methods

813.305–70 VA's imprest funds and third party drafts policy.

VA's Governmentwide commercial purchase card and/or convenience checks shall be used in lieu of imprest funds and third party drafts.

[85 FR 16906, Mar. 25, 2020]

PART 814—SEALED BIDDING

Subpart 814.1 [Reserved]

Subpart 814.2—Solicitation of Bids

Sec.
814.201 Preparation of invitations for bids.
814.201–2 Part I—The Schedule.
814.201–6 Solicitation provisions.
814.202 General rules for solicitation of bids.
814.202–4 Bid samples.

Subpart 814.3—Submission of Bids

814.304 Submission, modification, and withdrawal of bids.

Subpart 814.4 [Reserved]

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 814.1 [Reserved]

Subpart 814.2—Solicitation of Bids

814.201 Preparation of invitations for bids

814.201–2 Part I—The Schedule.

(b) *Section B, Supplies or services and prices.*

(1) When the contracting officer determines that it will be to the Government's advantage to make an award on the basis of a summary bid, the IFB shall include the following statement in Part I—The Schedule, Section B:

The award will be made on either the bid price for individual items or the summary bid price summary for all items, whichever results in the lowest price to the Government. Therefore, to assure proper evaluation of all bids, a bidder quoting a summary bid price must also quote a price on each individual item included in the summary bid price.

(2) When a contracting officer determines that it will be to the Government's advantage to make an award by group or groups of items, the IFB shall include the following statement in Part I—The Schedule, Section B:

Award shall be made on the basis of the bid price for each identified group of items. The individual price of each line item in the group does not have to be the lowest bid received for that item. This may apply when the items in the group or groups are readily available from sources to be solicited; and one of the following applies:

(i) Furniture or fixtures are required for a single project and uniformity of design is desirable.

(ii) The articles required will be assembled and used as a unit.

[83 FR 16208, Apr. 16, 2018]

814.201–6 Solicitation provisions.

(a) In an invitation for bid for supplies, equipment, or services (other than construction), the contracting officer shall define the extent to which VA will authorize and consider alternate bids.

(1) The contracting officer shall include the provision at 852.214–71, Restrictions on Alternate Item(s), in the invitation when VA will consider an alternate item only where acceptable bids on a desired item are not received or the bids do not satisfy the total requirement. (For construction projects, VA will consider for acceptance an alternate specified only as a part of the basic item.)

(2) The contracting officer shall include the provision at 852.214–72, Alternate Item(s), in the invitation, when VA will consider an alternate item on an equal basis with the item specified. (For construction projects, VA will consider for acceptance an alternate specified only as a part of the basic item.)

(3) In addition to either of the provisions referenced in paragraphs (a)(1) or (2) of this section, the contracting officer shall include the provision at 852.214–73, Alternate Packaging and Packing, in the invitation when bids will be allowed based on different packaging, unit designation, etc.

(b) The contracting officer shall include the provision at 852.214–74, Marking of Bid Samples, in the invitation, along with the provision at FAR 52.214–20, Bid Samples, when the contracting officer determines that samples are necessary to the proper awarding of a contract.

[83 FR 16209, Apr. 16, 2018]

814.202 General rules for solicitation of bids.

814.202–4 Bid samples.

(a) *Policy.* When bid samples are required, the contracting officer shall include a notice in the contract Schedule that requires bidders to submit samples produced by the manufacturer whose products will be supplied under the contract.

(g) *Handling bid samples.*

(1) Samples from successful bids shall be retained for the period of contract performance.

(2) If the contracting officer anticipates a claim regarding the contract, the contracting officer shall require that the bid samples be retained until the claim is resolved. If there are no outstanding claims regarding the contract, the contracting officer may authorize disposal of the samples at the end of the contract term in accordance with the bidder's instructions.

(3) The contracting officer shall require that samples from unsuccessful bids be retained until award. After award, these samples may be disposed of in accordance with the bidder's instructions.

[83 FR 16209, Apr. 16, 2018]

Subpart 814.3—Submission of Bids

814.304 Submission, modification, and withdrawal of bids.

(f) A notification to late bidders shall specify the final date by which VA must receive evidence of timeliness. This date shall be within five calendar days of the date an electronic notice is sent to the bidder, or within ten calendar days of receipt by the bidder of a notice sent by other than electronic means.

[83 FR 16209, Apr. 16, 2018]

Subpart 814.4 [Reserved]

PART 815—CONTRACTING BY NEGOTIATION

Subpart 815.3—Source Selection

Sec.

815.304–70 Evaluation factor commitments.
815.304–71 Solicitation provision and clause
815.370 Only one offer.
815.370–1 Policy.
815.370–2 Promote competition.
815.370–3 Fair and reasonable price.
815.370–4 Exceptions.
815.370–5 Solicitation provision.

Subparts 815.4—815.6 [Reserved]

AUTHORITY: 38 U.S.C. 8127 and 8128; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 815.3—Source Selection

815.304–70 Evaluation factor commitments.

Contracting officers shall—

(a) Include the clause at 852.215–70, Service-Disabled Veteran-Owned Small Business and Veteran-Owned Small Business Evaluation Factors, in negotiated solicitations and contracts giving preference to offers received from VOSBs and additional preference to offers received from SDVOSBs;

(b) Use past performance in meeting SDVOSB subcontracting goals as a non-price evaluation factor in making award determination; and

(c) Use the proposed inclusion of SDVOSBs or VOSBs as subcontractors as an evaluation factor when competitively negotiating the award of contracts or task or delivery orders.

[84 FR 46452, Sept. 4, 2019]

815.304–71 Solicitation provision and clause.

(a) The contracting officer shall insert the clause at 852.215–70, Service-Disabled Veteran-Owned Small Business and Veteran-Owned Small Business Evaluation Factors, in competitively negotiated solicitations and contracts that are not set aside for SDVOSBs or VOSBs.

(b) The contracting officer shall insert the clause at 852.215–71, Evaluation Factor Commitments, in solicitations and contracts that include VAAR clause 852.215–70, Service-Disabled Veteran-Owned Small Business and Veteran-Owned Small Business Evaluation Factors.

[84 FR 46452, Sept. 4, 2019]

815.370 Only one offer.

815.370–1 Policy.

It is VA policy, if only one offer is received in response to a competitive solicitation, to—

(a) Take action to promote competition (see 815.370–2); and

(b) Ensure that the price is fair and reasonable (see 815.370–3) and comply with the statutory requirement for certified cost or pricing data (see FAR 15.403–4).

[84 FR 46452, Sept. 4, 2019]

815.370–2 Promote competition.

Except as provided in 815.370–4, if only one offer is received when competitive procedures were used and the solicitation allowed fewer than 30 days for receipt of proposals, the contracting officer should—

(a) Consult with the requiring activity as to whether the requirements document should be revised in order to promote more competition (see FAR 6.502(b) and 11.002); and

(b) Consider re-soliciting, allowing an additional period of at least 30 days for receipt of proposals.

[84 FR 46452, Sept. 4, 2019]

815.370–3 Fair and reasonable price.

(a) If there was ''reasonable expectation that two or more offerors, competing independently, would submit priced offers'' but only one offer is received, this circumstance does not constitute adequate price competition unless an official at a level above the contracting officer approves the determination that the price is reasonable (see FAR 15.403–1(c)(1)(ii)).

(b) Except as provided in 815.370–4(a), if only one offer is received when competitive procedures were used and the solicitation allowed at least 30 days for receipt of proposals (unless the 30-day requirement is not applicable in accordance with 815.370–4(a)(3)), the contracting officer shall—

(1) Determine through cost or price analysis that the offered price is fair and reasonable and that adequate price competition exists (with approval of the determination at a level above the contracting officer) or another exception to the requirement for certified cost or pricing data applies (see FAR 15.403–1(c) and 15.403–4). In these circumstances, no further cost or pricing data is required; or

(2)(i) Obtain from the offeror cost or pricing data necessary to determine a fair and reasonable price and comply with the requirement for certified cost

or pricing data at FAR 15.403–4. For acquisitions that exceed the cost or pricing data threshold, if no exception at FAR 15.403–1(b) applies, the cost or pricing data shall be certified; and

(ii) Enter into negotiations with the offeror as necessary to establish a fair and reasonable price. The negotiated price should not exceed the offered price.

[84 FR 46452, Sept. 4, 2019]

815.370–4 Exceptions.

(a) The requirements at 815.370–2 do not apply to—

(1) Acquisitions at or below the simplified acquisition threshold;

(2) Acquisitions in support of emergency, humanitarian or peacekeeping operations, or to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; or to support response to an emergency or major disaster;

(3) Small business set-asides under FAR subpart 19.5, set-asides offered and accepted into the 8(a) Program under FAR subpart 19.8, or set-asides under the HUBZone Program (see FAR 19.1305(c)), the VA Small Business Program (see VAAR subpart 819.70), or the Women-Owned Small Business Program (see FAR 19.1505(d));

(4) Acquisitions of basic or applied research or development, as specified in FAR 35.016(a), that use a broad agency announcement; or

(5) Acquisitions of architect-engineer services (see FAR 36.601–2).

(b) The applicability of an exception in paragraph (a) of this section does not eliminate the need for the contracting officer to ensure adequate time for competition is allotted or that the price is fair and reasonable.

[84 FR 46453, Sept. 4, 2019]

815.370–5 Solicitation provision.

Use the provision at 852.215–72, Notice of Intent to Re-solicit, in competitive solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items that will be solicited for fewer than 30 days, unless an exception at 815.370–4 applies.

[84 FR 46453, Sept. 4, 2019]

Subparts 815.4—815.6 [Reserved]

PART 816—TYPES OF CONTRACTS

Subpart 816.1 [Reserved]

Subpart 816.2—Fixed-Price Contracts

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816.203 Fixed-price contracts with economic price adjustment.
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816.770 Consignment agreements.

Subpart 816.70 [Reserved]

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 816.1 [Reserved]

Subpart 816.2—Fixed-Price Contracts

SOURCE: 83 FR 7403, Feb. 21, 2018, unless otherwise noted.

816.203 Fixed-price contracts with economic price adjustment.

816.203–4 Contract clauses.

(e) The contracting officer shall, when contracting by negotiation, use the following clauses.

(1) The contracting officer shall insert the clause at 852.216–71, ''Economic Price Adjustment of Contract Price(s) Based on a Price Index,'' in solicitations and firm fixed price contracts, subject to FAR 16.203–4(d)(1) and when changes to a price index will be used to calculate corresponding changes to the total contract price or unit prices of the contract.

(i) Exceptions:

(A) Do not use this clause when changes to the price index will apply to

only a component part of the contract price.

(B) Do not publish or include the footnotes in the solicitation, they are only included herein to provide guidance to contracting officers.

(2) The contracting officer shall insert the clause at 852.216–72, ''Proportional Economic Price Adjustment of Contract Price(s) Based on a Price Index,'' in solicitations and firm fixed price contracts, and subject to FAR 16.203–4(d)(1) when changes to an industry price index shall be used to calculate changes to only a portion of the contract price or the unit prices of the contract.

(i) Exceptions:

(A) The clause should not be used when a change in the index price will be applied directly and totally to the contract price or the unit prices, *i.e.*, when the Consumer Price Index is used to calculate changes and a 5% increase in the CPI would result in a 5% increase in the total contract price of the unit prices.

(B) Do not publish or include the footnotes in the solicitation, as they are only provided for guidance to the contracting officer.

(3) The contracting officer shall insert the clause at 852.216–73, ''Economic Price Adjustment—State Nursing Home Care for Veterans,'' in solicitations and firm fixed price contracts subject to FAR 16.203–4(d)(1) and the following circumstance: When changes to the Medicaid rate, as authorized by the State Medicaid Agency (SMA), shall be used to calculate corresponding changes in the total contract price or the per diem prices of the agreement or contract.

(4) The contracting officer shall insert the clause at 852.216–74, ''Economic Price Adjustment—Medicaid Labor Rates,'' in solicitations and firm fixed price contracts when the conditions specified in FAR 16.203–4(c)(1) apply. The clause is modifiable by increasing the 10-percent maximum limit on aggregate increases specified in paragraph (c)(4) of this section, upon the approval by the Head of the Contracting Activity (HCA) or designee.

(5) The contracting officer shall insert the clause at 852.216–75, ''Economic Price Adjustment—Fuel Surcharge,'' in solicitations and firm fixed price contracts when contracting by negotiation is subject to changes in the cost of fuel increases. The clause is subject to the conditions at FAR 16.203–4(d)(1).

(f) The contracting officer shall follow procedures as prescribed in FAR 16.203–4(c) and 38 CFR 51.41(b)(1) for EPA fixed price contracts based on Medicaid rates. These procedures shall be used when contracting by negotiation between the VA and the State Veteran Home for making payments under contracts for nursing home care for Veterans.

Subpart 816.5—Indefinite-Delivery Contracts

816.505 Ordering.

(b)(8) Task-order and delivery-order ombudsman. The task-order contract and delivery-order ombudsman for VA is the Associate Deputy Assistant Secretary (ADAS) for Procurement Policy, Systems and Oversight. The VA Ombudsman shall review and resolve complaints from contractors concerning all task and delivery order actions. If any corrective action is needed after reviewing complaints from contractors, the VA Ombudsman shall provide a written determination of such action to the contracting officer. Contracting officers shall be notified of any complaints submitted to the VA Ombudsman.

[83 FR 7404, Feb. 21, 2018]

816.506–70 Requirements—supplement for mortuary services.

Insert the clause 852.216–76, Requirements—Supplement for Mortuary Services, in contracts for mortuary services containing FAR clause 52.216–21, Requirements. The contracting officer shall insert activities authorized to place orders in paragraph (e) of the clause.

[84 FR 46453, Sept. 4, 2019]

816.570 Ordering officers.

In accordance with 801.601, when authorized, ordering officers may place orders for supplies and services against

established Indefinite-Delivery Contracts within the ordering limits identified in the contract or the specific ordering guide when funding is available. Ordering officers shall only place orders against the contract if it is awarded to a single awardee. When a contracting officer appoints an ordering officer in writing after award, the contracting officer will furnish the contractor with an updated list of individual ordering officers authorized to place orders against the contract. Ordering officers may not negotiate contract terms and conditions, determine price reasonableness, or determine best value.

[87 FR 70748, Nov. 21, 2022]

Subpart 816.7—Agreements

SOURCE: 83 FR 7404, Feb. 21, 2018, unless otherwise noted.

816.770 Consignment agreements.

Consignment agreements shall only be established under a contract and by a contracting officer. A consignment agreement is defined as a delivery method for a specified period of time in which the contractor provides an item/s for Government use and the contractor receives reimbursement only if and when the item is used by the Government. Consignment agreements are allowable and shall be considered in those instances when the requirement for an item is immediate and on-going and when it is impossible to predetermine the type or model of a particular item until the need is established, and it is determined to be in the best interest of the VA.

Subpart 816.70 [Reserved]

PART 817—SPECIAL CONTRACTING METHODS

Subparts 817.1—817.4 [Reserved]

Subpart 817.5—Interagency Acquisitions

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AUTHORITY: 38 U.S.C. 8127–8128; 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subparts 817.1—817.4 [Reserved]

Subpart 817.5—Interagency Acquisitions

817.501 General.

(d) Agreements pursuant to FAR subpart 17.5, including construction, shall include a requirement, that, when acquiring goods and services on behalf of the Department of Veterans Affairs, the entity will comply, to the maximum extent feasible, with the provisions of 38 U.S.C. 8127 and 8128, and the Veterans First Contracting Program as implemented at subpart 819.70.

[84 FR 29393, July 24, 2019]

Subpart 817.70—Undefinitized Contract Actions

SOURCE: 84 FR 29393, June 24, 2019, unless otherwise noted.

817.7000 Scope.

This subpart prescribes policies and procedures for use of undefinitized contract actions.

817.7001 Definitions.

As used in this subpart—

(a) *Contract action* includes:

(1) Contracts and contract modifications for supplies or services.

(2) Task orders and delivery orders.

(3) It does not include change orders, administrative changes, funding modifications, or any other contract modifications that are within the scope and under the terms of the contract, *e.g.*,

engineering change proposals and value engineering change proposals.

(b) *Definitization* means the agreement on, or determination of, contract terms, specifications, and price, which converts the undefinitized contract action to a definitive contract.

(c) *Definitization proposal* means a proposal containing sufficient data for the VA to do complete and meaningful analyses and audits of the—

(1) Data in the proposal; and

(2) Any other data that the contracting officer has determined VA needs to review in connection with the contract.

(d) *Undefinitized contract action* means any contract action for which the contract terms, specifications, or price are not agreed upon before performance is begun under the action. Examples are letter contracts and orders under basic ordering agreements for which the final price has not been agreed upon before performance has begun.

817.7002 Exceptions.

(a) The following undefinitized contract actions (UCAs) are not subject to this subpart:

(1) Purchases at or below the simplified acquisition threshold.

(2) Congressionally mandated long-lead procurement contracts.

(b) However, the contracting officer shall apply the policy and procedures to the contract actions in paragraph (a) to the maximum extent practicable.

817.7003 Policy.

Undefinitized contract actions shall—

(a) Be used only when—

(1) The negotiation of a definitive contract action is not possible in sufficient time to meet the Government's requirements; and

(2) The Government's interest demands that the contractor be given a binding commitment so that contract performance can begin immediately.

(b) Be as complete and definite as practicable.

817.7004 Limitations.

817.7004–1 Authorization.

The contracting officer shall obtain approval one level above the contracting officer before—

(a) *Entering into a UCA.* The request for approval must fully explain the need to begin performance before definitization, including the adverse impact on the VA resulting from delays in beginning performance.

(b) *Including requirements for non-urgent items and equipment in a UCA.* The request should show that inclusion of the non-urgent items is consistent with good business practices and in the best interest of the Government.

(c) *Modifying the scope of a UCA when performance has already begun.* The request should show that the modification is consistent with good business practices and in the best interests of the Government.

817.7004–2 Price ceiling.

UCAs shall include a not-to-exceed price.

817.7004–3 Definitization schedule.

(a) UCAs shall contain definitization schedules that provide for definitization by the earlier of—

(1) The date that is 180 days after issuance of the action (this date may be extended but may not exceed the date that is 180 days after the contractor submits a definitization proposal); or

(2) The date on which the amount of funds paid to the contractor under the contract action is equal to more than 50 percent of the not-to-exceed price.

(b) Submission of a definitization proposal in accordance with the definitization schedule is a material element of the contract. If the contractor does not submit a timely definitization proposal, the contracting officer may suspend or reduce progress payments under FAR 32.503–6, or take other appropriate action.

817.7004–4 Final price negotiation—profit.

Before the final price of a UCA is negotiated, contracting officers shall ensure the profit agreed to and documented in the contract negotiation

memorandum reflects consideration of any risks incurred in performance of the work under the UCA.

817.7005 Contract clause.

(a) Use the clause at 852.217–70, Contract Action Definitization, in—

(1) All UCAs;

(2) Solicitations associated with UCAs;

(3) Orders against basic ordering agreements;

(4) Indefinite delivery task orders; and

(5) Any other type of contract providing for the use of UCAs.

(b) Insert the applicable information in paragraphs (a), (b), and (d) of the clause.

(c) If, at the time of entering into the UCA, the contracting officer knows that the definitive contract action will meet the criteria of FAR 15.403–1, 15.403–2, or 15.403–3 for not requiring submission of certified cost or pricing data, the words ''and certified cost or pricing data'' may be deleted from paragraph (a) of the clause.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 819—SMALL BUSINESS PROGRAMS

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Subpart 819.3—Determination of Small Business Size and Status for Small Business Programs

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819.7007 VA veteran-owned small business set-aside procedures.
819.7008 Sole source awards to verified service-disabled veteran-owned small businesses.
819.7009 Sole source awards to verified veteran-owned small businesses.
819.7010 Tiered set-aside evaluation.
819.7011 Contract clauses.

Subpart 819.71 [Reserved]

AUTHORITY: 15 U.S.C. 631, *et seq.;* 15 U.S.C. 637(d)(4)(E); 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 63005, Oct. 18, 2022, unless otherwise noted.

819.000 Scope of part.

(a) This part supplements FAR part 19 and implements the service-disabled veteran-owned small business (SDVOSB), veteran-owned small business (VOSB), and small business provisions of 38 U.S.C. 8127 and 8128, Executive Order 13360, and the Small Business Act (15 U.S.C. 631 et. seq.) as applied to the Department of Veterans Affairs (VA). This part also covers—

(1) Goals for using SDVOSBs and VOSBs;

(2) Priorities and preferences for using SDVOSBs/VOSBs;

(3) SDVOSB/VOSB eligibility and contract compliance;

(4) Setting aside acquisitions for SDVOSBs/VOSBs;

(5) Sole-source awards to SDVOSBs and VOSBs; and

(6) Evaluation preferences and contract clauses.

Subpart 819.2—Policies

819.201 General policy.

(a) It is VA policy that small business concerns owned and controlled by veterans shall have maximum practicable opportunity to participate in VA acquisitions, consistent the priorities and preferences prescribed under

the Veterans First Contracting Program in subpart 819.70.

(1) To carry out this policy the Secretary shall establish annual SDVOSB and VOSB contracting goals.

(2) In support of these goals, each administration and staff office shall in turn establish annual goals for each subordinate contracting activity that present, for that activity, the maximum practicable opportunity for small business concerns, and particularly SDVOSBs/VOSBs, to participate in the performance of the activity's contracts and subcontracts.

(3) The attainment of these goals or the use of interagency acquisition vehicles does not limit the applicability of the Veterans First Contracting Program and priorities in subpart 819.70.

(c) In addition to the duties and responsibilities in FAR 19.201(c), the Executive Director, Office of Small and Disadvantaged Business Utilization (OSDBU), is responsible for overseeing implementation of the Veterans First Contracting Program under subpart 819.70.

(d) Each organization with contracting authority shall designate small business specialists/technical advisors in coordination with the OSDBU Director.

819.202 Specific policies.

OSDBU is responsible for reviewing procurement strategies, establishing thresholds for such reviews and making recommendations to assist contracting officers in the implementation of this part. These responsibilities shall be conducted within the VA hierarchy of small business program preferences established by 38 U.S.C. 8127(h) (see subpart 819.70), which requires VA to consider preferences for VIP-listed SDVOSBs first, then preferences for VIP-listed VOSBs. Contracting officers shall use VA Form 2268, Small Business Program and Contract Bundling Review, to document actions and recommendations.

819.203 Relationship among small business programs.

819.203–70 Priority for SDVOSB/VOSB contracting preferences.

(a) 38 U.S.C. 8127 and 8128 require the VA to provide priority and establish special acquisition methods to increase contracting opportunities for SDVOSBs/VOSBs. These priorities and special acquisition methods are set forth in subpart 819.70 and shall be applied by contracting officers before other priorities and preferences in FAR 19.203.

(b) Pursuant to 38 U.S.C. 8128, contracting officers shall give priority to SDVOSBs/VOSBs if such business concern(s) also meet the requirements of that contracting preference. The requirement in this paragraph (b) applies even when using a contracting preference under FAR part 19 (for example, a women-owned small business set-aside).

Subpart 819.3—Determination of Small Business Size and Status for Small Business Programs

819.307 Protesting a firm's status as a service-disabled veteran-owned small business concern.

819.307–70 SDVOSB/VOSB status protests.

All protests relating to size, status, and/or whether an SDVOSB or a VOSB is a ''small business'' are subject to the Small Business Administration (SBA) regulations at 13 CFR part 121 and must be filed in accordance with SBA guidelines at 13 CFR part 134 (see FAR subpart 19.3). Pursuant to Public Law 114–328, SBA will hear cases related to size and status, including ownership and control challenges under the VA Veterans First Contracting Program (see 38 U.S.C. 8127(f)(8)).

Subpart 819.5—Small Business Total Set-Asides, Partial Set-Asides, and Reserves

819.501 General.

819.501–70 General principles for setting aside VA acquisitions.

(a) The following principles apply to VA acquisitions under this subpart:

(1) Before setting aside or reserving an acquisition for small businesses under FAR subpart 19.5, contracting officers shall refer to 808.002 and 819.203–70 and subpart 819.70 for VA SDVOSB/VOSB priorities and preferences.

(2) Set-asides under the Veterans First Contracting Program in subpart 819.70 (see 819.7006 and 819.7007) have precedence over other small business set-asides authorized in FAR part 19, both above and below the simplified acquisition threshold (SAT). An SDVOSB/VOSB set-aside satisfies the legislative requirement to reserve actions below the SAT for small business.

(3) Pursuant to 38 U.S.C. 8127(d), set-asides for SDVOSBs/VOSBs are mandatory whenever a contracting officer has a reasonable expectation of receiving two or more offers/quotes from eligible, capable and verified firms, and that an award can be made at a fair and reasonable price that offers best value to the Government. (VA Rule of Two (see 802.101))

(b) The set-aside principles in this section apply to VA acquisitions even when a procuring activity is meeting its goals or is planning the use of an interagency agreement, Federal Supply Schedule, or a multiple award contract, including a Governmentwide contract vehicle.

(c) The requirements in this section apply to all VA acquisitions under this subpart, including reserves, orders, and BPAs under multiple award contracts, GSA Federal Supply Schedule contracts, and Multi-Agency Contracts (MACs) awarded by another agency. A set-aside restricted to SDVOSBs/VOSBs pursuant to subpart 819.70 satisfies competition requirements in FAR part 6, as well as fair opportunity requirements for orders under multiple-award contracts (see FAR 16.505(b)(2)(i)(F)).

819.502 Setting aside acquisitions.

819.502–1 Requirements for setting aside acquisitions.

(b) Contracting officers shall refer to 808.002 for the VA policy regarding priorities for use of SDVOSBs/VOSBs and mandatory Government sources.

819.502–2 Total small business set-asides.

(a) If the contracting officer receives no acceptable offers from responsible small business concerns, the set-aside shall be withdrawn and the requirement, if still valid, shall be resolicited on an unrestricted basis or, if permitted in the solicitation, the contracting officer will follow the tiered set-aside evaluation procedures in 819.7010, Tiered evaluation, and proceed to the next eligible tier in the evaluation process.

819.507 Solicitation provisions and contract clauses.

819.507–70 Additional VA solicitation provisions and contract clauses.

For contracts, orders, or BPAs to be issued as SDVOSB/VOSB reserve, tiered evaluation, set-aside, or sole source, see 819.7011. Also see subparts 808.4 and 815.3 and 819.203–70 for requirements and clauses applicable to VA small business set-asides.

Subpart 819.6 [Reserved]

Subpart 819.7—The Small Business Subcontracting Program

819.704–70 VA subcontracting plan requirements.

(a) VA's current subcontracting goals, at a minimum, shall be inserted into all solicitations which contain FAR clause 52.219–9. To the maximum extent possible, the contracting officer shall ensure that individual subcontracting plans submitted by offerors subject to clause 852.219–70, VA Small Business Subcontracting Plan Minimum Requirements, include SDVOSB/VOSB goals that are commensurate with the annual VA SDVOSB/VOSB subcontracting goals (see 819.708).

(1) Only firms listed as verified on the Vendor Information Pages (VIP)

database (see subpart 819.70) will count towards SDVOSB and VOSB goals.

(2) A contractor may reasonably rely on a subcontractor's status as shown in the VIP database as of the date of subcontract award, provided the contractor retains records of the results of the VIP database query.

(3) In furtherance of 38 U.S.C. 8127(a)(4), contractors shall submit subcontracting plan reports to OSDBU as set forth in clause 852.219–70, VA Small Business Subcontracting Plan Minimum Requirements. Unless otherwise directed by OSDBU, VA Form 0896A, Report of Subcontracts to Small and Veteran Owned Business, shall be used to submit the required information.

(b) Subcontracting goals should be expressed as a percentage of total dollars to be subcontracted unless otherwise stated in the solicitation.

(c) If an offeror proposes to use an SDVOSB/VOSB subcontractor for the purpose of receiving SDVOSB/VOSB evaluation factors credit pursuant to 808.405–70 or 815.304–70, the contracting officer shall ensure that the offeror, if awarded the contract, actually uses the proposed subcontractor or another SDVOSB/VOSB for that subcontract or for work of similar value, in accordance with clause 852.208–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors—Orders or BPAs, or 852.215–71, Evaluation Factor Commitments.

(d) Pursuant to 38 U.S.C. 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB or VOSB status is subject to debarment from contracting with the Department for a period of not less than five years. This includes the debarment of all principals in the business (see 809.406–270).

819.708 Contract clauses.

(b) The contracting officer shall insert clause 852.219–70, Small Business Subcontracting Plan Minimum Requirements, in solicitations and contracts that include FAR clause 52.219–9, Small Business Subcontracting Plan.

Subpart 819.8—Contracting With the Small Business Administration (the 8(a) Program)

819.800 General.

(e) The Small Business Administration (SBA) and the Department of Veterans Affairs (VA) have entered into a Partnership Agreement delegating SBA's contract execution and administrative functions to VA. Contracting officers shall follow the alternate procedures in the Partnership Agreement and this subpart, as applicable, to award an 8(a) contract. In the event the Partnership Agreement ceases to be in effect, contracting officers shall follow the procedures in FAR subpart 19.8.

819.811 Preparing the contracts.

819.811–370 VA/SBA Partnership Agreement and contract clauses.

(a) Before placing new requirements under the 8(a) program, the contracting officer must determine whether an SDVOSB/VOSB set-aside is mandated under the VA Rule of Two (see 802.101). If the determination does not result in an SDVOSB/VOSB set-aside, the contracting officer may consider the 8(a) program.

(b) The Partnership Agreement provides that SBA can release procurements already in the program whenever an SDVOSB or VOSB set-aside is feasible.

(c) When an 8(a) acquisition is processed pursuant to the Partnership Agreement, the contracting officer shall:

(1) For competitive solicitations and awards, use the clause at 852.219–71, VA Notification of Competition Limited to Eligible 8(a) Participants, substituting paragraph (c) of FAR 52.219–18, Notification of Competition Limited to Eligible 8(a) Participants, with paragraph (c) contained in 852.219–71.

(2) For noncompetitive solicitations and awards insert the clause at 852.219–72, Notification of Section 8(a) Direct Awards, instead of the prescribed FAR clauses at 52.219–11, Special 8(a) Contract Conditions; 52.219–12, Special 8(a) Subcontract Conditions; and 52.219–17, Section 8(a) Award.

(3) In all instances, contracting include the clause at FAR 52.219–14, Limitations on Subcontracting, or if applicable 52.219–33, Nonmanufacturer Rule.

Subpart 819.70—The VA Veterans First Contracting Program

819.7001 General.

(a) Sections 502 and 503 of Public Law 109–461, the Veterans Benefits, Health Care, and Information Technology Act of 2006, as amended (38 U.S.C. 8127-8128), authorizes a VA specific program to increase contracting opportunities for eligible small business concerns owned and controlled by Veterans with service-connected disabilities and small business concerns owned and controlled by Veterans. Once ownership and control by these veterans is verified, these businesses are referred to as service-disabled veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) or collectively SDVOSB/VOSB for ease of reference.

(b) The program as implemented in this subpart shall be known as the Veterans First Contracting Program. The purpose of the program is to increase contracting opportunities and provide for priority in the award of contracts and subcontracts to SDVOSBs/VOSBs so they can fully participate in the VA contracting process. Eligible SDVOSBs qualify for any VOSB preferences under this subpart.

(c) VA's program is codified at 38 U.S.C. 8127(b), (c), and (d), and provides the authority for VA contracting officers to make awards to SDVOSBs/VOSBs using restricted competition, as well as other than full and open competition (sole source), as set-forth in this subpart. Additionally, 38 U.S.C. 8128 provides the authority for VA to give SDVOSBs/VOSBs priority in the awarding of contracts and subcontracts using evaluation preferences.

(d) Contracting officers shall award contracts by restricting competition to eligible SDVOSBs/VOSBs as provided in 819.7006 and 819.7007. The contracting officer may use other preferences in this subpart as appropriate and in accordance with procuring activity guidelines.

(e) Pursuant to 38 U.S.C. 8128, contracting officers shall give priority to SDVOSBs/VOSBs if such business concern(s) also meet the requirements of that contracting preference. In carrying out this responsibility, contracting officers shall include the clauses prescribed at 808.405–570 and 815.304–71 in competitive solicitations and contracts that are not set-aside for SDVOSB/VOSB, including those under FAR part 12. The requirement in this paragraph (e) applies even when using a contracting preference under FAR part 19 (for example, a women-owned small business set-aside).

(f) The attainment of goals or the use of interagency vehicles or Government-wide contract vehicles (*i.e.*, Federal Supply Schedules (FSS)) does not relieve the contracting officer from using SDVOSB/VOSB set-asides and other preferences as provided in subpart 819.70. Moreover, if the VA enters into a contract, agreement, or other arrangement with any governmental entity to acquire goods or services, the entity acting on behalf of the VA through such an interagency acquisition or other agreement will comply, to the maximum extent feasible, with the provisions of the Veterans First Contracting Program as set forth in this subpart.

(g) Contracting officers shall ensure awards are made using the VA hierarchy of SDVOSB/VOSB preferences in this subpart. Specifically, the contracting officer will consider preferences for eligible SDVOSBs first, then preferences for other eligible VOSBs.

(h) When an offer of an SDVOSB/VOSB prime contractor includes a proposed team of small business subcontractors and specifically identifies the first-tier subcontractor(s) in the proposal, the contracting officer must consider the capabilities, past performance, and experience of each first tier subcontractor that is part of the team as the capabilities, past performance, and experience of the small business prime contractor if the capabilities, past performance, and experience of the small business prime does not independently demonstrate capabilities and past performance necessary for award.

819.7002 Applicability.

Unless otherwise exempted by law, this subpart applies to VA contracting activities and contracts (see FAR 2.101) including BPAs and orders under FAR subpart 8.4 and acquisition of commercial products or commercial services under FAR part 12. In addition, this subpart applies to VA contractors, their subcontractors and to any Government entity that has a contract, agreement, or other arrangement with the VA to acquire goods and services on behalf of the VA (see 817.501). For applicability and VA policy regarding priorities for use of mandatory Government sources see 808.002.

[87 FR 63005, Oct. 18, 2022; 87 FR 71262, Nov. 22, 2022]

819.7003 Eligibility.

(a) SDVOSB/VOSB size eligibility, challenges, and appeals are governed by the Small Business Administration (SBA) regulations at 13 CFR parts 121, 125, and 134, except where directed otherwise by this part or 38 CFR part 74.

(b) At the time of submission of offers/quotes, and at the time of award of any contract, the offeror must represent to the contracting officer that it is a—

(1) SDVOSB or VOSB eligible under this subpart;

(2) Small business concern under the North American Industry Classification System (NAICS) code assigned to the acquisition; and

(3) Listed as a verified SDVOSB/VOSB on the VA's Vendor Information Pages (VIP) at *https://www.vetbiz.va.gov/vip/*.

(c) A joint venture may be considered eligible if it meets the requirements in 13 CFR part 125; and the joint venture is listed in the VIP database.

(d) To receive a benefit under the Veterans First Contacting Program, an otherwise eligible SDVOSB/VOSB must also meet SBA requirements at 13 CFR parts 121 and 125, including the nonmanufacturer rule requirements at 13 CFR 121.406(b) and limitations on subcontracting at 13 CFR 125.6. The nonmanufacturer rule (see 13 CFR 121.406) and the limitations on subcontracting requirements apply to all SDVOSB and VOSB set-aside and sole source contracts above the micro-purchase threshold. An offeror shall submit a certification of compliance to be considered eligible for any award under this part (see 819.7004).

(e) Pursuant to 38 U.S.C. 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB/VOSB status is subject to debarment from contracting with the Department for a period of not less than five years. This includes the debarment of all principals in the business. See 809.406–270.

819.7004 Limitations on subcontracting compliance requirements.

(a) A contract awarded under this subpart is subject to the SBA limitations on subcontracting requirements in 13 CFR 125.6, provided that—

(1) Only VIP-listed SDVOSBs are considered eligible and/or ''similarly situated'' under an SDVOSB sole source or set-aside.

(2) A VOSB is subject to the same limitations on subcontracting that apply to an SDVOSB.

(3) Any VIP-listed SDVOSB/VOSB is considered eligible and/or ''similarly situated'' under a VOSB sole source or set-aside.

(b) Pursuant to the authority of 38 U.S.C. 8127(k)(2), a contracting officer may award a contract under this subpart only after obtaining from the offeror a certification that the offeror will comply with the limitations on subcontracting requirement as provided in the solicitation and which shall be included in the resultant contract (see 819.7011).

(1) The formal certification must be completed, signed and returned with the offeror's bid, quotation, or proposal.

(2) The Government will not consider offers for award from offerors that do not provide the certification with their bid, quotation, or proposal, and all such responses will be deemed ineligible for evaluation and award.

(c) An otherwise eligible first tier subcontractor must meet the NAICS size standard assigned by the prime contractor and be listed in VIP to count as similarly situated. Any work

that a first tier VIP-listed subcontractor further subcontracts will count towards the percent of subcontract amount that cannot be exceeded.

(d) An SDVOSB/VOSB awarded a contract on the basis of a set-aside, sole source, or an evaluation preference is required to comply with the limitations on subcontracting either by—

(1) 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 set aside for SDVOSB/VOSB as described in 808.405 and FAR 16.505(b)(2)(i)(F), or for an order issued directly to an SDVOSB/VOSB in accordance with FAR 19.504(c)(1)(ii), by the end of the performance period for the order.

(e) The contracting officer may also, at their discretion, require the contractor to demonstrate its compliance with the limitations on subcontracting at any time during performance of the contract, and upon completion of a contract if the information regarding such compliance is not already available to the contracting officer. Evidence of compliance includes, but is not limited to, invoices, copies of subcontracts, or a list of the value of tasks performed.

(f) Pursuant to Public Law 116–183, the Office of the Small and Disadvantaged Business Utilization (OSDBU) and Chief Acquisition Officer (CAO), will implement a process to monitor compliance with the requirement in this section. The OSDBU and CAO shall jointly refer any violations or suspected violations to the VA Office of Inspector General. This referral obligation does not relieve contracting officers of their obligation to report suspected violations of law to the Office of the Inspector General (OIG).

(1) If the Secretary or designee determines in consultation with the Inspector General that an SDVOSB/VOSB awarded a contract pursuant to 38 U.S.C. 8127 did not act in good faith with respect to the requirements described in 819.7003(d), such SDVOSB/VOSB shall be subject to any or all of the following—

(i) Referral to the VA Suspension and Debarment Committee;

(ii) A fine under section 16(g)(1) of the Small Business Act (15 U.S.C. 645(g)(1)); and

(iii) Prosecution for violating 18 U.S.C. 1001.

(2) The Inspector General shall report to the Congress annually on the number of referred violations and suspected violations, and the disposition of such violations, including the number of small business concerns suspended or debarred from federal contracting or referred for Department of Justice prosecution.

819.7005 Contracting order of priority.

(a) In determining the acquisition strategy applicable to a procurement requirement not otherwise covered under 808.002, the contracting officer shall observe the order of contracting preferences in 38 U.S.C. 8127(h).

(b) Specifically, preferences for awarding contracts to small business concerns shall be applied in the following order of priority:

(1) Contracts awarded to small business concerns owned and controlled by Veterans with service-connected disabilities as provided in this subpart.

(2) Contracts to small business concerns owned and controlled by Veterans that are not covered by paragraph (b)(1) of this section as provided in this subpart.

(3) Contracts awarded pursuant to—

(i) Section 8(a) of the Small Business Act (15 U.S.C. 637(a) as provided in FAR subpart 19.8; or

(ii) Section 31 of the Small Business Act (15 U.S.C. 657a) as provided in FAR subpart 19.13.

(4) Contracts awarded pursuant to any other small business set aside contracting preference, with due deference to the priority for awarding to women-owned small businesses as provided in FAR 19.203(b) through (e) and FAR subpart 19.15.

819.7006 VA service-disabled veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 808.002, 813.106, 819.7007, and

819.7008, the contracting officer shall set-aside a contract action exceeding the micro-purchase threshold for competition restricted to VIP-listed SDVOSB upon a reasonable expectation based on market research that—

(1) Offers/quotations will be received from two or more eligible VIP-listed SDVOSBs; and

(2) Award can be made at a fair and reasonable price that offers the best value to the Government.

(b) When conducting SDVOSB set-asides, the contracting officer shall ensure that—

(1) Offerors are registered and verified as eligible in the VIP database at the time of submission of offers and at time of award; and

(2) Offerors affirmatively represent their SDVOSB and small business status based on the size standard corresponding to the North American Industrial Classification System (NAICS) code assigned to the solicitation/contract, as set forth in 819.7003(b) or (c).

(c) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible VIP-listed SDVOSB, the contracting officer may make an award to that concern. If the contracting officer receives no acceptable offers from eligible SDVOSBs, the set-aside shall be withdrawn and the requirement, if still valid, set aside for VOSB competition if warranted or otherwise procured using the most appropriate strategy based on the results of market research.

819.7007 VA veteran-owned small business set-aside procedures.

(a) The contracting officer shall consider SDVOSB set-asides before considering VOSB set-asides. Except as authorized by 808.002, 813.106, 819.7007, and 819.7008, the contracting officer shall set aside a contract action exceeding the micro-purchase threshold for competition restricted to VIP-listed VOSBs upon a reasonable expectation based on market research that—

(1) Offers/quotations will be received from two or more VIP-listed VOSBs; and

(2) Award can be made at a fair and reasonable price that offers the best value to the Government.

(b) When conducting VOSB set-asides, the contracting officer shall ensure that—

(1) Offerors are registered and verified as eligible in the VIP database at the time of submission of offers and at time of award; and

(2) Offerors affirmatively represent their SDVOSB/VOSB and small business status based on the size standard corresponding to the NAICS code assigned to the solicitation/contract (see 819.7003(b) and (c)).

(c) If the contracting officer receives only one acceptable offer at a fair and reasonable price from an eligible VIP-listed VOSB in response to a VOSB set-aside, the contracting officer may make an award to that concern. If the contracting officer decides not to make an award to the single acceptable offer received, or if the contracting officer receives no acceptable offers from eligible VOSBs, the set-aside shall be withdrawn and the requirement, if still valid, set aside for other small business programs in accordance with 819.7005 or otherwise procured using the most appropriate strategy based on the results of market research.

819.7008 Sole source awards to verified service-disabled veteran-owned small businesses.

(a) A contracting officer may award a contract to a VIP-listed service-disabled veteran-owned small business (SDVOSB) using other than competitive procedures provided—

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized and the required justification pursuant to FAR 6.302–5(c)(2)(ii) is posted in accordance with FAR part 5;

(3) The SDVOSB has been determined to be a responsible contractor with respect to performance; and

(4) In the estimation of the contracting officer contract award can be made at a fair and reasonable price that offers best value to the Government.

(b) The contracting officer's determination to make a sole source award is a business decision wholly within the discretion of the contracting officer.

To ensure that opportunities are available to the broadest number of SDVOSBs, this authority is to be used only when in the best interest of the Government.

(c) A determination that only one SDVOSB can meet the requirement is not required. However, in accordance with FAR 6.302–5(c)(2)(ii), contracts awarded using this authority shall be supported by a written justification and approval described in FAR 6.303 and 6.304, as applicable.

(d) When conducting a SDVOSB sole source acquisition, the contracting officer shall ensure the business meets eligibility requirements in 819.7003.

(e) A procurement requirement estimated to exceed the legislative threshold of $5 million shall not be split or subdivided to permit the use of this SDVOSB sole source authority.

819.7009 Sole source awards to verified veteran-owned small businesses.

(a) A contracting officer may award a contract to a VIP-listed veteran-owned small business (VOSB) using other than competitive procedures provided—

(1) The anticipated award price of the contract (including options) will not exceed $5 million;

(2) The requirement is synopsized and the required justification pursuant to FAR 6.302–5(c)(2)(ii) is posted in accordance with FAR part 5;

(3) The VOSB has been determined to be a responsible contractor with respect to performance;

(4) In the estimation of the contracting officer contract award can be made at a fair and reasonable price that offers best value to the Government; and

(5) No responsible SDVOSB has been identified.

(b) The contracting officer's determination to make a sole source award is a business decision wholly within the discretion of the contracting officer. To ensure that opportunities are available to the broadest number of VOSBs, this authority is to be used only when in the best interest of the Government.

(c) A determination that only one VOSB can meet the requirement is not required. However, in accordance with FAR 6.302–5(c)(2)(ii), contracts awarded using this authority shall be supported by a written justification and approval described in FAR 6.303 and 6.304, as applicable.

(d) When conducting a VOSB sole source acquisition, the contracting officer shall ensure the business meets eligibility requirements in 819.7003.

(e) A procurement requirement estimated to exceed the legislative threshold of $5 million shall not be split or subdivided to permit the use of this VOSB sole source authority.

819.7010 Tiered set-aside evaluation.

(a) Pursuant to the authority of 38 U.S.C. 8127 and under limited circumstances as set forth in this section, contracting officers may consider using a tiered set-aside evaluation approach to minimize delays in the re-solicitation process.

(b) Tiered evaluation of offers is a procedure that may be used in competitive negotiated acquisitions, including construction and acquisitions for commercial products and commercial services when the VA Rule of Two (see 802.101) determination indicates a set-aside is required, but other circumstances preclude a confident conclusion that an award can be made at the SDVOSB or VOSB tier. The contracting officer—

(1) Solicits and receives offers from targeted tiers of small business groups, with SDVOSB as the first tier and VOSB as the second tier;

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

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

(c) Market research, which shall be conducted and documented in advance of issuing the solicitation, will inform which of the following types of tiers will be included in the solicitation:

(1) Tiered evaluations limited to SDVOSBs or VOSBs;

(2) Tiered evaluations including 8(a) and HUBZone small businesses; or

(3) Tiered evaluations including all other small business concerns.

(d) The tiered order of priority shall be consistent with 819.7005. Consideration shall be given to HUBZone and

8(a) small business concerns before evaluating offers from other small business concerns.

819.7011 Contract clauses.

(a) The contracting officer shall insert clause 852.219–73, VA Notice of Total Set-Aside for Verified Service-Disabled Veteran-Owned Small Businesses, or clause 852.219–74, VA Notice of Total Set-Aside for Verified Veteran-Owned Small Businesses, as applicable, in solicitations, orders and contracts that are set-aside, reserved, evaluated or awarded under this subpart. This includes sole source awards as well as multiple-award contracts when orders may be set aside for SDVOSBs/VOSBs as described in 808.405 and FAR 19.504(c)(1)(ii).

(b) The contracting officer shall insert the clause at 852.219–75, VA Notice of Limitations on Subcontracting—Certificate of Compliance for Services and Construction, in solicitations and contracts for services and construction, including BPAs, BOAs, and orders, for acquisitions that are evaluated, set-aside, or awarded on a sole source basis under this subpart. This includes orders awarded under multiple-award contracts to SDVOSBs/VOSBs.

(c) The contracting officer shall insert the clause at 852.219–76, VA Notice of Limitations on Subcontracting—Certificate of Compliance for Supplies and Products, in solicitations and contracts for supplies or products, including BPAs, BOAs, and orders, for acquisitions that are to be awarded on the basis of an SDVOSB/VOSB set-aside, sole source, or an evaluation preference under this subpart. This includes orders awarded under multiple-award contracts to SDVOSBs/VOSBs. The contracting officer shall tailor clause 852.219–76, and paragraph (a)(2)(iii) of the clause, as appropriate.

Subpart 819.71 [Reserved]

PART 822—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 822.3—Contract Work Hours and Safety Standards Act

Sec.

822.304 Variations, tolerances, and exemptions.
822.305 Contract clause.

Subpart 822.4 [Reserved]

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 29 CFR 5.15(d); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 822.3—Contract Work Hours and Safety Standards Act

822.304 Variations, tolerances, and exemptions.

For contracts providing nursing home care for veterans, the Secretary of Labor has allowed a variation to the requirements of Contract Work Hours and Safety Standards (the statute) (40 U.S.C. 3701, *et seq.*) regarding the payment of overtime (see 29 CFR 5.15(d)(2)). The variation provides that overtime may be calculated on a basis other than a 40 hour workweek (as an alternate work period) when—

(a) Due to operational necessity or convenience a work period of 14 consecutive days may be accepted in lieu of the workweek of 7 consecutive days for the purpose of computing overtime compensation, pursuant to an agreement or understanding arrived at between the contractor and the contractors' employees before performance of the work; and

(b) If The contractor's employees receive compensation for employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period at a rate not less than 1½ times the regular rate at which the individual is employed, computed in accordance with the requirements of the Fair Labor Standards Act of 1938, as amended

[83 FR 16209, Apr. 16, 2018]

822.305 Contract clause.

The contracting officer shall insert the clause at 852.222–70, Contract Work Hours and Safety Standards—Nursing Home Care for Veterans, in solicitations and contracts for nursing home care for veterans. The contractor shall flow down this clause and insert in all subcontracts, at any tier.

[83 FR 16209, Apr. 16, 2018]

Subpart 822.4 [Reserved]

PART 823—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG–FREE WORKPLACE

Subpart 823.1—Sustainable Acquisition Policy

Sec.
823.103–70 Policy.
823.103–71 Solicitation provision.

Subpart 823.3—Hazardous Material Identification and Material Safety Data

823.300 Scope of subpart.
823.303–70 Contract clause.

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

SOURCE: 84 FR 45681, Aug. 30, 2019, unless otherwise noted.

Subpart 823.1—Sustainable Acquisition Policy

823.103–70 Policy.

(a) For new contracts and orders above the micro-purchase threshold, contracting officers may insert a solicitation provision to include an evaluation factor for an offeror's Sustainable Acquisition Plan.

(b) When a solicitation includes the provision at 852.223–70, Instruction to Offerors—Sustainable Acquisition Plan, offerors shall include a Sustainable Acquisition Plan in their technical proposal addressing the sustainable products and services for delivery under any resulting contract.

823.103–71 Solicitation provision.

The contracting officer shall insert the provision at 852.223–70, Instruction to Offerors—Sustainable Acquisition Plan, in solicitations above the micro-purchase threshold.

Subpart 823.3—Hazardous Material Identification and Material Safety Data

823.300 Scope of subpart.

This subpart provides a contract clause for use in administering safety and health requirements.

823.303–70 Contract clause.

Contracting officers shall insert clause 852.223–71, Safety and Health, in solicitations and contracts that involve hazardous materials for the following types of requirements:

(a) Research, development, or test projects.

(b) Transportation of hazardous materials.

(c) Construction.

PART 824—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 824.1—Protection of Individual Privacy

Sec.
824.102 General.
824.103 Procedures.
824.103–70 Protection of privacy—general requirements and procedures related to Business Associate Agreements.
824.103–71 Liquidated damages—protection of information.

Subpart 824.2—Freedom of Information Act

824.203 Policy.

AUTHORITY: 5 U.S.C. 552a; 38 U.S.C. 5723–5724, 5725(a)–(c); 40 U.S.C. 121(c); 41 U.S.C. 1121(c), 1702; 38 CFR 1.550 through 1.562 and 1.575 through 1.584; and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 824.1—Protection of Individual Privacy

824.102 General.

VA rules implementing the Privacy Act of 1974 are in 38 CFR 1.575 through

1.584, Safeguarding Personal Information in Department of Veterans Affairs Records.

[84 FR 45681, Aug. 30, 2019]

824.103 Procedures.

(c) The contracting officer shall reference the following documents in solicitations and contracts that require the design, development, or operation of a system of records—

(1) VA Handbook 6500.6, Contract Security;

(2) VA Handbook 6508.1, Procedures for Privacy Threshold Analysis and Privacy Impact Assessment;

(3) VA Handbook 6510, VA Identity and Access Management—

(i) The contracting officer will ensure that statements of work or performance work statements that require the design, development, or operation of a system of records include procedures to follow in the event of a Personally Identifiable Information (PII) breach; and

(ii) The contracting officer shall ensure that Government surveillance plans for contracts that require the design, development, or operation of a system of records include monitoring of the contractor's adherence to Privacy Act/PII regulations. The assessing official should document contractor-caused breaches or other incidents related to PII in past performance reports. Such incidents include instances in which the contractor did not adhere to Privacy Act/PII contractual requirements.

[84 FR 45681, Aug. 30, 2019]

824.103–70 Protection of privacy—general requirements and procedures related to Business Associate Agreements.

To ensure compliance with unique responsibilities to protect protected health information (PHI), contractors performing under VA contracts subject to unique PHI and the Health Insurance Portability and Accountability Act of 1996 (HIPAA) shall comply with requirements and the clause (852.204–71, Information and Information Systems Security) prescribed at 804.1903.

(a) *HIPAA Business Associate Agreement requirement.* Under the HIPAA Privacy and Security Rules (see 45 CFR part 160), a covered entity (Veterans Health Administration (VHA)) must have a satisfactory assurance that its PHI will be safeguarded from misuse. To do so, a covered entity enters into a Business Associate Agreement (BAA) with a contractor (now the business associate), which obligates the business associate to only use the covered entity's PHI for the purposes for which it was engaged, provide the same protections and safeguards as is required from the covered entity, and agree to the same disclosure restrictions to PHI that is required of the covered entity in situations where a contractor—

(1) Creates, receives, maintains, or transmits VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI in order to perform certain health care operations activities or functions on behalf of the covered entity; or

(2) Provides one or more of the services specified in the HIPAA Privacy Rule to or for the covered entity.

(b) *Veterans Health Administration (VHA)—a HIPAA covered entity.* VHA is the only administration of the Department of Veterans Affairs that is a HIPAA covered entity under the HIPAA Privacy Rule.

(c) *Contractors or entities required to execute BAAs for contracts and other agreements become VHA business associates.* BAAs are issued by VHA or may be issued by other VA programs in support of VHA. The HIPAA Privacy Rule requires VHA to execute compliant BAAs with persons or entities that create, receive, maintain, or transmit VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI in order to perform certain activities, functions or services to, for, or on behalf of VHA.

(1) There may be other VA components or staff offices which also provide certain services and support to VHA and must receive PHI in order to do so. If these components award contracts or enter into other agreements, purchase/delivery orders, modifications, and issue Governmentwide purchase card transactions to help in the delivery of these services to VHA, they will also fall within the requirement to obtain a

satisfactory assurance from these contractors by executing a BAA.

(2) Contractors or other entities supporting VHA required to create, receive, maintain, or transmit VHA PHI shall be required to execute a BAA as mandated by the HIPAA Privacy Rule and requested by the contracting officer, the contracting officer's representative (COR) or the cognizant privacy officer—

(i) Whether via a contract or agreement with VHA; or

(ii) Whether provided from or through another VA administration or staff activity contract for supplies, services or support that involves performing a certain activity, function or service to, for, or on behalf of VHA (*see* VA Directive 6066, Protected Health Information (PHI) and Business Associate Agreements Management).

(d) *BAA requirement flow down to subcontractors.* A prime contractor required to execute a BAA shall also obtain a satisfactory assurance, in the form of a BAA, that any of its subcontractors who will also create, receive, maintain, or transmit VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI will comply with HIPAA requirements to the same degree as the contractor. A contractor employing a subcontractor who creates, receives, maintains, or transmits VHA PHI or that will store, generate, access, exchange, process, or utilize such VHA PHI under a contract or agreement is required to execute a BAA with each of its subcontractors which also obligates the subcontractor (*i.e.*, also a business associate) to provide the same protections and safeguards and agree to the same disclosure restrictions to VHA's PHI that is required of the covered entity and the prime contractor.

[88 FR 4746, Jan. 25, 2023]

824.103–71 Liquidated damages—protection of information.

(a) *Purpose.* As required by 38 U.S.C. 5725 any contracts where sensitive personal information such as PHI must be disclosed to the contractor for the contractor to perform certain functions or services on behalf of VHA shall include a liquidated damages clause as prescribed at 811.503–70.

(b) *Applicability to contracts requiring Business Associate Agreements.* A liquidated damages clause is required (*see* 811.503–70) when performance under a contract requires a contractor to enter into a Business Associate Agreement with VHA because the contractor or its subcontractor is required to create, receive, maintain, or transmit VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI, for certain services or functions, on behalf of VHA. The liquidated damages clause shall be added even in situations where the prime contractor never directly receives VA's sensitive personal information and the same flows directly to the prime contractor's subcontractor.

[88 FR 4746, Jan. 25, 2023]

Subpart 824.2—Freedom of Information Act

824.203 Policy.

(a) VA rules implementing the Freedom of Information Act (FOIA) are in 38 CFR 1.550 through 1.562.

(b) Upon receipt of a request, the contracting officer shall provide the requester with the name of the cognizant VA FOIA Service Office. The VA FOIA Service Office (see *http://www.oprm.va.gov/foia/*) is the focal point for all FOIA requests and official information may only be released through the cognizant FOIA Service or their authorized designee.

[84 FR 45681, Aug. 30, 2019]

PART 825 [RESERVED]

PART 826—OTHER SOCIOECONOMIC PROGRAMS

Subpart 826.2—Disaster or Emergency Assistance Activities

Sec.

826.202–1 Local area set-aside.
826.202–2 Evaluation preference.

AUTHORITY: 38 U.S.C. 8127–8128; 40 U.S.C. 121(c); 41 U.S.C. 1702; 38 CFR 1.550–1.562 and 1.575–1.584; and 48 CFR 1.301–1.304.

SOURCE: 84 FR 45682, Aug. 30, 2019, unless otherwise noted.

Subpart 826.2—Disaster or Emergency Assistance Activities

826.202–1 Local area set-aside.

(c) The contracting officer shall determine whether a local area set-aside should be further restricted to verified Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) or Veteran-Owned Small Businesses (VOSBs) pursuant to subpart 819.70.

826.202–2 Evaluation preference.

Pursuant to 38 U.S.C. 8128, the contracting officer shall include evaluation factors in accordance with 815.304 and the evaluation criteria clause prescribed at 815.304–71(a), 852.215–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 828—BONDS AND INSURANCE

Subpart 828.1—Bonds and Other Financial Protections

Sec.
828.106 Administration.
828.106–70 Bond premium adjustment.
828.106–71 Assisting service-disabled veteran-owned and veteran-owned small businesses in obtaining bonding.
828.106–72 Contract provision.

Subpart 828.2 [Reserved]

Subpart 828.3—Insurance

828.306 Insurance under fixed-price contracts.

Subpart 828.70—Indemnification of Contractors for Medical Research or Development Contracts

828.7000 Scope of subpart.
828.7001 Extent of indemnification.
828.7002 Financial protection.
828.7003 Indemnification clause.

AUTHORITY: 38 8127–8128 and 8151–8153; 40 U.S.C. 121(c); 41 U.S.C 1121; 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 828.1—Bonds and Other Financial Protections

828.106 Administration.

828.106–70 Bond premium adjustment.

The contracting officer shall insert the clause at 852.228–70, Bond Premium Adjustment, in solicitations and contracts when performance and payment bonds or payment protection is required.

[83 FR 7404, Feb. 21, 2018]

828.106–71 Assisting service-disabled veteran-owned and veteran-owned small businesses in obtaining bonding.

VA prime contractors are encouraged to assist SDVOSB concerns and VOSB concerns in obtaining subcontractor performance and payment bonds. Mentors are especially encouraged to assist their protégés in obtaining bid, payment, and performance bonds as prime contractors and bonds as subcontractors when bonds are required.

[74 FR 64636, Dec. 8, 2009]

828.106–72 Contract provision.

Insert 852.228–72, Assisting Service-Disabled Veteran-Owned and Veteran-Owned Small Businesses in Obtaining Bonds, in solicitations that include FAR clause 52.228–1, Bid Guarantee.

[74 FR 64636, Dec. 8, 2009]

Subpart 828.2 [Reserved]

Subpart 828.3—Insurance

828.306 Insurance under fixed-price contracts.

(a) The contracting officer shall insert the provision at 852.228–71, Indemnification and Insurance, in solicitations when utilizing term contracts or contracts of a continuing nature for ambulance, automobile and aircraft service.

(b) Paragraph (a) of this section does not apply to emergency or sporadic ambulance service authorized by VA Manual MP–1, Part II, Chapter 3, or other emergency or sporadic vehicle or aircraft services if both of the following conditions exist:

(1) The service is not used solely for the purpose of avoiding entering into a continuing contract.

(2) The services will be obtained from firms known to carry insurance coverage in accordance with State or local requirements.

[73 FR 2717, Jan. 15, 2008, as amended at 83 FR 7404, Feb. 21, 2018]

Subpart 828.70—Indemnification of Contractors for Medical Research or Development Contracts

SOURCE: 83 FR 7404, Feb. 21, 2018, unless otherwise noted.

828.7000 Scope of subpart.

(a) As used in this subpart, the term ''contractor'' includes subcontractors of any tier under a contract containing an indemnification provision under 38 U.S.C. 7317.

(b) This subpart sets forth the policies and procedures concerning indemnification of contractors performing contracts involving medical research or research and development that involve risks of an unusually hazardous nature, as authorized by 38 U.S.C. 7317.

(c) The authority to indemnify the contractor under this subpart does not create any rights to third parties that do not exist by law.

828.7001 Extent of indemnification.

(a) A contract for medical research or development authorized by 38 U.S.C. 7303, may provide that the Government will indemnify the contractor against losses or liability specified in paragraphs (b) and (c) of this section if all of the following apply:

(1) The contract work involves a risk of an unusually hazardous nature.

(2) The losses or liability arise out of the direct performance of the contract.

(3) The losses or liability are not covered by the financial protection required under 828.7002.

(b) The Government may indemnify a contractor for liability (including reasonable expenses of litigation or settlement) to third persons for death, bodily injury, or loss of or damage to property from a risk that the contract defines as unusually hazardous. The indemnification will not cover liability under State or Federal worker's injury compensation laws to employees of the contractor who are both:

(1) Employed at the site of the contract work; and

(2) Working on the contract for which indemnification is granted.

(c) The Government may indemnify the contractor for loss of or damage to property of the contractor from a risk that the contract defines as unusually hazardous.

(d) A contract that provides for indemnification in accordance with this subpart must also require that:

(1) The contractor must notify the contracting officer of any claim or suit against the contractor for death, bodily injury, or loss of or damage to property; and

(2) The Government may choose to control or assist in the defense of any suit or claim for which indemnification is provided in the contract. (38 U.S.C. 7317)

828.7002 Financial protection.

(a) A contractor shall have and maintain an amount of financial protection to cover liability to third persons and loss of or damage to the contractor's property that meets one of the following:

(1) The maximum amount of insurance available from private sources; or

(2) A lesser amount that the Secretary establishes after taking into consideration the cost and terms of private insurance.

(b) Financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination that provides the maximum amount required. If a contractor elects to self-insure, the contractor must provide the contracting officer, before award, proof of financial responsibility up to the maximum amount required. (38 U.S.C. 7317)

828.7003 Indemnification clause.

The contracting officer shall include the clause, 852.228–72, ''Indemnification of Contractor—Hazardous Research Projects'' in contracts and solicitations that indemnify a contractor for liability (including reasonable expenses of litigation or settlement) to third person for death, bodily injury, or loss of or damage to property from a risk that the contract defines in the performance work statement, the statement of work, or the statement of objectives as unusually hazardous.

PART 829—TAXES

Sec.

829.000 Scope of part.

Subpart 829.2—Federal Excise Taxes

829.203 Other Federal tax exemptions.
829.203–70 Tax exemptions for alcohol products.

Subpart 829.3—State and Local Taxes

829.303 Application of State and local taxes to Government contractors and subcontractors.

AUTHORITY: 26 U.S.C. 5214(a)(2), 5271, 7510; 40 U.S.C. 121(c); 41 U.S.C. 1303(a)(2); 41 U.S.C. 1702 and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

829.000 Scope of part.

This part states the policies and procedures for the following:

(a) Exemptions of alcohol products purchased for use by the VA medical care program from Federal excise taxes.

(b) Specified refund procedures for State and local taxes.

Subpart 829.2—Federal Excise Taxes

SOURCE: 83 FR 48258, Sept. 24, 2018, unless otherwise noted.

829.203 Other Federal tax exemptions.

829.203–70 Tax exemptions for alcohol products.

(a) *General.* (1) Pursuant to 26 U.S.C. 5214(a)(2) and 26 U.S.C. 5271, VA may purchase spirits using a tax exemption as provided by Department of the Treasury, Alcohol and Tobacco Tax and Trade Bureau (TTB) regulations (see 27 CFR parts 1 through 39). As stated in 27 CFR 19.426, agencies of the United States Government that wish to obtain either specially denatured spirits or spirits free of tax for nonbeverage purposes must apply for and receive a permit on form TTB F 5150.33 or must have a previously issued permit on ATF Form 1444.

(2) When purchasing spirits under a tax exemption, the contracting officer shall indicate in the contract document the basis for the exemption and make a copy of the permit available to the contractor. Upon receipt of the spirits, the contractor shall return the permit to the contracting officer unless future orders are anticipated or as directed by the contracting officer.

(3) Department of Veterans Affairs activities that require spirits free of tax for beverage purposes under 26 U.S.C. 7510 must provide a proper purchase order signed by the head of the agency or an authorized designee.

(b) *Specially denatured spirits or spirits free of tax for nonbeverage purposes.* Contracting officers may make purchases of excise tax-free spirits, including denatured alcohol and specially denatured alcohol only from qualified distillery plants or bonded dealers.

(1) Permits previously issued on Alcohol, Tobacco, and Firearms (ATF) Form 1444, Tax-Free Spirits for Use of United States, remain valid until surrendered or cancelled.

(2) A copy of the current ATF Form 1444 or TTB Form 5150.33 shall be made available to the supplier with the initial order. The permit number only needs to be referenced on any future orders with the same supplier.

(c) *Wine.* No tax exemption form or ATF/TTB permit is required for the tax-free procurement of wine from bonded wine premises. The purchase order must show the kind, quantity, and alcohol content of the wine and must state the purpose for which wine is to be used (see 27 CFR 24.293). An extra copy of a properly executed purchase order may be furnished to the bonded wine premises from which wine is purchased to facilitate record keeping. The order must be signed by the head of the contracting activity or their designee.

[83 FR 48259, Sept. 24, 2018]

Subpart 829.3—State and Local Taxes

829.303 Application of State and local taxes to Government contractors and subcontractors.

(a) The authority to make the determination prescribed in FAR 29.303(a) is delegated, without power of redelegation, to the head of the contracting activity (HCA).

[83 FR 48259, Sept. 24, 2018]

PART 830—COST ACCOUNTING STANDARDS ADMINISTRATION [RESERVED]

PART 831—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 831.70—Contract Cost Principles and Procedures for Veterans Services

Sec.
831.7000 Scope of subpart.
831.7000–1 Definitions.
831.7001 Allowable costs and negotiated prices under vocational rehabilitation and education contracts.
831.7001–1 Tuition.
831.7001–2 Special services or courses.
831.7001–3 Books, supplies, and equipment required to be personally owned.
831.7001–4 Medical services and hospital care.
831.7001–5 Consumable instructional supplies.
831.7001–6 Reimbursement for other supplies and services.

AUTHORITY: 38 U.S.C. chapter 31; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C 1702; and 48 CFR 1.301–1.304.

SOURCE: 83 FR 46414, Sept. 13, 2018, unless otherwise noted.

Subpart 831.70—Contract Cost Principles and Procedures for Veterans Services

831.7000 Scope of subpart.

This subpart contains general cost principles and procedures for the determination and allowance of costs or negotiation of prices under cost reimbursement or fixed-price contracts for providing vocational rehabilitation, education, and training to eligible Veterans under 38 U.S.C. chapter 31, (referred to as a ''chapter 31 program''). This subpart applies to contracts with educational institutions as well as to contracts with commercial and nonprofit organizations.

831.7000–1 Definitions.

Chapter 31 refers to the vocational rehabilitation and employment (VR&E) program that provides training and rehabilitation for Veterans with service-connected disabilities under chapter 31 of Title 38 U.S.C.

Consumable instructional supplies means those supplies which are required for instruction in the classroom, shop school, and laboratory of an educational institution, which are consumed, destroyed, or expended by either the student, instructor or both in the process of use, and which have to be replaced at frequent intervals without adding to the value of the institution's physical property.

Similarly circumstanced non-Veteran student means a student in equal or like situations as a person who is neither receiving educational or training benefits under chapter 31 or chapter 33 of Title 38 U.S.C. or the savings provisions of section 12(a) of Public Law 85–857, nor having all or any part of tuition fees or other charges paid by the educational institution.

Work adjustment training means a specialized structure program that is facility or community based and designated to assist an individual in acquiring or improving work skills, work behaviors, work tolerance, interpersonal skills or work ethics.

831.7001 Allowable costs and negotiated prices under vocational rehabilitation and education contracts.

831.7001–1 Tuition.

(a) Tuition and enrollment fees shall be paid at the institution's customary amount that—

(1) Does not exceed the tuition charged to similarly circumstanced non-Veteran students; and

(2) Is equal to the lowest price offered or published for the entire course, semester, quarter, or term.

(b) The cost of the Veteran student's tuition and fees under a contract shall be offset by—

(1) Any amount of tuition and fees that are waived by a State or other government authority; or

(2) Any amounts the Veteran student receives from a fellowship, scholarship, grant-in-aid, assistantship, or similar award that limits its use to payment of tuition, fees, or other charges that VA normally pays as part of a chapter 31 program.

(c) VA will not pay tuition or incidental fees to institutions or establishments furnishing apprentice or on-the-job training. VA may elect to pay charges or expenses that fall into either of the following categories:

(1) Charges customarily made by a nonprofit workshop or similar establishment for providing work adjustment training to similarly

circumstanced non-Veteran students even if the trainee receives an incentive wage as part of the training.

(2) Training expenses incurred by an employer who provides on-the-job training following rehabilitation to the point of employability when VA determines that the additional training is necessary.

831.7001–2 Special services or courses.

Special services or courses are those services or courses that VA requests that are supplementary to those the institution customarily provides for similarly circumstanced non-Veteran students, and that the contracting officer considers them to be necessary for the rehabilitation of the trainee. VA will negotiate the costs/prices of special services or courses prior to ordering them.

831.7001–3 Books, supplies, and equipment required to be personally owned.

(a) *Reimbursement for books, supplies, and equipment.* VA will provide reimbursement for books, equipment, or other supplies of the same variety, quality, or amount that all students taking the same course or courses are customarily required to own personally. VA will provide reimbursement for items that the institution does not specifically require for pursuit of the course if VA determines that such items are needed because of the demands of the course, general possession by other students, and the disadvantage imposed on a Veteran student by not having the item.

(b) *Partial payment agreements.* Agreements in which VA would pay the institution a partial payment with the remainder to be paid by the Veteran student are not authorized.

(c) *Thesis expenses.* The institution's costs in connection with a Veteran student's thesis are considered supplies and are therefore authorized for reimbursement if the Veteran student's committee chairman, major professor, department head, or appropriate dean certifies that the thesis is a course requirement and the expenses are required to complete the thesis. These expenses may include research expenses, typing, printing, microfilming, or otherwise reproducing the required number of copies.

(d) *Reimbursement for books, supplies, and equipment.* Books, supplies, and equipment that the institution purchases specifically for trainees will be reimbursed at the net cost to the institution. The VA shall reimburse the institution for books, supplies, and equipment when these items are—

(1) Issued to students from its own bookstore or supply store;

(2) Issued to students from retail stores or other non-institutionally owned establishments not owned by the contractor/institution but arranged or designated by them in cooperation with VA; or

(3) Rented or leased books, supplies and equipment and are issued to students for survey classes when it is customary that students are not required to own the books.

(e) *Handling charges.* VA shall reimburse the institution for any handling charges not to exceed more than 10 percent of the allowable charge for the books, equipment or other supplies unless—

(1) The tuition covers the charges for supplies or rentals or a stipulated fee is assessed to all students; or

(2) The handling charge is for Government-owned books that the contractor procures from the Library of Congress.

831.7001–4 Medical services and hospital care.

(a) VA may pay the customary student health fee when payment of the fee is required for similarly circumstanced non-Veteran students. If payment of the fee is not required for similarly circumstanced non-Veteran students, payment may be made if VA determines that payment is in the best interest of the Veteran student and the Government.

(b) When the customary Veteran student's health fee does not cover medical services or hospital care, but these medical services are available in an institution-operated facility or with doctors and hospitals in the immediate area through a prior arrangement, VA may provide reimbursement for these services in a contract for the services if—

(1) An arrangement is necessary to provide timely medical services for Veteran-students attending the facility under provisions of chapter 31; and

(2) The general rates established for medical services do not exceed the rates established by VA.

(c) VA may reimburse a rehabilitation facility for incidental medical services provided during a Veteran student's program at the facility.

831.7001–5 Consumable instructional supplies.

(a) VA will provide reimbursement for consumable instructional supplies that the institution requires for the instruction of all students, Veteran or non-Veteran students, pursuing the same or comparable course or courses when—

(1) The supplies are entirely consumed in the fabrication of a required project; or

(2) The supplies are not consumed but are of such a nature that they cannot be salvaged from the end product for reuse by disassembling or dismantling the end product.

(b) VA will not provide reimbursement for consumable instructional supplies if any of the following apply:

(1) The supplies can be salvaged for reuse.

(2) The supplies are used in a project that the student has elected as an alternate class project to produce an end product of greater value than that normally required to learn the skills of the occupation, and the end product will become the Veteran's property upon completion.

(3) The supplies are used in a project that the institution has selected to provide the student with a more elaborate end product than is required to provide adequate instruction as an inducement to the Veteran student to elect a particular course of study.

(4) The sale value of the end product is equal to or greater than the cost of supplies plus assembly, and the supplies have not been reasonably used so that the supplies are not readily salvaged from the end product to be reused for instructional purposes.

(5) The end product is of permanent value and retained by the institution.

(6) A third party loans the articles or equipment for repair or improvement and the third party would otherwise pay a commercial price for the repair or improvement.

(7) The number of projects resulting in end products exceeds the number normally required to teach the recognized job operations and processes of the occupation stipulated in the approved course of study.

(8) The cost of supplies is included in the charge for tuition or as a fee designated for such purpose.

831.7001–6 Reimbursement for other supplies and services.

VA will provide reimbursement for other services and assistance that may be authorized under applicable provisions of 38 U.S.C. chapter 31 regulations, including, but not limited to, employment and self-employment services, initial and extended evaluation services, and independent living services.

PART 832—CONTRACT FINANCING

Sec.

832.001 Definitions.
832.006 Reduction or suspension of contract payments upon finding of fraud.
832.006–1 General.
832.006–4 Procedures.

Subpart 832.1—Non-Commercial Item Purchase Financing

832.111 Contract clauses for noncommercial purchases.
832.111–70 VA contract clauses for non-commercial purchases.

Subpart 832.2—Commercial Item Purchase Financing

832.202 General.
832.202–1 Policy.
832.202–4 Security for Government financing.

Subpart 832.4—Advance Payments for Non-Commercial Items

832.402 General.
832.404 Exclusions.

Subparts 832.5—832.9 [Reserved]

Subpart 832.11 [Reserved]

Subpart 832.70—Electronic Invoicing Requirements

832.7000 General.
832.7001 Electronic payment requests.
832.7001–1 Data transmission.
832.7001–2 Contract clause.

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

832.001 Definitions.

As used in this part:

(a) *Designated agency office* means the office designated by the purchase order, agreement, or contract to first receive and review invoices. This office can be contractually designated as the receiving entity. This office may be different from the office issuing the payment.

(b) *Electronic form* means an automated system transmitting information electronically according to the accepted electronic data transmission methods identified in 832.7002–1. Facsimile, email, and scanned documents are not acceptable electronic forms for submission of payment requests.

(c) *Payment request* means any request for contract financing payment or invoice payment submitted by a contractor under a contract.

[83 FR 49305, Oct. 1, 2018]

832.006 Reduction or suspension of contract payments upon finding of fraud.

832.006–1 General.

(b) The Senior Procurement Executive (SPE) is authorized to make determinations that there is substantial evidence that contractors' requests for advance, partial, or progress payments are based on fraud and may direct that further payments to the contractors be reduced or suspended, as provided in FAR 32.006.

[83 FR 49305, Oct. 1, 2018]

832.006–4 Procedures.

(b) The Remedy Coordination Official (RCO) for VA is the Deputy Senior Procurement Executive (DSPE) who shall carry out the responsibilities of the Secretary or designee in FAR 32.006–4(b).

(e) The RCO shall carry out the responsibilities of the agency head in FAR 32.006–4(e) to notify the contractor of the reasons for the recommended action and of its right to submit information within a reasonable period of time in response to the proposed action under FAR 32.006.

(1) The notice of proposed action will be sent to the last known address of the contractor, the contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other method that provides signed evidence of receipt. In the case of a business, the notice of proposed action may be sent to any partner, principal, officer, director, owner or co-owner, or joint venture. The contractor will be afforded an opportunity to appear before the RCO to present information or argument in person or through a representative and may supplement the oral presentation with written information and argument.

(2) The contractor may supplement the oral presentation with written information and argument. The proceedings will be conducted in an informal manner and without the requirement for a transcript. If the RCO does not receive a reply from the contractor within 30 calendar days, the RCO will base his or her recommendations on the information available. Any recommendation of the RCO under FAR 31.006–4(a) and paragraph (b) of this section, must address the results of this notification and the information, if any, provided by the contractor. After reviewing all the information, the RCO shall make a recommendation to the SPE whether or not substantial evidence of fraud exists.

(g) In addition to following the procedures in FAR 32.006–4, the SPE shall provide a copy of each final determination and the supporting documentation to the contractor, the RCO, the contracting officer, and the Office of the Inspector General (OIG). The contracting officer will place a copy of the determination and the supporting documentation in the contract file.

[83 FR 49305, Oct. 1, 2018]

Subpart 832.1—Non-Commercial Item Purchase Financing

832.111 Contract clauses for non-commercial purchases.

832.111–70 VA contract clauses for non-commercial purchases.

(a)(1) Insert the clause at 852.232–70, Payments Under Fixed-Price Construction Contracts (Without NAS–CPM) in solicitations and contracts that contain the FAR clause at 52.232–5, Payments Under Fixed-Price Construction Contracts, and if the solicitation or contract does not require use of the ''Network Analysis System—Critical Path Method (NAS–CPM).''

(2) If the solicitation or contract includes guarantee period services, the contracting officer shall use the clause with its Alternate I.

(b)(1) Insert the clause at 852.232–71, Payments Under Fixed-Price Construction Contracts (Including NAS–CPM), in solicitations and contracts that contain the FAR clause at 52.232–5, Payments Under Fixed-Price Construction Contracts, and if the solicitation or contract requires use of the ''Network Analysis System—Critical Path Method (NAS–CPM).''

(2) If the solicitation or contract includes guarantee period services, the contracting officer shall use the clause with its Alternate I.

[83 FR 49306, Oct. 1, 2018]

Subpart 832.2—Commercial Item Purchase Financing

832.202 General.

832.202–1 Policy.

(d) HCAs shall report, no later than December 31st of each calendar year, to the Senior Procurement Executive (SPE) and the DSPE, on the number of contracts for commercial items with unusual contract financing or with commercial interim or advance payments approved for the previous fiscal year. The report shall include the contract number and amount, the amount of the unusual contract financing or with commercial interim or advance payments approved, and the kind and amount of security obtained for the advance.

[83 FR 49306, Oct. 1, 2018]

832.202–4 Security for Government financing.

(a)(2) An offeror's financial condition may be considered adequate security to protect the Government's interest when the Government provides contract financing. In assessing the offeror's financial condition, the contracting officer may obtain, to the extent required, the following information—

(i) A current year interim balance sheet and income statement and balance sheets and income statements for the two preceding fiscal years. The statements should be prepared in accordance with generally accepted accounting principles and must be audited and certified by an independent public accountant or an appropriate officer of the firm;

(ii) A cash flow forecast for the remainder of the contract term showing the planned origin and use of cash within the firm or branch performing the contract;

(iii) Information on financing arrangements disclosing the availability of cash to finance contract performance, the contractor's exposure to financial risk, and credit arrangements;

(iv) A statement of the status of all State, local, and Federal tax accounts, including any special mandatory contributions;

(v) A description and explanation of the financial effects of any leases, deferred purchase arrangements, patent or royalty arrangements, insurance, planned capital expenditures, pending claims, contingent liabilities, and other financial aspects of the business; and

(vi) Any other financial information deemed necessary.

[83 FR 49306, Oct. 1, 2018]

Subpart 832.4—Advance Payments for Non-Commercial Items

832.402 General.

(c)(1)(iii) The authority to make the determination required by FAR

32.402(c)(1)(iii) and to approve contract terms is delegated to the head of the contracting activity (HCA). The request for approval shall include the information required by FAR 32.409–1 and shall address the standards for advance payment in FAR 32.402(c)(2). HCAs shall report, no later than December 31st of each calendar year, to the Senior Procurement Executive (SPE) and the DSPE, on number of contracts for non-commercial items with advance payments approved in the previous fiscal year. The report shall include the contract number and amount, the amount of the advance payment, and the kind and amount of security obtained for the advance.

[83 FR 49306, Oct. 1, 2018]

832.404 Exclusions.

(b)(1) As permitted by 31 U.S.C. 3324(d)(2), VA allows advance payment for subscriptions or other charges for newspapers, magazines, periodicals, and other publications for official use, notwithstanding the provisions of 31 U.S.C. 3324(a). The term ''other publications'' includes any publication printed, microfilmed, photocopied or magnetically or otherwise recorded for auditory or visual use.

(2) As permitted by 31 U.S.C. 1535, VA allows advance payment for services and supplies obtained from another Government agency.

(3) As permitted by 5 U.S.C. 4109, VA allows advance payment for all or any part of the necessary expenses for training Government employees, including obtaining professional credentials under 5 U.S.C. 5757, in Government or non-Government facilities, including the purchase or rental of books, materials, and supplies or services directly related to the training of a Government employee.

[83 FR 49306, Oct. 1, 2018]

Subparts 832.5—832.9 [Reserved]

Subpart 832.11 [Reserved]

Subpart 832.70—Electronic Invoicing Requirements

SOURCE: 83 FR 49306, Oct. 1, 2018, unless otherwise noted.

832.7000 General.

This subpart prescribes policy requirements for submitting and processing payment requests in electronic form.

832.7001 Electronic payment requests.

(a) The contractor shall submit payment requests in electronic form unless directed by the contracting officer to submit payment requests by mail. Purchases paid with a Government-wide commercial purchase card are considered to be an electronic transaction for purposes of this rule, and therefore no additional electronic invoice submission is required.

(b) The contracting officer may direct the contractor to submit payment requests by mail, through the United States Postal Service, to the designated agency office for—

(1) Awards made to foreign vendors for work performed outside the United States;

(2) Classified contracts or purchases when electronic submission and processing of payment requests could compromise the safeguarding of classified or privacy information;

(3) Contracts awarded by contracting officers in the conduct of emergency operations, such as responses to national emergencies;

(4) Solicitations or contracts in which the designated agency office is a VA entity other than the VA Financial Services Center in Austin, Texas; or

(5) Solicitations or contracts in which the VA designated agency office does not have electronic invoicing capability as described above.

832.7001–1 Data transmission.

The contractor shall submit electronic payment requests through—

(a) VA's Electronic Invoice Presentment and Payment System at the current website address provided in the contract; or

(b) A system that conforms to the X12 electronic data interchange (EDI)

formats established by the Accredited Standards Center (ASC) chartered by the American National Standards Institute (ANSI).

832.7001–2 Contract clause.

The contracting officer shall insert the clause at 852.232–72, Electronic Submission of Payment Requests, in solicitations and contracts exceeding the micro-purchase threshold, except those for which the contracting officer has directed otherwise under 832.7001, and those paid with a Governmentwide commercial purchase card.

PART 833—PROTESTS, DISPUTES, AND APPEALS

Subpart 833.1—Protests

Sec.
833.103–70 Protests to VA.
833.106–70 Solicitation provisions.

Subpart 833.2—Disputes and Appeals

833.209 Suspected fraudulent claims.
833.211 Contracting officer's decision.
833.213 Obligation to continue performance.
833.214 Alternative dispute resolution (ADR).
833.215 Contract clauses.

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; 41 U.S.C. chapter 71; and 48 CFR 1.301–1.304.

SOURCE: 83 FR 46416, Sept. 13, 2018, unless otherwise noted.

Subpart 833.1—Protests

833.103–70 Protests to VA.

(a) *Agency protests.* Pursuant to FAR 33.103(d)(4), an interested party may protest to the contracting officer or, as an alternative, may request an independent review at a level above the contracting officer as provided in this section. An interested party may also appeal to VA a contracting officer's decision on a protest.

(1) *Protests to the contracting officer.* Protests to the contracting officer shall be in writing and shall be addressed where the offer/bid is to be submitted or as indicated in the solicitation.

(2) *Independent review or appeal of a contracting officer decision—protest filed directly with the agency.* (i) Protests requesting an independent review a level above the contracting officer, and appeals within VA above the level of the contracting officer, shall be addressed to: Executive Director, Office of Acquisition and Logistics, Risk Management and Compliance Service (RMCS), Department of Veterans Affairs, 810 Vermont Avenue NW., Washington, DC 20420.

(ii) The protest and pertinent documents shall be mailed to the address in paragraph (a)(2)(i) of this section or sent electronically to: *EDProtests@va.gov.*

(3) An independent review of a protest filed pursuant to paragraph (a)(2) of this section will not be considered if the interested party has a protest on the same or similar issues pending with the contracting officer.

(b) *Agency actions on specific types of protests.* The following types of protests may be dismissed by VA without consideration of the merits or may be forwarded to another agency for appropriate action:

(1) *Contract administration.* Disputes between a contractor and VA are resolved under the disputes clause see the Dispute statute, 41 U.S.C. chapter 71.

(2) *Small business size standards and standard industrial classification.* Challenges of established size standards, ownership and control or the size status of particular firm, and challenges of the selected standard industrial classification are for review solely by the Small Business Administration (SBA) (see 15 U.S.C. 637(b)(6); 13 CFR 121.1002). Pursuant to Public Law 114–328, SBA will also hear cases related to size, status, and ownership and control challenges under the VA Veterans First Contracting Program (see 38 U.S.C. 8127(f)(8)).

(3) *Small business certificate of competency program.* A protest made under section 8(b)(7) of the Small Business Act, or in regard to any issuance of a certificate of competency or refusal to issue a certificate under that section, is not reviewed in accordance with bid protest procedures unless there is a showing of possible fraud or bad faith on the part of Government officials.

(4) *Protests under section 8(a) of the Small Business Act.* The decision to

place or not to place a procurement under the 8(a) program is not subject to review unless there is a showing of possible fraud or bad faith on the part of Government officials or that regulations may have been violated (see 15 U.S.C. 637(a)).

(5) *Affirmative determination of responsibility by the contracting officer.* An affirmative determination of responsibility will not be reviewed unless there is a showing that such determination was made fraudulently or in bad faith or that definitive responsibility criteria in the solicitation were not met.

(6) *Contracts for materials, supplies, articles, and equipment exceeding $15,000.* Challenges concerning the legal status of a firm as a regular dealer or manufacturer within the meaning of 41 U.S.C. chapter 65 are determined solely by the procuring agency, the SBA (if a small business is involved), and the Secretary of Labor (see FAR subpart 22.6).

(7) *Subcontractor protests.* The contracting agency will not consider subcontractor protests except where VA determines it is in the interest of the Government.

(8) *Judicial proceedings.* The contracting agency will not consider protests where the matter involved is the subject of litigation before a court of competent jurisdiction.

(c) *Alternative dispute resolution.* Bidders/offerors and VA contracting officers are encouraged to use alternative dispute resolution (ADR) procedures to resolve protests at any stage in the protest process. If ADR is used, VA will not furnish any documentation in an ADR proceeding beyond what is allowed by the FAR.

(d) *Appeal of contracting officer's protest decision—agency appellate review.* An interested party may request an independent review of a contracting officer's protest decision by filing an appeal in accordance with paragraph (a)(2) of this section.

(1) To be considered timely, the appeal must be received by the cognizant official in paragraph (a)(2) of this section within 10 calendar days of the date the interested party knew, or should have known, whichever is earlier, of the basis for the appeal.

(2) Appeals do not extend the Government Accountability Office's (GAO) timeliness requirements for protests to GAO. By filing an appeal as provided in this paragraph (d), an interested party may waive its rights to further protest to the Comptroller General at a later date.

(3) Agency responses to appeals submitted to the agency shall be reviewed and concurred in by the Office of the General Counsel (OGC).

833.106–70 Solicitation provisions.

(a) The contracting officer shall insert the provision at 852.233–70, Protest Content/Alternative Dispute Resolution, in solicitations expected to exceed the simplified acquisition threshold, including those for commercial items.

(b) The contracting officer shall insert the provision at 852.233–71, Alternate Protest Procedure, in solicitations expected to exceed the simplified acquisition threshold, including those for commercial items.

Subpart 833.2—Disputes and Appeals

833.209 Suspected fraudulent claims.

The contracting officer must refer matters relating to suspected fraudulent claims to the Office of Inspector General for investigation and potential referral to the Department of Justice. The contracting officer may not initiate any collection, recovery, or other settlement action while the matter is in the hands of the Department of Justice without first obtaining the concurrence of the U.S. Attorney concerned, through the Office of the Inspector General.

833.211 Contracting officer's decision.

(a) For purposes of appealing a VA contracting officer's final decision, the Board of Contract Appeals referenced in FAR 33.211(a) and elsewhere in this subpart is the Civilian Board of Contract Appeals (CBCA), 1800 F Street NW, Washington, DC 20405.

833.213 Obligation to continue performance.

(a) As provided in FAR 33.213, contracting officers shall use FAR clause

52.233–1, Disputes, or with its Alternate I. FAR clause 52.233–1 requires the contractor to continue performance in accordance with the contracting officer's decision in the event of a claim arising *under* a contract. Alternate I expands this authority, adding a requirement for the contractor to continue performance in the event of a claim *relating* to the contract.

(b) In the event of a dispute not arising under, but relating to, the contract, as permitted by FAR 33.213(b), if the contracting officer directs continued performance and considers providing financing for such continued performance, the contracting officer shall contact OGC for advice prior to requesting higher level approval for or authorizing such financing. The contracting officer shall document in the contract file any required approvals and how the Government's interest was properly secured with respect to such financing (see FAR 32.202–4 and VAAR subpart 832.2).

833.214 Alternative dispute resolution (ADR).

Contracting officers and contractors are encouraged to use alternative dispute resolution (ADR) procedures. Guidance on ADR may be obtained at the U.S. Civilian Board of Contract Appeals website: *http://www.cbca.gsa.gov*.

833.215 Contract clauses.

The contracting officer shall use the clause at 52.233–1, Disputes, or with its Alternate I (see 833.213).

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 835—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.
835.001–70 Veterans Affairs (VA) definitions.
835.003–70 VA policy.
835.003–71 Research misconduct.
835.003–72 Protection of human subjects.
835.003–73 Animal welfare.
835.003–74 Facilities.
835.003–75 Acknowledgement of support and disclaimer.
835.010 Scientific and technical reports.

AUTHORITY: 38 U.S.C. 7303; 40 U.S.C. 121(c); 41 U.S.C. 1702 and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 70748, Nov. 21, 2022, unless otherwise noted.

835.001–70 Veterans Affairs (VA) definitions.

Research means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalized knowledge.

Research impropriety refers to noncompliance with the laws, regulations, and policies regarding human subject protections, laboratory animal welfare, research safety, research laboratory security, research information security, and research misconduct. It does not encompass improper procedures or conduct in areas outside of the mandate of the Office of Research Oversight (ORO) (*e.g.*, waste, fraud, abuse, or fiscal mismanagement).

Research misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results.

VA facility means a component of the VA national health care system, such as a VA Medical Center, VA Health Care System, or VA Medical and Regional Office Center.

835.003–70 VA policy.

(a) Pursuant to 38 U.S.C. 7303, VA is authorized to carry out a program of medical research in connection with the provisions of medical care and treatment to Veterans.

(b) The Office of Research Oversight (ORO) serves as the primary Veterans Health Administration (VHA) office that advises the Under Secretary for Health on all compliance matters related to—

(1) Human subject protections;
(2) Laboratory animal welfare;
(3) Research safety;
(4) Research laboratory security;
(5) Research information security;
(6) Research misconduct; and
(7) Other research improprieties.

835.003–71 Research misconduct.

The contracting officer shall insert the clause at 852.235–70, Research Misconduct, in all research and development (R&D) solicitations and contracts.

835.003–72 Protection of human subjects.

The contracting officer shall insert the clause at 852.235–71, Protection of Human Subjects, in all research and development (R&D) solicitations and contracts.

835.003–73 Animal welfare.

The contracting officer shall insert the clause at 852.235–72, Animal Welfare, in all research and development (R&D) solicitations and contracts.

835.003–74 Facilities.

If the contracting officer determines that the facilities to be assigned to perform effort on a research and development (R&D) contract are critical to the success of the R&D effort, the contracting officer shall insert the clause at 852.235–73, Facilities, in the solicitation and contract.

835.003–75 Acknowledgement of support and disclaimer.

The contracting officer shall insert the clause at 852.235–74, Acknowledgement of Support and Disclaimer, in all research and development (R&D) solicitations and contracts.

835.010 Scientific and technical reports.

The contracting officer shall insert the clause at 852.235–75, Scientific and Technical Reports, in all research and

development (R&D) solicitations and contracts.

PART 836—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 836.2—Special Aspects of Contracting for Construction

Sec.
836.202 Specifications.
836.202–70 Specifications—use of equal products.
836.203 Government estimate of construction costs.
836.203–70 Protection of the independent government estimate—sealed bid.
836.204 Disclosure of the magnitude of construction projects.

Subpart 836.5—Contract Clauses

836.500 Scope of subpart.
836.501 Performance of work by the contractor.
836.521 Specifications and drawings for construction.
836.573 Contractor production report.
836.574 Subcontracts and work coordination.
836.580 Notice to bidders—additive or deductive bid line items.

Subpart 836.6—Architect-Engineer Services

836.603 Collecting data on and appraising firms' qualifications.
836.606 Negotiations.
836.606–70 Architect-engineer firms' proposal.
836.606–71 Application of 6 percent architect-engineer fee limitation.

Subpart 836.70—Unique Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition, or Removal of Improvements

836.7000 Scope of subpart.
836.7001 Unique construction and architect-engineer services forms.

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3), 1303(a)(2) and 1702; and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 836.2—Special Aspects of Contracting for Construction

836.202 Specifications.

836.202–70 Specifications—use of equal products.

Upon approval of the justification documentation required by FAR 11.105, Items peculiar to one manufacturer, the contracting officer shall include the clause found at 852.236–90, Restriction on Submission and Use of Equal Products, in solicitations and contracts. The contracting officer shall complete the clause by inserting the items which have been approved for restriction to a brand name. This clause also places offerors or bidders on notice that the ''brand name'' provisions of any clause or provision that may authorize the submission of an ''equal'' product, shall not apply to the specific items listed in clause 852.236–90.

[84 FR 9971, Mar. 19, 2019]

836.203 Government estimate of construction costs.

836.203–70 Protection of the independent government estimate—sealed bid.

For sealed bid acquisitions the contracting officer or bid custodian is not authorized to release the basis for calculating the estimate at any time. The person preparing the independent government estimate (IGE) shall—

(a) Designate the IGE as ''For Official Use Only (FOUO)'';

(b) The contracting officer or bid custodian shall file a sealed copy of the IGE with the bids. (In the case of two-step acquisitions, the contracting officer or bid custodian accomplishes this during the second step);

(c) After the bids are read and recorded during a Public Bid Opening, remove the ''For Official Use Only (FOUO)'' designation then read and record the estimate as if it were a bid, in the same detail as the bids; and

(d) In instances where only one bid has been received, the government estimate shall not be read by the contracting officer as it may be needed to conduct negotiations with the offeror.

[84 FR 9972, Mar. 19, 2019]

836.204 Disclosure of the magnitude of construction projects.

The contracting officer shall utilize the estimated price ranges defined in FAR 36.204(a) through (e) as further supplemented below when identifying the magnitude of a VA project in advance notices and solicitations:

(f) For estimated price ranges between $1,000,000 and $5,000,000, the contracting officer shall identify the magnitude of a VA project in advance notices and solicitations in terms of the following price ranges:

(1) Between $1,000,000 and $2,000,000.

(2) Between $2,000,000 and $5,000,000.

(g) Between $5,000,000 and $10,000,000.

(h) For estimated price ranges greater than $10,000,000, the contracting officer shall identify the magnitude of a VA project in advance notices and solicitations in terms of one of the following price ranges:

(1) Between $10,000,000 and $20,000,000.

(2) Between $20,000,000 and $50,000,000.

(3) Between $50,000,000 and $100,000,000.

(4) Between $100,000,000 and $150,000,000.

(5) Between $150,000,000 and $200,000,000.

(6) Between $200,000,000 and $250,000,000.

(7) More than $250,000,000.

[84 FR 9972, Mar. 19, 2019]

Subpart 836.5—Contract Clauses

836.500 Scope of subpart.

The clauses and provisions prescribed in this subpart are set forth for use in fixed-price construction contracts in addition to those prescribed in FAR subpart 36.5.

[84 FR 9972, Mar. 19, 2019]

836.501 Performance of work by the contractor.

The contracting officer shall insert the clause at 852.236–72, Performance of Work by the Contractor, in solicitations and contracts for construction that contain the FAR clause at 52.236–1, Performance of Work by the Contractor, except those awarded pursuant to subpart 819.70. When the solicitations or contracts include a section entitled ''Network Analysis System (NAS),'' the contracting officer shall use the clause with its Alternate I.

[84 FR 9972, Mar. 19, 2019]

836.521 Specifications and drawings for construction.

The contracting officer shall insert the clause at 852.236–71, Specifications and Drawings for Construction, in solicitations and contracts for construction that include the FAR clause at 52.236–21, Specifications and Drawings for Construction.

[84 FR 9972, Mar. 19, 2019]

836.573 Contractor production report.

The contracting officer shall insert the clause at 852.236–79, Contractor Production Report, in solicitations and contracts for construction expected to exceed the simplified acquisition threshold. The contracting officer may, when in the best interest of the Government, insert the clause in solicitations and contracts for construction when the contract amount is expected to be at or below the simplified acquisition threshold.

[84 FR 9972, Mar. 19, 2019]

836.574 Subcontracts and work coordination.

The contracting officer shall insert the clause at 852.236–80, Subcontracts and Work Coordination, in invitations for bids and contracts for construction expected to exceed the micro-purchase threshold for construction. When the solicitations or contracts are for new construction work with complex mechanical-electrical work, the contracting officer may use the clause with its Alternate I.

[84 FR 9972, Mar. 19, 2019]

836.580 Notice to bidders—additive or deductive bid line items.

The contracting officer may include the provision 852.236–92, Notice to Bidders—Additive or Deductive Bid Line Items, in invitations for bids when the contracting officer determines that funds may not be available for all the desired construction features at contract award.

[84 FR 9972, Mar. 19, 2019]

Subpart 836.6—Architect-Engineer Services

836.603 Collecting data on and appraising firms' qualifications.

The Associate Executive Director, Office of Facilities Engineering, for Central Office; the Director, Office of Construction Management, for National Cemetery Administration; the Senior Executive Service (SES) official for Administration and Facilities for Veterans Benefits Administration; and the Chief, Engineering Service, for field facilities, are responsible for collecting Standard Forms 330 and maintaining a data file on architect-engineer qualifications.

[84 FR 9973, Mar. 19, 2019]

836.606 Negotiations.

836.606–70 Architect-engineer firms' proposal.

(a) When the contract price is estimated to be $50,000 or more, the contracting officer shall use VA Form 6298, Architect-Engineer Fee Proposal, to obtain the proposal and supporting cost data from the proposed contractor and subcontractor in the negotiation of an A–E contract for design services.

(b) In obtaining A–E services for research study, seismic study, master planning study, construction management and other related services contracts, the contracting officer shall use VA Form 6298, supplemented or modified as needed for the particular project type.

[84 FR 9973, Mar. 19, 2019]

836.606–71 Application of 6 percent architect-engineer fee limitation.

(a) The production and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estimated cost of construction. Other A–E fees are not included in this 6 percent. Such fees are delineated in reference (c) below.

(b) The 6 percent limit also applies to contract modifications, including modifications involving:

(1) *Work not initially included in the contract.* Apply the 6 percent limit to the revised total estimated construction cost.

(2) *Redesign.* Apply the 6 percent limit as follows—

(i) Add the estimated construction cost of the redesign features to the original estimated construction cost;

(ii) Add the contract cost for the original design to the contract cost for redesign; and

(iii) Divide the total contract design cost by the total estimated construction cost. The resulting percentage may not exceed the 6 percent statutory limitation.

(c) The 6 percent fee limitation does not apply to the following architect or engineer services:

(1) Investigative services including but not limited to—

(i) Determination of program requirements, including schematic or preliminary plans and estimates;

(ii) Determination of feasibility of proposed project;

(iii) Preparation of measured drawings of existing facility;

(iv) Subsurface investigation;

(v) Structural, electrical, and mechanical investigation of existing facility;

(vi) Surveys: topographic, boundary, utilities, etc.;

(vii) Environmental services;

(viii) Geo-Tech studies; and

(ix) Feasibility studies.

(2) Special consultant services that are not normally available in organizations of architects or engineers and that are not specifically applied to the actual preparation of working drawings or specifications of the project for which the service are required.

(3) Other—

(i) Reproduction of approved designs through models, color renderings, photographs, or other presentation media;

(ii) Travel and per diem allowances other than those required for the development and review of working drawings and specifications;

(iii) Supervision or inspection of construction, review of shop drawings or samples, and other services performed during the construction phase;

(iv) All other services that are not an integral part of the production and delivery of plans, designs, and specifications; and

(v) The cost of reproducing drawings and specifications for bidding and their

distribution to prospective bidders and plan file rooms.

[84 FR 9973, Mar. 19, 2019]

Subpart 836.70—Unique Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition, or Removal of Improvements

SOURCE: 84 FR 9973, Mar. 19, 2019, unless otherwise noted.

836.7000 Scope of subpart.

This subpart sets forth requirements for the use of VA unique forms, as prescribed in this part, for contracting for construction, architect-engineer services, or dismantling, demolition, or removal of improvements. See part 853.

836.7001 Unique construction and architect-engineer services forms.

Contracting officers may use the following forms, as prescribed in this subpart, for construction, architect-engineer services or dismantling, demolition, or removal of improvements contracts as set forth below and in the referenced prescriptions:

(a) VA Form 6298, Architect-Engineer Fee Proposal (see 853.236–70). VA Form 6298, Architect-Engineer Fee Proposal, shall be used as prescribed in 836.606–70.

(b) VA Form 2138, Order for Supplies or Services (Including Task Orders for Construction or A–E Services) (see 853.236–71). VA Form 2138, Order for Supplies or Services (Including Task Orders for Construction or A–E Services), may be used for ordering supplies or services, including task orders for Construction or A–E services, to include dismantling, demolition, or removal of improvements.

(c) VA Form 10101, Contractor Production Report (see 853.236–72). Contractors may use VA Form 10101, Contractor Production Report or a contractor generated form containing the same type of information contained in the form, as required by 836.573 which prescribes the clause at 852.236–79, Contractor Production Report.

PART 837—SERVICE CONTRACTING

Subpart 837.1—Service Contracts—General

Sec.
837.110–70 VA solicitation provisions and contract clauses.

Subpart 837.2 [Reserved]

Subpart 837.4—Nonpersonal Health Care Services

837.403–70 VA contract clauses.

Subpart 837.70—Mortuary Services

837.7000 Scope.
837.7001 Solicitation provisions and contract clauses.

AUTHORITY: Pub. L. 101–647; 20 U.S.C. 7181–7183; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 837.1—Service Contracts—General

837.110–70 VA solicitation provisions and contract clauses.

(a) Contracting officers shall include the clause at 852.237–74, Non-Discrimination in Service Delivery, in all solicitations and contracts covering services provided to eligible beneficiaries.

(b) The contracting officer shall insert the clause at 852.237–75, Key Personnel, in solicitations and contracts when the contracting officer will require the contractor to designate contractor key personnel.

[84 FR 46453, Sept. 4, 2019]

Subpart 837.2 [Reserved]

Subpart 837.4—Nonpersonal Health Care Services

837.403–70 VA contract clauses.

(a) The contracting officer shall insert the clause at 852.237–70, Indemnification and Medical Liability Insurance, in lieu of FAR clause 52.237–7, in solicitations and contracts for nonpersonal health care services, including contracts awarded under the authority of 38 U.S.C. 7409, 38 U.S.C. 8151–8153, and part 873. The contracting officer may

include the clause in bilateral purchase orders for nonpersonal health care services awarded under the procedures in FAR part 13 and part 813.

(b) The contracting officer shall insert the clause at 852.237–71, Nonsmoking Policy for Children's Services, in solicitations, contracts, and orders that involve health or daycare services that are provided to children under the age of 18 on a routine or regular basis pursuant to the Nonsmoking Policy for Children's Services (20 U.S.C. 6081–6084).

(c) The contracting officer shall insert the clause at 852.237–72, Crime Control Act—Reporting of Child Abuse, in solicitations, contracts, and orders that require performance on Federal land or in a federally operated (or contracted) facility and involve the professions/activities performed by persons specified in the Crime Control Act of 1990 (42 U.S.C. 13031) including, but not limited to, teachers, social workers, physicians, nurses, dentists, health care practitioners, optometrists, psychologists, emergency medical technicians, alcohol or drug treatment personnel, child care workers and administrators, emergency medical technicians and ambulance drivers.

(d) The contracting officer shall insert the clause at 852.237–73, Crime Control Act—Requirement for Background Checks, in solicitations, contracts, and orders that involve providing child care services to children under the age of 18, including social services, health and mental health care, child- (day) care, education (whether or not directly involved in teaching), and rehabilitative programs covered under the Crime Control Act of 1990 (42 U.S.C. 13041).

[84 FR 46453, Sept. 4, 2019]

Subpart 837.70—Mortuary Services

837.7000 Scope.

This subpart applies to mortuary (funeral and burial) services for beneficiaries of VA as provided in 38 U.S.C. 2302, 2303, and 2308 when it is determined that a contract would be the most efficient and effective method. Contract payment terms for use of the purchase card as a method of payment

[84 FR 46454, Sept. 4, 2019]

837.7001 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the basic or the alternate of the provision at 852.237–76, Award to Single Offeror, in solicitations and contracts for mortuary services as follows:

(1) Insert the provision in all sealed bid solicitations for mortuary services; and

(2) Insert the basic provision with its alternate I in all negotiated solicitations for mortuary services.

(b) The contracting officer shall insert in addition to FAR 52.216–21, Requirements, the following VA clauses in all mortuary service solicitations and contracts:

(1) 852.237–77, Area of Performance.

(2) 852.237–78, Performance and Delivery.

(3) 852.237–79, Subcontracting.

(4) 852.237–80, Health Department and Transport Permits.

(c) See also 816.506–70 and 849.504–70 for additional clauses for use in contracts for mortuary services.

[84 FR 46454, Sept. 4, 2019]

PART 839—ACQUISITION OF INFORMATION TECHNOLOGY

Sec.

839.000 Scope of part.

Subpart 839.1—General

839.101 Policy.
839.105 Privacy.
839.105–70 Business Associate Agreements, information technology-related contracts and privacy.
839.105–71 Liquidated damages—protection of information in information technology related contracts.
839.106–70 Information security and privacy contract clauses.

Subpart 839.2—Information and Communication Technology

839.201 Scope of subpart.
839.203 Applicability.
839.203–70 Information and communication technology accessibility standards—contract clause and provision.

AUTHORITY: 38 U.S.C. 5723–5724, 5725(a)–(c); 40 U.S.C. 121(c), 11319(b)(1)(C); 41 U.S.C. 1121(c)(3), 1303 and 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 88 FR 4746, Jan. 25, 2023, unless otherwise noted.

839.000 Scope of part.

This part prescribes acquisition policies and procedures for use in acquiring VA information technology and information technology-related contracts (*see* 802.101) and applies to both VA-procured information technology systems as well as interagency acquisitions defined in FAR part 17 and part 817.

Subpart 839.1—General

839.101 Policy.

(a)(1) In acquiring information technology, including information technology-related contracts which may involve services (including support services), and related resources (*see* the definition at FAR 2.101), contracting officers and requiring activities shall include in solicitations and contracts the requirement to comply with the following directives, policies, and procedures in order to protect VA information, information systems, and information technology—

(i) VA Directive 6500, VA Cybersecurity Program, and the directives and handbooks in the VA 6500 series, to include, but not limited to, VA Handbook 6500.6, Contract Security, which establishes VA's procedures, responsibilities, and processes for complying with current Federal law, Executive orders, policies, regulations, standards, and guidance for protecting and controlling VA sensitive information and ensuring that security requirements are included in acquisitions, solicitations, contracts, purchase orders, and task or delivery orders.

(ii) The VA directives, security requirements, procedures, and guidance in paragraph (a)(1)(i) of this section apply to all VA contracts and to contractors, subcontractors, and their employees in the performance of contractual obligations to VA for information technology products purchased from vendors, as well as for services acquired from contractors and subcontractors or business associates, through contracts and service agreements, in which access to VA information, VA sensitive information or sensitive personal information (including protected health information (PHI))—

(A) That is created, received, maintained, or transmitted, or that will be stored, generated, accessed, exchanged, processed, or utilized by VA, a VA contractor, subcontractor, or third-party servicers or associates, or on behalf of any of these entities, in the performance of their contractual obligations to VA; and

(B) By or on behalf of any of the entities identified in this section, regardless of—

(*1*) Format; or

(*2*) Whether it resides on a VA or a non-VA system, or with a contractor, subcontractor, or third-party system or electronic information system(s), including cloud services, operating for or on the VA's behalf or as required by contract.

(c) Contractors, subcontractors, and third-party servicers or associates providing support to or on behalf of the entities identified in this section, shall employ adequate security controls and use appropriate common security configurations available from the National Institute of Standards and Technology (*see* FAR 39.101(c)) as appropriate in accordance with VA regulations in this chapter, directives, handbooks, and guidance, and established service level agreements and individual contracts, orders, and agreements. Contractors, subcontractors, and third-party servicers and associates will ensure that VA information or VA sensitive information that resides on a VA system or resides on a contractor/subcontractor/third-party entities/associates information and communication technology (ICT) system(s), operating for or on VA's behalf, or as required by contract, regardless of form or format, whether electronic or manual, and information systems, are protected from unauthorized access, use, disclosure, modification, or destruction to ensure information security (*see* FAR 2.101) is provided in order to ensure the integrity, confidentiality, and availability of such information and information systems.

839.105 Privacy.

839.105–70 Business Associate Agreements, information technology-related contracts and privacy.

In accordance with 824.103–70, contracting officers and contracting officer representatives (CORs) shall ensure that contractors, their employees, subcontractors, and third-parties under the contract complete Business Associate Agreements for—

(a) Information technology or information technology-related service contracts subject to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) where HIPAA PHI is created, received, maintained, or transmitted, or that will be stored, generated, accessed, exchanged, processed, or utilized in order to perform certain health care operations activities or functions on behalf of the Veterans Health Administration (VHA) as a covered entity (*see* 802.101 for the definition of information technology-related contracts); or

(b) Contractors supporting other VA organizations which support VHA in this regard and which would therefore require Business Associate Agreements in accordance with 824.103–70.

839.105–71 Liquidated damages—protection of information in information technology related contracts.

Contracting officers shall insert in information technology related contracts the liquidated damages clause as prescribed at 811.503–70.

839.106–70 Information security and privacy contract clauses.

(a) Contracting officers shall insert the clause at 852.239–70, Security Requirements for Information Technology Resources, and the clause at 852.239–71, Information System Security Plan and Accreditation, in all solicitations, contracts, and orders exceeding the micro-purchase threshold that include information technology services.

(b) Contracting officers shall insert the clause at 852.239–72, Information System Design and Development, in solicitations, contracts, orders, and agreements where services to perform information system design and development are required.

(c) Contracting officers shall insert the clause at 852.239–73, Information System Hosting, Operation, Maintenance or Use, in solicitations, contracts, orders, and agreements where services to perform information system hosting, operation, maintenance, or use are required.

(d) Contracting officers shall insert the clause at 852.239–74, Security Controls Compliance Testing, in solicitations, contracts, orders, and agreements, when the clause at 852.239–72 or 852.239–73 is inserted.

Subpart 839.2—Information and Communication Technology

839.201 Scope of subpart.

This subpart applies to the acquisition of Information and Communication Technology (ICT) supplies and services. It concerns the access to and use of information and data by both Federal employees with disabilities and members of the public with disabilities in accordance with FAR 39.201. This subpart implements VA policy on section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d) and 36 CFR parts 1193 and 1194 as it applies to contracts and acquisitions when developing, procuring, maintaining, or using ICT.

839.203 Applicability.

(a) *General.* Solicitations for information technology (IT) (*i.e.,* ICT) or IT-related supplies and services shall require the contractor to submit a VA Section 508 Checklist (*see https://www.section508.va.gov/*).

839.203–70 Information and communication technology accessibility standards—contract clause and provision.

(a) The contracting officer shall insert the provision at 852.239–75, Information and Communication Technology Accessibility Notice, in all solicitations.

(b) The contracting officer shall insert the clause at 852.239–76, Information and Communication Technology Accessibility, in all contracts and orders.

PART 841—ACQUISITION OF UTILITY SERVICES

Subpart 841.1—General

Sec.
841.100 Scope of part.
841.102 Applicability.

Subpart 841.2 [Reserved]

Subpart 841.5—Solicitation Provision and Contract Clauses

841.501 Solicitation provision and contract clauses.
841.501–70 Disputes—Utility contracts.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 841.1—General

841.102 Applicability.

(a) This part applies to purchases of utility services from nonregulated and regulated utility suppliers when a delegation of authority from GSA for those services is requested and obtained.

(b)(4) The acquisition of energy, such as electricity, and natural or manufactured gas, when purchased as a commodity is considered to be acquisitions of supplies rather than utility services as described in FAR part 41.

[85 FR 60077, Sept. 24, 2020]

Subpart 841.2 [Reserved]

Subpart 841.5—Solicitation Provision and Contract Clauses

SOURCE: 85 FR 60077, Sept. 24, 2020, unless otherwise noted.

841.501 Solicitation provision and contract clauses.

841.501–70 Disputes—Utility contracts.

The contracting officer shall insert the clause at 852.241–70, Disputes—Utility Contracts, in solicitations and contracts for utility services subject to the jurisdiction and regulation of a utility rate commission.

[85 FR 67463, Oct. 23, 2020]

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 842—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Sec.
842.000 Scope of part.
842.070 Definitions.

Subpart 842.1 [Reserved]

Subpart 842.2—Contract Administration Services

842.270 Contracting Officer's Representatives' role in contract administration.
842.271 Administrative Contracting Officer's role in contract administration and delegated functions.
842.272 Contract clause for Government construction contract administration.

Subpart 842.7—Indirect Cost Rates

842.705 Final indirect cost rates.

Subpart 842.8 [Reserved]

Subpart 842.12—Novation and Change-of-Name Agreements

842.1202 Responsibility for executing agreements.

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

842.000 Scope of part.

This part prescribes policies and procedures for contract administration and audit services for all Department of Veterans Affairs (VA) contracting activities.

[85 FR 60077, Sept. 24, 2020]

842.070 Definitions.

As used in this part—

Contract administration means Government actions taken after contract award to obtain compliance with such contract requirements as timely delivery of supplies or services, acceptance, payment, and closing of the contract. These actions include, but are not limited to, technical, financial, audit, legal, administrative, and managerial services in support of the contracting officer. It may include additional tasks requested of designated contract administration offices within VA in support of pre-award activities for solicitations issued by or awarded by other contracting activities through Interagency Acquisitions.

Administrative Contracting Officer Letter of Delegation means a delegation of functions as set forth in FAR 42.202, 42.302 and 842.271, Administrative Contracting Officer's role in contract administration and delegated functions, that is issued by a contracting officer to delegate certain contract administration or specialized support services.

[85 FR 60077, Sept. 24, 2020]

Subpart 842.1 [Reserved]-

Subpart 842.2—Contract Administration Services

SOURCE: 85 FR 60077, Sept. 24, 2020 and 85 FR 67463, Oct. 23, 2020, unless otherwise noted.

842.270 Contracting Officer's Representatives' role in contract administration.

(a) A contracting officer may designate a qualified person to be the Contracting Officer's Representative (COR) for the purpose of performing certain technical functions in administering a contract.

(b) The COR acts solely as a technical representative of the contracting officer and is not authorized to perform any function that results in a change in the scope, price, terms or conditions of the contract.

(c) A COR designation must be made in writing by the contracting officer. The designation shall identify the responsibilities and limitations of the COR. A copy of the designation must be furnished to the contractor and the Administrative Contracting Officer (ACO), if separately assigned.

842.271 Administrative Contracting Officer's role in contract administration and delegated functions.

(a) Contracting officers are authorized to delegate certain contract administration or specialized support

services in accordance with FAR 42.202 and 42.302 to cognizant VA administrative contracting officers.

(b) The Administrative Contracting Officer's authority is limited to the actions detailed in the delegation.

(c) These delegations of authority shall be set forth in a written Administrative Contracting Officer (ACO) Letter of Delegation issued by the contracting officer to the accepting contract administration office and designated administrative contracting officer. The ACO Letter of Delegation shall contain the information required in FAR 42.202(a) through (c) and identify the responsibilities and limitations of the ACO. A copy of the delegation will be furnished to the contractor and the ACO.

(d) The contracting officer shall insert the clause at 852.242–71, Administrative Contracting Officer, in solicitations and contracts expected to exceed the micro-purchase threshold.

842.272 Contract clause for Government construction contract administration.

The contracting officer shall insert the clause at 852.242–70, Government Construction Contract Administration, in solicitations and contracts for construction expected to exceed the micro-purchase threshold, when contract administration is delegated.

Subpart 842.7—Indirect Cost Rates

842.705 Final indirect cost rates.

Except when the quick-closeout procedures described in FAR 42.708 are used, contracting officers shall request contract audits on proposed final indirect cost rates and billing rates for use in cost reimbursement and fixed-price incentive contracts as prescribed in FAR subpart 42.7.

[85 FR 60077, Sept. 24, 2020]

Subpart 842.8 [Reserved]

Subpart 842.12—Novation and Change-of-Name Agreements

842.1202 Responsibility for executing agreements.

To avoid duplication of effort on the part of VA contracting offices in preparing and executing agreements to recognize a change of name or successor in interest involving multiple contracts issued by VA activities, only one agreement will be prepared and executed between the Government and the parties (transferor and transferee) and will be processed as forth in FAR 42.1203. The Office of Acquisition and Logistics, Risk Management and Compliance Service will, in each case, designate a cognizant HCA responsible for assigning a contracting officer. The designated contracting officer shall be responsible for taking all necessary and appropriate actions with respect to either recognizing or not recognizing a successor in interest or recognizing a change of name agreement and processing and executing the agreements as set forth in VA procedures.

[85 FR 60078, Sept. 24, 2020]

PART 843—CONTRACT MODIFICATIONS

Subpart 843.2—Change Orders

Sec.
843.205 Contract clauses.
843.205–70 Contract changes—supplement.

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

SOURCE: 84 FR 45682, Aug. 30, 2019, unless otherwise noted.

Subpart 843.2—Change Orders

843.205 Contract clauses.

As authorized in the introductory text of clauses FAR 52.243–1, Changes—Fixed-Price; FAR 52.243–2, Changes—Cost-Reimbursement; and FAR 52.243–4, Changes, and in the prescription at FAR 43.205(c) for FAR 52.243–3, Changes—Time-and-Materials or Labor-Hours, the contracting officer may vary the period within which a contractor must assert its right to an equitable adjustment but the extended

period shall not exceed 60 calendar days.

843.205–70 Contract changes—supplement.

The contracting officer shall insert the clause at 852.243–70, Construction Contract Changes—Supplement, in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction.

PART 844—SUBCONTRACTING POLICIES AND PROCEDURES

Subpart 844.2—Consent to Subcontracts

Sec.
844.202–2 Considerations.

Subpart 844.3—Contractors' Purchasing Systems Reviews

844.303 Extent of review.

Subpart 844.4—Subcontracts for Commercial Items and Commercial Components

844.402 Policy requirements.

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1702 and 48 CFR 1.301–1.304.

SOURCE: 83 FR 47099, Sept. 18, 2018, unless otherwise noted.

Subpart 844.2—Consent to Subcontracts

844.202–2 Considerations.

(a)(14) Where other than lowest price is the basis for subcontractor selection, has the contractor adequately substantiated the selection as being fair, reasonable, and representing the best value to the Government?

Subpart 844.3—Contractors' Purchasing Systems Reviews

844.303 Extent of review.

(f) Policies and procedures pertaining to the use of VA-verified Service-Disabled Veteran-Owned Small Businesses (SDVOSBs) and Veteran-Owned Small Businesses (VOSBs) and utilization in accordance with subpart 819.70 and the Veterans First Contracting Program;

(l) Documentation of commercial item determinations to ensure compliance with the definition of ''commercial item'' in FAR 2.101; and

(m) For acquisitions involving electronic parts, that the contractor has implemented a counterfeit electronic part detection and avoidance system to ensure that counterfeit electronic parts do not enter the supply chain.

Subpart 844.4—Subcontracts for Commercial Items and Commercial Components

844.402 Policy requirements.

(a)(3) Determine whether a particular subcontract item meets the definition of a commercial item. This requirement does not affect the contracting officer's responsibilities or determinations made under FAR 15.403–1(c)(3).

PART 845—GOVERNMENT PROPERTY

Subpart 845.4—Title to Government Property

Sec.
845.402 Title to contractor-acquired property.
845.402–70 Policy.

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1702 and 48 CFR 1.301–1.304.

SOURCE: 83 FR 47099, Sept. 18, 2018, unless otherwise noted.

Subpart 845.4—Title to Government Property

845.402 Title to contractor-acquired property.

845.402–70 Policy.

(a) For other than firm-fixed-price contracts, contractor-acquired property items not anticipated at time of contract award, or not otherwise specified for delivery on an existing line item, shall, by means of a contract modification, be specified for delivery to the Government on an added contract line item. The value of such contractor-acquired property item shall be recorded at the original purchase cost. Unless otherwise noted by the contractor at the time of delivery to the Government, the placed-in-service date shall be the date of acquisition or completed manufacture, if fabricated.

(b) Following delivery and acceptance by the Government of contractor-acquired property items, if these items are to be retained by the contractor for continued use under a successor contract, these items become Government-furnished property (GFP). The items shall be added to the successor contract as GFP by contract modification.

(c) Individual contractor-acquired property items should be recorded in the contractor's property management system at the contractor's original purchase cost.

(d) All other contractor inventory that is excess to the needs of the contract shall be disposed of in accordance with FAR subpart 45.6.

PART 846—QUALITY ASSURANCE

Subpart 846.1—General

Sec.
846.101 Definition.

Subpart 846.3—Contract Clauses

846.370 Clauses for supplies, equipment or perishable goods.
846.370–1 Rejected goods.
846.370–2 Frozen processed foods.
846.370–3 Noncompliance with packaging, packing, and/or marking requirements.
846.370–4 Purchase of shellfish.

Subpart 846.4—Government Contract Quality Assurance

846.408–70 Inspection of subsistence.
846.470 Use of commercial organizations for inspections and grading services.
846.471 Food service equipment.

Subpart 846.7—Warranties

846.702–70 Guarantee period services and specifications.

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1121; 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 846.1—General

846.101 Definition.

As used in this part—

Rejected goods means supplies and/or equipment failing to meet contractual terms and conditions and/or generally accepted quality standards that may be returned by the Government at the contractor's risk and expense.

[83 FR 48259, Sept. 24, 2018]

Subpart 846.3—Contract Clauses

SOURCE: 83 FR 48259, Sept. 24, 2018, unless otherwise noted.

846.370 Clauses for supplies, equipment or perishable goods.

846.370–1 Rejected goods.

The contracting officer shall insert the clause at 852.246–71, Rejected Goods, in solicitations and contracts for the acquisition of supplies, equipment or perishable goods. Perishable goods include such items as packing house and dairy products, bread and bakery products, fresh and frozen fruits, and vegetables.

846.370–2 Frozen processed foods.

(a) The contracting officer shall insert the clause at 852.246–72, Frozen Processed Foods, in solicitations and contracts for frozen processed foods.

(b) The following frozen processed food products must contain a label that complies with the Federal Food, Drug and Cosmetic Act (21 U.S.C. 301), which requires all ingredients be listed in accordance with their predominance order:

(1) Frozen processed food products that contain meat, poultry, or a significant proportion of eggs.

(2) Frozen processed food products that contain fish or fish products.

(3) Frozen bakery products.

(c) All procured frozen processed food products that contain meat, poultry or a significant proportion of eggs must meet the following requirements:

(1) The products must be processed or prepared in plants operating under the supervision of the Department of Agriculture (USDA).

(2) The product must be inspected and approved in accordance with USDA regulations governing meat, poultry, or egg inspection. A label or seal that indicates compliance with USDA regulations, affixed to the container, will be accepted as evidence of compliance.

(d) All procured frozen processed food products that contain fish or fish products must meet the following requirements:

(1) The product must be processed or prepared in plants or vessels, sanitarily inspected, approved, and certified by the United States Department of Commerce (USDC). The products are listed in USDC's publication ''USDC Approved Establishments'' under U.S. Establishments Approved for Sanitation and for Producing USDC Inspected Fishery Products. The inspected products packed under various labels bearing the brand names are produced in accordance with current U.S. Grade Standards or official product specifications, packed under optimum hygienic conditions, and must meet Federal, State, and city sanitation and health regulations. Such brand label or USDC seal indicating compliance with USDC regulations, affixed to a container, will be accepted as evidence of compliance.

(2) If the conditions in paragraph (d)(1) of this section were not met (*e.g.*, no seal), the shipment may be lot-inspected by the USDC and containers stamped to indicate acceptance or a Certification of Inspection issued to accompany the shipment.

(e) Producers of frozen bakery products that ship products in interstate commerce are required to comply with the Federal Food, Drug and Cosmetic Act. Therefore, the product must be verified as shipped interstate or that the producer ships products to other purchasers interstate.

846.370–3 Noncompliance with packaging, packing, and/or marking requirements.

The contracting officer shall insert the clause at 852.246–73, Noncompliance with Packaging, Packing, and/or Marking Requirements, in non-commercial item solicitations and contracts for supplies or equipment where there are special packaging, packing and/or marking requirements. The clause may be used in commercial item acquisitions if a waiver is approved in accordance with FAR 12.302(c).

846.370–4 Purchase of shellfish.

(a) The U.S. Food and Drug Administration (FDA) at *http://www.fda.gov* provides quality assurance seafood safety guidelines.

(b) The contracting officer shall insert the clause at 852.246–76, Purchase of Shellfish, in solicitations and contracts for shellfish.

Subpart 846.4—Government Contract Quality Assurance

SOURCE: 83 FR 48260, Sept. 24, 2018, unless otherwise noted.

846.408–70 Inspection of subsistence.

(a) The contracting officer shall indicate the time and place of inspection in the solicitation.

(b) The contracting officer shall also provide in the solicitation that the contractor is responsible for all of the following:

(1) Arranging and paying for inspection services.

(2) Obtaining from the inspectors a certificate indicating that the product complies with specifications.

(3) Assuring that the certificate, or copy, accompanies the shipment.

(4) Furnishing samples for inspection at the contractor's expense.

(5) Indicating the address where inspection will occur.

(c) The contracting officer must furnish a copy of the purchase document to the inspecting activity.

846.470 Use of commercial organizations for inspections and grading services.

The contracting officer may use a commercial organization for inspection and grading services when the contracting officer determines that all of the following exist:

(a) The results of a technical inspection or grading are dependent upon the application of scientific principles or specialized techniques.

(b) VA is unable to employ the personnel qualified to properly perform the services and is unable to locate another Federal agency capable of providing the service.

(c) The inspection or grading results issued by a private organization are essential to verify the acceptance or rejection of a special commodity.

(d) The services may be performed without direct Government supervision.

846.471 Food service equipment.

(a) All new food service equipment purchased for Dietetic Service through other than the Defense General Supply Center sources must meet requirements set forth by NSF International (NSF) at *http://www.nsf.org*.

(b) The contracting officer will ensure that the following language is placed in the solicitation to assert that the equipment meets NSF standards:

The Government will accept an affixed NSF label and/or documentation of the NSF Certification from the contractor as evidence that the subject equipment meets NSF Sanitation standards.

Subpart 846.7—Warranties

846.702–70 Guarantee period services and specifications.

(a) Guarantee period of services are associated with preserving and protecting a specified piece of contractor-installed equipment that is guaranteed under a construction contract. Specifications for certain high-dollar or traditionally troublesome equipment are designed to allow for the original installer of the equipment to service the equipment throughout the guaranty period.

(b) Guarantee period services are not the same as the 1-year general construction guaranty clause found at FAR clause 52.246–21, Warranty of Construction.

(c) The contracting officer may determine, when in the best interest of VA that guarantee period services, not to exceed a period of 5 years, are appropriate to protect the integrity of the installed equipment and ensure that the equipment performs as guaranteed.

(d) When the determination is made under paragraph (c) of this section, the contracting officer shall include the guarantee period of services as a separately priced contract line item number (CLIN) in solicitations and contracts.

(e) The contracting officer shall insert the clause at 852.246–75, Warranty of Construction—Guarantee Period Services, in solicitations and contracts for construction that include the FAR clause 52.246–21, Warranty of Construction, and that also include guarantee period services.

(f) In accordance with the approved VA specifications, the following types of equipment contain the guarantee period services specifications. The following represents a sampling of these specifications.

(1) *Division 14—Conveying Equipment.* (i) Electric Dumbwaiters Geared Traction and Winding Drum (VA 14 12 11).

(ii) Electric Traction Elevators (VA 14 21 00).

(iii) Traction Cartlift (VA 14 21 11).

(iv) Hydraulic Elevators (VA 14 24 00).

(v) Hydraulic Cartlift (VA 14 24 11).

(2) *Division 27—Communications.* (i) Public Address and Mass Notification Systems (VA 27 51 16).

(ii) Intercommunication and Program Systems (VA 27 51 23).

(g) The construction contractor shall require the original installer of the equipment, which is normally a subcontractor, to provide the guarantee period services.

[83 FR 48260, Sept. 24, 2018]

PART 847—TRANSPORTATION

Subpart 847.2—Contracts for Transportation or for Transportation-Related Services

Sec.
847.207 Solicitation provisions, contract clauses, and special requirements.
847.207–8 Government responsibilities.
847.207–70 VA solicitation provisions, contract clauses, and special requirements.

Subpart 847.3—Transportation in Supply Contracts

847.302 Place of delivery—f.o.b. point.
847.305 Solicitation provisions, contract clauses, and transportation factors.
847.305–10 Packing, marking, and consignment instructions.
847.305–70 Potential destinations known but quantities unknown.
847.305–71 VA contract clauses.
847.306 Transportation factors in the evaluation of offers.
847.306–70 Records of claims.

AUTHORITY: 38 U.S.C. 513; 40 U.S.C. 121(c); 41 U.S.C. 1303; 41 U.S.C. 1702; 41 CFR part 102–117; and 48 CFR 1.301–1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 847.2—Contracts for Transportation or for Transportation-Related Services

SOURCE: 83 FR 48260, Sept. 24, 2018, unless otherwise noted.

847.207 Solicitation provisions, contract clauses, and special requirements.

847.207–8 Government responsibilities.

Transportation payments are audited by the Traffic Manager, to ensure that payment and payment mechanisms for agency transportation are uniform and appropriate in accordance with 41 CFR part 102–118.

847.207–70 VA solicitation provisions, contract clauses, and special requirements.

(a) *Insurance under patient transportation contracts.* The contracting officer shall ensure that all the proper certificates of insurance are submitted to perform on the contract, as outlined in the solicitation, and subsequently included in the contract file. In accordance with 828.306, the contracting officer shall insert the provision at 852.228–71, Indemnification and Insurance, in solicitations when utilizing term contracts or contracts of a continuing nature for ambulance, automobile and aircraft service. When contracting for these services, consider using requirements language such as the following:

(1) Written proof of insurance coverage as required and outlined in the solicitation is required prior to award of any contract. Coverage must be maintained continually through the life of the contract.

(2) Within 10 days of notification of acceptance and pending award of contract, the contractor shall furnish to the contracting officer a certificate of insurance which shall contain an endorsement to the effect that cancellation of, or any material change in, the policies which adversely affect the interests of the Government in such insurance shall not be effective unless a 30-day advance written notice of cancellation or change is furnished to the contracting officer.

(3) Within 10 days of notification of acceptance and pending award of contract, and prior to award of a contract, the contractor shall furnish to the contracting officer a copy of the contractor's current and valid Worker's Compensation certificate.

(b) *Contractor personnel.* The contracting officer shall ensure that contractor personnel have the appropriate level of training, experience, licensure, and pertinent qualifications to ensure patient safety. When contracting for these services, consider using requirements language such as the following:

(1) All contractor personnel performing contract services shall meet the qualifications as specified in the contract, as well as any qualifications required by Federal, State, County, and local Government entities from the place in which they operate. Contractor personnel shall meet these qualifications at all times while performing contract services.

(2) During the contract period of performance, if the contractor proposes to add-on, or replace personnel to perform contract services, the contractor shall submit required evidence of training, certifications, licensing, background, and security clearances, and any other applicable qualifications to the designated contracting officer's representative (COR). At no time shall the contractor utilize add-on or replacement personnel to perform contract services who do not meet the qualifications under the terms and conditions of the contract.

(3) Records of contractor personnel qualifications and eligibility to perform on the contract must be current and maintained throughout the life of the contract, and be made available for inspection upon request. The contractor shall forward to the contracting officer, on an annual basis, a list of contractor employees listing the employees name, position(s), and licenses and/or certifications and their current certification number. This annual statement of driver competency must include any advanced certifications, such as Advanced Cardiac Life

Support or specialized training to assist and secure patients by stretcher or wheelchair, as applicable.

(4) Within seven (7) days after receipt of award notification, the contractor shall provide evidence of required training, certifications, licensing and any other qualifications of any personnel who will be performing services under the contract. The initial documentation shall be provided to the contracting officer and COR.

(c) Contracts must include requirements to report vehicle accidents and incidents to the contracting officer with a formal accident report.

(d) Contracts for ambulance services must require that the contractor meet the current specifications of Federal Specification KKK–A–1822E, ''Star of Life Ambulance'' standard.

(e) Contracts must include requirements to ensure patient safety is maintained through the consistent practice of securing patient care equipment, other cargo, and vehicles, and ensure that security of patients in vehicles is established and observed when transportation needs are either primary or secondary in the actual performance of the contract. When contracting for these services, consider using requirements language to ensure that patient transportation meets industry standards for transporting patients based on the patient's condition/needs (*e.g.*, wheelchair, ambulatory, on stretcher, etc.).

Subpart 847.3—Transportation in Supply Contracts

SOURCE: 83 FR 48261, Sept. 24, 2018, unless otherwise noted.

847.302 Place of delivery—f.o.b. point.

The contracting officer shall insert clause 852.247–71, Delivery Location, or a clause substantially the same as the clause at 852.247–71, Delivery Location, in supply contracts when it is necessary to specify delivery locations. If appropriate, the clause may reference an attachment which lists various delivery locations and other delivery details (*e.g.*, quantities to be delivered to each location, etc.).

847.305 Solicitation provisions, contract clauses, and transportation factors.

847.305–10 Packing, marking, and consignment instructions.

(a) The contracting officer shall insert clause 852.247–72, Marking Deliverables, or a clause substantially the same as 852.247–72 in solicitations and contracts if special marking on deliverables are required.

(b) The contracting officer shall insert the clause at 852.247–73, Packing for Domestic Shipment, in contracts when item(s) will be delivered for immediate use to a destination in the continental United States; when the material specification or purchase description does not provide preservation, packaging, packing, and/or marking requirements; and/or when the requiring activity has not cited a specific specification for packaging.

847.305–70 Potential destinations known but quantities unknown.

When the contracting officer contracts with multiple bidders to provide items directly to VA field installations, on an f.o.b. origin basis, the evaluation of bids must follow specific procedures. In these instances, the contracting officer shall insert clause 852.247–70, Determining Transportation Costs for Evaluation of Offers, or a clause substantially the same as clause 852.247–70. By inserting this clause, each bid is placed on an equal basis, even though specific quantities required by each facility cannot be predetermined. The contracting officer must use an anticipated demand factor in proportion to the number of hospital beds or patient workload.

847.305–71 VA contract clauses.

(a) The contracting officer shall insert clause 852.247–74, Advance Notice of Shipment, or a clause substantially the same as 852.247–74, in solicitations and contracts when the f.o.b. point is destination, and special Government assistance is required in the delivery or receipt of the items.

(b) The contracting officer shall insert clause 852.247–75, Bills of Lading, or a clause substantially the same as

clause at 852.247–75, in f.o.b. origin solicitations and contracts.

847.306 Transportation factors in the evaluation of offers.

847.306–70 Records of claims.

When contracting for transportation, and consistent with FAR 15.304, contracting officers should consider using offerors' record of claims involving loss or damage as an evaluation factor or subfactor.

PART 849—TERMINATION OF CONTRACTS

Subpart 849.1 [Reserved]

Subpart 849.5—Contract Termination Clauses

849.504 Termination of fixed-price contracts for default.
849.504–70 Termination of mortuary services.

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 849.1 [Reserved]

Subpart 849.5—Contract Termination Clauses

849.504 Termination of fixed-price contracts for default.

849.504–70 Termination of mortuary services.

Use the clause at 852.249–70, Termination for Default—Supplement for Mortuary Services, in all solicitations and contracts for mortuary services containing the FAR clause 52.249–8, Default (Fixed-Price Supply and Service).

Subpart 849.5—Contract Termination Clauses

SOURCE: 85 FR 36349, June 16, 2020, unless otherwise noted.

849.504 Termination of fixed-price contracts for default.

849.504–70 Termination of mortuary services.

Use the clause at 852.249–70, Termination for Default—Supplement for Mortuary Services, in all solicitations and contracts for mortuary services containing the FAR clause 52.249–8, Default (Fixed-Price Supply and Service).

SUBCHAPTER H—CLAUSES AND FORMS

PART 852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 852.1—Instructions for Using Provisions and Clauses

Sec.

852.101–70 Using part 852.
852.102 Incorporating provisions and clauses.

Subpart 852.2—Text of Provisions and Clauses

852.201–70 Contracting Officer's Representative.
852.203–70 Commercial Advertising.
852.203–71 [Reserved]
852.204–70 Personal Identity Verification of Contractor Personnel.
852.204–71 Information and Information Systems Security.
852.207–70 [Reserved]
852.208–70 Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors—Orders or BPAs.
852.208–71 Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factor Commitments—Orders and BPAs.
852.209–70 Organizational Conflicts of Interest.
852.211–70 Equipment Operation and Maintenance Manuals.
852.211–71 [Reserved]
852.211–72 Technical Industry Standards.
852.211–73—852.211–75 [Reserved]
852.211–76 Liquidated Damages—Reimbursement for Data Breach Costs.
852.212–70 [Reserved]
852.212–71 Gray Market and Counterfeit Items.
852.212–72 Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts.
852.214–70 [Reserved]
852.214–71 Restrictions on Alternate Item(s).
852.214–72 Alternate Item(s).
852.214–73 Alternate Packaging and Packing.
852.214–74 Marking of Bid Samples.
852.215–70 Service-disabled veteran-owned and veteran-owned small business evaluation factors.
852.215–71 Evaluation factor commitments.
852.215–72 Notice of intent to re-solicit.
852.216–70 [Reserved]
852.216–71 Economic Price Adjustment of Contract Price(s) Based on a Price Index.
852.216–72 Proportional Economic Price Adjustment of Contract Price(s) Based on a Price Index.
852.216–73 Economic Price Adjustment—State Nursing Home Care for Veterans.
852.216–74 Economic Price Adjustment—Medicaid Labor Rates.
852.216–75 Economic Price Adjustment—Fuel Surcharge.
852.216–76 Requirements—supplement for mortuary services.
852.217–70 Contract Action Definitization.
852.219–70 VA Small Business Subcontracting Plan Minimum Requirements.
852.219–71 Notification of Competition Limited to Eligible 8(a) Participants.
852.219–72 Notification of Section 8(a) Direct Award.
852.219–73 VA Notice of Total Set-Aside for Verified Service-Disabled Veteran-Owned Small Businesses.
852.219–74 VA Notice of Total Set-Aside for Verified Veteran-Owned Small Businesses.
852.219–75 VA Notice of Limitations on Subcontracting—Certificate of Compliance for Services and Construction.
852.219–76 VA Notice of Limitations on Subcontracting—Certificate of Compliance for Supplies and Products.
852.222–70 Contract Work-Hours and Safety Standards—Nursing Home Care for Veterans.
852.223–70 Instructions to Offerors—Sustainable Acquisition Plan.
852.223–71 Safety and Health.
852.228–70 Bond Premium Adjustment.
852.228–71 Indemnification and Insurance.
852.228–72 Assisting Service-Disabled Veteran-Owned and Veteran-Owned Small Businesses in Obtaining Bonds.
852.228–73 Indemnification of Contractor—Hazardous Research Projects.
852.229–70—852.229–71 [Reserved]
852.232–70 Payments Under Fixed-Price Construction Contracts (Without NAS–CPM).
852.232–71 Payments Under Fixed-Price Construction Contracts (Including NAS–CPM).
852.232–72 Electronic Submission of Payment Requests.
852.233–70 Protest Content/Alternative Dispute Resolution.
852.233–71 Alternate Protest Procedure.
852.235–70 Research Misconduct.
852.235–71 Protection of Human Subjects.
852.235–72 Animal Welfare.
852.235–73 Facilities.
852.235–74 Acknowledgement of Support and Disclaimer.
852.235–75 Scientific and Technical Reports.
852.236–70 [Reserved]

852.236–71 Specifications and Drawings for Construction.
852.236–72 Performance of work by the contractor.
852.236–73—852.236–78 [Reserved]
852.236–79 Contractor Production Report.
852.236–80 Subcontracts and Work Coordination.
852.236–81—852.236–89 [Reserved]
852.236–90 Restriction on Submission and Use of Equal Products.
852.236–91 [Reserved]
852.236–92 Notice to Bidders—Additive or Deductive Bid Line Items.
852.237–70 Indemnification and Medical Liability Insurance.
852.237–71 Nonsmoking Policy for Children's Services.
852.237–72 Crime Control Act—Reporting of Child Abuse.
852.237–73 Crime Control Act—Requirement for Background Checks.
852.237–74 Non-discrimination in Service Delivery.
852.237–75 Key Personnel.
852.237–76 Award to Single Offeror.
852.237–77 Area of performance.
852.237–78 Performance and delivery.
852.237–79 Subcontracting.
852.237–80 Health department and transport permits.
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852.273–74 Award Without Exchanges.

AUTHORITY: 38 U.S.C. 8127–8128 and 8151–8153; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

Subpart 852.1—Instructions for Using Provisions and Clauses

852.101–70 Using part 852.

Part 852 prescribes supplemental provisions and clauses to the FAR. Provision and clause numbering are as prescribed in FAR 52.101 (e.g., supplementary construction clauses under part 836 are numbered 852.236–71, 852.236–72, etc.).

[73 FR 2717, Jan. 15, 2008. Redesignated at 86 FR 54403, Oct. 1, 2021]

852.102 Incorporating provisions and clauses.

(a) As authorized by FAR 52.102(c), any 48 CFR chapter 8 (VAAR) provision or clause may be incorporated in a quotation, solicitation, or contract by reference, provided the contracting officer complies with the requirements stated in FAR 52.102(c)(1), (c)(2), and (c)(3). To ensure compliance with FAR 52.102(c)(1) and (c)(2), contracting officers shall insert the provision found at 852.252–70, Solicitation provisions or clauses incorporated by reference, in full text in a quotation, solicitation, or contract if the quotation, solicitation, or contract incorporates by reference a FAR or 48 CFR chapter 8 (VAAR) provision or clause that requires completion

by the offeror or prospective contractor and submittal with the quotation or offer.

(b) For any FAR or 48 CFR chapter 8 (VAAR) provision or clause that requires completion by the contracting officer, the contracting officer shall, as a minimum, insert the title of the provision or clause and the paragraph that requires completion in full text in the quotation, solicitation, or contract. The balance of the provision or clause may be incorporated by reference.

(c) When one or more FAR or 48 CFR chapter 8 (VAAR) provisions, or portions thereof, are incorporated in a quotation or solicitation by reference, the contracting officer shall insert in the quotation or solicitation the provision found at FAR 52.252–1, Solicitation Provisions Incorporated by Reference.

(d) When one or more FAR or 48 CFR chapter 8 (VAAR) clauses, or portions thereof, are incorporated in a quotation, solicitation, or contract by reference, the contracting officer shall insert in the quotation, solicitation, or contract the clause found at FAR 52.252–2, Clauses Incorporated by Reference.

(e) If one or more FAR provisions or clauses, or portions thereof, are incorporated in a quotation, solicitation, or contract by reference, the contracting officer shall insert in the FAR provision or clause required by paragraph (c) or (d) of this section the following internet address: *https://www.acquisition.gov/browse/index/far*.

(f) If one or more 48 CFR chapter 8 (VAAR) provisions or clauses, or portions thereof, are incorporated in a quotation, solicitation, or contract by reference, the contracting officer shall insert in the FAR provision or clause required by paragraph (c) or (d) of this section the following internet address: *https://www.acquisition.gov/vaar*.

[73 FR 2717, Jan. 15, 2008, as amended at 86 FR 54403, Oct. 1, 2021]

Subpart 852.2—Text of Provisions and Clauses

852.201–70 Contracting Officer's Representative.

As prescribed in 801.604, insert the following provision:

CONTRACTING OFFICER'S REPRESENTATIVE (DEC 2022)

The Contracting Officer reserves the right to designate representatives to act for him/her in furnishing technical guidance and advice or generally monitor the work to be performed under this contract. Such designation will be in writing and will define the scope and limitation of the designee's authority. A copy of the designation letter shall be furnished to the Contractor.

(End of provision)

[87 FR 70751, Nov. 21, 2022]

852.203–70 Commercial Advertising.

As prescribed in 803.570–2, insert the following clause:

COMMERCIAL ADVERTISING (MAY 2018)

The Contractor shall not make reference in its commercial advertising to Department of Veterans Affairs contracts in a manner that states or implies the Department of Veterans Affairs approves or endorses the Contractor's products or services or considers the Contractor's products or services superior to other products or services.

(End of clause)

[83 FR 16209, Apr. 16, 2018]

852.203–71 [Reserved]

852.204–70 Personal Identity Verification of Contractor Personnel.

As prescribed in 804.1303, insert the following clause:

PERSONAL IDENTITY VERIFICATION OF CONTRACTOR PERSONNEL (MAY 2020)

(a) The Contractor shall comply with current Department of Veterans Affairs policy for personal identity verification of all employees performing under this contract when frequent and continuing access to VA facilities or information systems is required.

(b) The Contractor shall insert this clause in all subcontracts when the subcontractor's employees will require frequent and continuing access to VA facilities or information systems.

(End of clause)

[85 FR 36349, June 16, 2020]

852.204–71 Information and Information Systems Security.

As prescribed in 804.1903, insert the following clause:

INFORMATION AND INFORMATION SYSTEMS SECURITY (FEB 2023)

(a) *Definitions.* As used in this clause—

Business Associate means an entity, including an individual (other than a member of the workforce of a covered entity), company, organization or another covered entity, as defined by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, that performs or assists in the performance of a function or activity on behalf of the Veterans Health Administration (VHA) that involves the creating, receiving, maintaining, transmitting of, or having access to, protected health information (PHI). The term also includes a subcontractor of a business associate that creates, receives, maintains, or transmits PHI on behalf of the business associate.

Business Associate Agreement (BAA) means the agreement, as dictated by the Privacy Rule, between VHA and a business associate, which must be entered into in addition to the underlying contract for services and before any release of PHI can be made to the business associate, in order for the business associate to perform certain functions or activities on behalf of VHA.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information whether automated or manual.

Information technology (*see* FAR 2.101) also means Information and Communication Technology (ICT).

Information technology-related contracts means those contracts which include services (including support services), and related resources for information technology as defined in 802.101.

Privacy officer means the VA official with responsibility for implementing and oversight of privacy related policies and practices that impact a given VA acquisition.

Sensitive personal information means, with respect to an individual, any information about the individual maintained by VA, including but not limited to the following:

(1) Education, financial transactions, medical history, and criminal or employment history.

(2) Information that can be used to distinguish or trace the individual's identity, including but not limited to name, social security number, date and place of birth, mother's maiden name, or biometric records.

Security plan means a formal document that provides an overview of the security requirements for an information system or an information security program and describes the security controls in place or planned for meeting those requirements.

VA Information Security Rules of Behavior for Organizational Users (VA National Rules of Behavior) means a set of VA rules that describes the responsibilities and expected behavior of users of VA information or information systems.

VA sensitive information means all VA data, on any storage media or in any form or format, which requires protection due to the risk of harm that could result from inadvertent or deliberate disclosure, alteration, or destruction of the information and includes sensitive personal information. The term includes information where improper use or disclosure could adversely affect the ability of VA to accomplish its mission, proprietary information, records about individuals requiring protection under various confidentiality provisions such as the Privacy Act and the HIPAA Privacy Rule, and information that can be withheld under the Freedom of Information Act. Examples of VA sensitive information include the following: individually-identifiable medical, benefits, and personnel information; financial, budgetary, research, quality assurance, confidential commercial, critical infrastructure, investigatory, and law enforcement information; information that is confidential and privileged in litigation such as information protected by the deliberative process privilege, attorney work-product privilege, and the attorney-client privilege; and other information which, if released, could result in violation of law or harm or unfairness to any individual or group, or could adversely affect the national interest or the conduct of Federal programs.

(b) *General.* Contractors, subcontractors, their employees, third-parties, and business associates with access to VA information, information systems, or information technology (IT) or providing and accessing IT-related goods and services, shall adhere to VA Directive 6500, VA Cybersecurity Program, and the directives and handbooks in the VA 6500 series related to VA information (including VA sensitive information and sensitive personal information and information systems security and privacy), as well as those set forth in the contract specifications, statement of work, or performance work statement. These include, but are not limited to, VA Handbook 6500.6, Contract Security; and VA Directive and Handbook 0710, *Personnel Security and Suitability Program,* which establishes VA's procedures, responsibilities, and processes for complying with current Federal law, Executive Orders, policies, regulations, standards and guidance for protecting VA information, information systems (*see* 802.101, Definitions) security and privacy, and adhering to personnel security requirements when accessing VA information or information systems.

(c) *Access to VA information and VA information systems.* (1) Contractors are limited in their request for logical or physical access to VA information or VA information systems for their employees, subcontractors, third parties and business associates to the extent necessary to perform the services or provide the goods as specified in the contracts, agreements, task, delivery or purchase orders.

(2) All Contractors, subcontractors, third parties, and business associates working with VA information are subject to the same investigative requirements as those of VA appointees or employees who have access to the same types of information. The level and process of background security investigations for contractors to access VA information and VA information systems shall be in accordance with VA Directive and Handbook 0710, *Personnel Security and Suitability Program.*

(3) Contractors, subcontractors, third parties, and business associates who require access to national security programs must have a valid security clearance.

(4) HIPAA Business Associate Agreement requirement. Contractors shall enter into a Business Associate Agreement (BAA) with VHA, VA's Covered Entity, when contract requirements and access to protected health information is required and when requested by the Contracting Officer, or the Contracting Officer's Representative (COR) (see VAAR 824.103–70). Under the HIPAA Privacy and Security Rules, a Covered Entity (VHA) must have a satisfactory assurance that its PHI will be safeguarded from misuse. To do so, a Covered Entity enters into a BAA with a contractor (now the business associate), which obligates the business associate to only use the Covered Entity's PHI for the purposes for which it was engaged, provide the same protections and safeguards as is required from the Covered Entity, and agree to the same disclosure restrictions to PHI that is required of the Covered Entity in situations where a contractor—

(i) Creates, receives, maintains, or transmits VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI in order to perform certain health care operations activities or functions on behalf of the Covered Entity; or

(ii) Provides one or more of the services specified in the Privacy Rule to or for the Covered Entity.

(A) *Contractors or entities required to execute BAAs for contracts and other agreements become VHA business associates.* BAAs are issued by VHA or may be issued by other VA programs in support of VHA. The HIPAA Privacy Rule requires VHA to execute compliant BAAs with persons or entities that create, receive, maintain, or transmit VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI in order to perform certain activities, functions or services to, for, or on behalf of VHA. There may be other VA components or staff offices which also provide certain services and support to VHA and must receive PHI in order to do so. If these components award contracts or enter into other agreements, purchase/delivery orders, modifications and issue governmentwide purchase card transactions to help in the delivery of these services to VHA, they will also fall within the requirement to obtain a satisfactory assurance from these contractors by executing a BAA.

(B) *BAA requirement flow down to subcontractors.* A prime Contractor required to execute a BAA shall also obtain a satisfactory assurance, in the form of a BAA, that any of its subcontractors who will also create, receive, maintain, or transmit VHA PHI or that will store, generate, access, exchange, process, or utilize such PHI will comply with HIPAA requirements to the same degree as the Contractor. Contractors employing a subcontractor who creates, receives, maintains, or transmits VHA PHI or that will store, generate, access, exchange, process, or utilize such VHA PHI under a contract or agreement is required to execute a BAA with each of its subcontractors which also obligates the subcontractor (*i.e.,* also a business associate) to provide the same protections and safeguards and agree to the same disclosure restrictions to VHA's PHI that is required of the Covered Entity and the prime Contractor.

(d) *Contractor operations required to be in United States.* Custom software development and outsourced operations must be located in the U.S. to the maximum extent practicable. If such services are proposed to be performed outside the continental United States, and are not otherwise disallowed by other Federal law, regulations or policy, or other VA policy or other mandates as stated in the contract, specifications, statement of work or performance work statement (including applicable Business Associate Agreements), the Contractor/subcontractor must state in its proposal where all non-U.S. services are provided. At a minimum, the Contractor/subcontractor must include a detailed Information Technology Security Plan, for review and approval by the Contracting Officer, specifically to address mitigation of the resulting problems of communication, control, and data protection.

(e) *Contractor/subcontractor employee reassignment and termination notification.* Contractors and subcontractors shall provide written notification to the Contracting Officer and Contracting Officer's Representative (COR) immediately, and not later than four (4) hours, when an employee working on a VA information system or with access to VA information is reassigned or leaves the Contractor or subcontractor's employment on the cognizant VA contract. The Contracting

Officer and COR must also be notified immediately by the Contractor or subcontractor prior to an unfriendly termination.

(f) *VA information custodial requirements.* (1) *Release, publication, and use of data.* Information made available to a Contractor or subcontractor by VA for the performance or administration of a contract or information developed by the Contractor/subcontractor in performance or administration of a contract shall be used only for the stated contract purpose and shall not be used in any other way without VA's prior written approval. This clause expressly limits the Contractor's/subcontractor's rights to use data as described in Rights in Data—General, FAR 52.227–14(d).

(2) *Media sanitization.* VA information shall not be co-mingled with any other data on the Contractors/subcontractor's information systems or media storage systems in order to ensure federal and VA requirements related to data protection, information segregation, classification requirements, and media sanitization can be met (*see* VA Directive 6500, VA Cybersecurity Program). VA reserves the right to conduct scheduled or unscheduled on-site inspections, assessments, or audits of Contractor and subcontractor IT resources, information systems and assets to ensure data security and privacy controls, separation of data and job duties, and destruction/media sanitization procedures are in compliance with Federal and VA requirements. The Contractor and subcontractor will provide all necessary access and support to VA and/or GAO staff during periodic control assessments or audits.

(3) *Data retention, destruction, and contractor self-certification.* The Contactor and its subcontractors are responsible for collecting and destroying any VA data provided, created, or stored under the terms of this contract, to a point where VA data or materials are no longer readable or reconstructable to any degree, in accordance with VA Directive 6371, Destruction of Temporary Paper Records, or subsequent issue. Prior to termination or completion of this contract, the Contractor/subcontractor must provide its plan for destruction of all VA data in its possession according to VA Handbook 6500, and VA Cybersecurity Program, including compliance with National Institute of Standards and Technology (NIST) 800–88, Guidelines for Media Sanitization, for the purposes of media sanitization on all IT equipment. The Contractor must certify in writing to the Contracting Officer within 30 days of termination of the contract that the data destruction requirements in this paragraph have been met.

(4) *Return of VA data and information.* When information, data, documentary material, records and/or equipment is no longer required, it shall be returned to the VA (as stipulated by the Contracting Officer or the COR) or the Contractor/subcontractor must hold it until otherwise directed. Items returned will be hand carried, securely mailed, emailed, or securely electronically transmitted to the Contracting Officer or to the address as provided in the contract or by the assigned COR, and/or accompanying BAA. Depending on the method of return, Contractor/subcontractor must store, transport, or transmit VA sensitive information, when permitted by the contract using VA-approved encryption tools that are, at a minimum, validated under Federal Information Processing Standards (FIPS) 140–3 (or its successor). If mailed, Contractor/subcontractor must send via a trackable method (USPS, UPS, Federal Express, etc.) and immediately provide the Contracting Officer with the tracking information. No information, data, documentary material, records or equipment will be destroyed unless done in accordance with the terms of this contract and the VHA Records Control Schedule 10–1.

(5) *Use of VA data and information.* The Contractor/subcontractor must receive, gather, store, back up, maintain, use, disclose and dispose of VA information only in compliance with the terms of the contract and applicable Federal and VA information confidentiality and security laws, regulations and policies. If Federal or VA information confidentiality and security laws, regulations and policies become applicable to the VA information or information systems after execution of the contract, or if the National NIST issues or updates applicable FIPS or Special Publications (SP) after execution of this contract, the parties agree to negotiate in good faith to implement the information confidentiality and security laws, regulations and policies for this contract as a result of any updates, if required.

(6) *Copying VA data or information.* The Contractor/subcontractor shall not make copies of VA information except as authorized and necessary to perform the terms of the contract or to preserve electronic information stored on Contractor/subcontractor electronic storage media for restoration in case any electronic equipment or data used by the Contractor/subcontractor needs to be restored to an operating state. If copies are made for restoration purposes, after the restoration is complete, the copies must be appropriately destroyed.

(7) *Violation of information custodial requirements.* If VA determines that the Contractor has violated any of VA's information confidentiality, privacy, or security provisions, it shall be sufficient grounds for VA to withhold payment to the Contractor or third-party or terminate the contract for default in accordance with FAR part 49 or terminate for cause in accordance with FAR 12.403.

(8) *Encryption.* The Contractor/subcontractor must store, transport, or transmit VA sensitive information, when permitted by

the contract, using cryptography, and VA-approved encryption tools that are, at a minimum, validated under FIPS 140–3 (or its successor).

(9) *Firewall and web services security controls.* The Contractor/subcontractor's firewall and web services security controls, if applicable, shall meet or exceed VA's minimum requirements. VA Configuration Guidelines are available upon request.

(10) *Disclosure of VA data and information.* Except for uses and disclosures of VA information authorized in a cognizant contract for performance of the contract, the Contractor/subcontractor may use and disclose VA information only in two other situations: (i) subject to paragraph (f)(10) of this section, in response to a court order from a court of competent jurisdiction, or (ii) with VA's prior written approval. The Contractor/subcontractor must refer all requests for, demands for production of, or inquiries about, VA information and information systems to the Contracting Officer for response. If the Contractor/subcontractor is in receipt of a court order or other request or believes it has a legal requirement to disclose VA information, that Contractor/subcontractor shall immediately refer such court order or other request to the Contracting Officer for response. If the Contractor or subcontractor discloses information on behalf of VHA, the Contractor and/or subcontractor must maintain an accounting of disclosures. Accounting of Disclosures documentation maintained by the Contractor/subcontractor will include the name of the individual to whom the information pertains, the date of each disclosure, the nature or description of the information disclosed, a brief statement of the purpose of each disclosure or, in lieu of such statement, a copy of a written request for a disclosure, and the name and address of the person or agency to whom the disclosure was made. The Contractor/subcontractor will provide its Accounting of Disclosures upon request and within 15 calendar days to the assigned COR and Privacy Officer. Accounting of disclosures should be provided electronically via encrypted email to the COR and designated VA facility Privacy Officer as provided in the contract, BAA, or by the Contracting Officer. If providing the Accounting of Disclosures electronically cannot be done securely, the Contractor/subcontractor will provide copies via trackable methods (UPS, USPS, Federal Express, etc.) immediately, providing the designated COR and Privacy Officer with the tracking information.

(11) *Compliance with privacy statutes and applicable regulations.* The Contractor/subcontractor shall not disclose VA information protected by any of VA's privacy statutes or applicable regulations including but not limited to: the Privacy Act of 1974, 38 U.S.C. 5701, confidential nature of claims, 38 U.S.C. 5705, confidentiality of medical quality assurance records and/or 38 U.S.C. 7332, confidentiality of certain health records pertaining to drug addiction, sickle cell anemia, alcoholism or alcohol abuse, or infection with human immunodeficiency virus or the HIPAA Privacy Rule. If the Contractor/subcontractor is in receipt of a court order or other requests for VA information or has questions if it can disclose information protected under the above-mentioned confidentiality statutes because it is required by law, that Contractor/subcontractor shall immediately refer such court order or other request to the Contracting Officer for response.

(g) *Report of known or suspected security/privacy incident.* The Contractor, subcontractor, third-party affiliate or business associate, and its employees shall notify VA immediately via the Contracting Officer and the COR or within one (1) hour of an incident which is an occurrence (including the discovery or disclosure of successful exploits of system vulnerability) that (A) actually or imminently jeopardizes, without lawful authority, the integrity, confidentiality, or the availability of its data and operations, or of its information or information system(s); or (B) constitutes a violation or imminent threat of violation of law, security policies, security procedures, or acceptable use policies. The initial notification may first be made verbally but must be followed up in writing within one (1) hour. See VA Data Breach Response Service at *https://www.oprm.va.gov/dbrs/about_dbrs.aspx*. Report all actual or suspected security/privacy incidents and report the information to the Contracting Officer and the COR as identified in the contract or as directed in the contract, within one hour of discovery or suspicion.

(1) Such issues shall be remediated as quickly as is practical, but in no event longer than ___ days [*Fill in: Contracting Officer fills in the number of days*]. The Contractor shall notify the Contracting Officer in writing.

(2) When the security fixes involve installing third party patched (*e.g.,* Microsoft OS patches or Adobe Acrobat), the Contractor will provide written notice to VA that the patch has been validated as not affecting the systems within 10 working days. When the Contractor is responsible for operations or maintenance of the systems, they shall apply the security fixes within ___ [*Fill in: Contracting Officer fills in the number of days in consultation with requiring activity*].

(3) All other vulnerabilities shall be remediated in a timely manner based on risk, but within 60 days of discovery or disclosure. Contractors shall notify the Contracting Officer, and COR within 2 business days after remediation of the identified vulnerability. Exceptions to this paragraph (*e.g.,* for the convenience of VA) must be requested by the

Contractor through the COR and shall only be granted with approval of the Contracting Officer and the VA Assistant Secretary for Office of Information and Technology. These exceptions will be tracked by the Contractor in concert with the Government in accordance with VA Directive 6500.6 and related VA Handbooks.

(h) *Security and privacy incident investigation.* (1) The term ''privacy incident'' means the unauthorized disclosure or use of VA information protected under a confidentiality statute or regulation.

(2) The term ''security incident'' means an occurrence that (A) actually or imminently jeopardizes, without lawful authority, the integrity, confidentiality, or availability of information systems; or (B) constitutes a violation or imminent threat of violation of law, security policies, security procedures, or acceptable policies. The Contractor/subcontractor shall immediately notify the Contracting Officer and COR for the contract of any known or suspected security or privacy incident, or any other unauthorized disclosure of sensitive information, including that contained in system(s) to which the Contractor/subcontractor has access.

(3) To the extent known by the Contractor/subcontractor, the Contractor/subcontractor's notice to VA shall identify the information involved, the circumstances surrounding the incident (including to whom, how, when, and where the VA information or assets were placed at risk or compromised), and any other information that the Contractor/subcontractor considers relevant.

(4) With respect to unsecured PHI, the Business Associate is deemed to have discovered a security incident as defined above when the Business Associate either knew, or by exercising reasonable diligence should have been known to an employee of the Business Associate. Upon discovery, the Business Associate must notify VHA of the security incident immediately within one hour of discovery or suspicion as agreed to in the BAA.

(5) In instances of theft or break-in or other criminal activity, the Contractor/subcontractor must concurrently report the incident to the appropriate law enforcement entity (or entities) of jurisdiction, including the VA OIG and the VA Office of Security and Law Enforcement. The Contractor, its employees, and its subcontractors and their employees shall cooperate with VA and any law enforcement authority responsible for the investigation and prosecution of any possible criminal law violation(s) associated with any incident. The Contractor/subcontractor shall cooperate with VA in any civil litigation to recover VA information, obtain monetary or other compensation from a third party for damages arising from any incident, or obtain injunctive relief against any third party arising from, or related to, the incident.

(i) *Data breach notification requirements.* (1) This contract may require access to sensitive personal information. If so, the Contractor is liable to VA for liquidated damages in the event of a data breach involving any VA sensitive personal information the Contractor/Subcontractor processes or maintains under the contract as set forth in clause 852.211–76, Liquidated Damages—Reimbursement for Data Breach Costs.

(2) The Contractor/subcontractor shall provide notice to VA of a privacy or security incident as set forth in the Security and Privacy Incident Investigation section of this clause. The term 'data breach' means the loss, theft, or other unauthorized access, or any access other than that incidental to the scope of employment, to data containing sensitive personal information, in electronic or printed form, that results in the potential compromise of the confidentiality or integrity of the data. The Contractor shall fully cooperate with VA or third-party entity performing an independent risk analysis on behalf of VA. Failure to cooperate may be deemed a material breach and grounds for contract termination.

(3) The Contractor/subcontractor shall fully cooperate with VA or any Government agency conducting an analysis regarding any notice of a data breach or potential data breach or security incident which may require the Contractor to provide information to the Government or third-party performing a risk analysis for VA, and shall address all relevant information concerning the data breach, including the following:

(i) Nature of the event (loss, theft, unauthorized access).

(ii) Description of the event, including—

(A) Date of occurrence;

(B) Date of incident detection;

(C) Data elements involved, including any PII, such as full name, social security number, date of birth, home address, account number, disability code.

(D) Number of individuals affected or potentially affected.

(E) Names of individuals or groups affected or potentially affected.

(F) Ease of logical data access to the lost, stolen or improperly accessed data in light of the degree of protection for the data, *e.g.*, unencrypted, plain text.

(G) Amount of time the data has been out of VA control.

(H) The likelihood that the sensitive personal information will or has been compromised (made accessible to and usable by unauthorized persons).

(I) Known misuses of data containing sensitive personal information, if any.

(J) Assessment of the potential harm to the affected individuals.

(K) Data breach analysis as outlined in 6500.2 Handbook, Management of Breaches

Involving Sensitive Personal Information, as appropriate.

(L) Whether credit protection services may assist record subjects in avoiding or mitigating the results of identity theft based on the sensitive personal information that may have been compromised.

(M) Steps taken in response to mitigate or prevent a repetition of the incident.

(j) *Training.* (1) All Contractor employees and subcontractor employees requiring access to VA information or VA information systems shall complete the following before being granted access to VA information and its systems:

(i) On an annual basis, successfully complete the VA Privacy and Information Security Awareness and VA Information Security Rules of Behavior training.

(ii) On an annual basis, sign and acknowledge (either manually or electronically) understanding of and responsibilities for compliance with the VA Information Security Rules of Behavior for Organizational Users, relating to access to VA information and information systems.

(iii) Successfully complete any additional cyber security or privacy training, as required for VA personnel with equivalent information system access.

(2) The Contractor shall provide to the Contracting Officer and/or the COR a copy of the training certificates and affirmation that VA Information Security Rules of Behavior for Organizational Users signed by each applicable employee have been completed and submitted within five (5) days of the initiation of the contract and annually thereafter, as required.

(3) Failure to complete the mandatory annual training and acknowledgement of the VA Information Security Rules of Behavior, within the timeframe required, is grounds for suspension or termination of all physical or electronic access privileges and removal from work on the contract until such time as the training and documents are complete.

(k) *Subcontract flow down.* The Contractor shall include the substance of this clause, including this paragraph (k), in subcontracts, third-party agreements, and BAAs, of any amount and in which subcontractor employees, third-party servicers/employees, and business associates will perform functions where they will have access to VA information (including VA sensitive information, *i.e.*, sensitive personal information and protected health information), information systems, information technology (IT) or providing and accessing information technology-related contract services, support services, and related resources (see VAAR 802.101 definition of information technology-related contracts).

(End of clause)

[88 FR 4748, Jan. 25, 2023]

852.207–70 [Reserved]

852.208–70 Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors—Orders or BPAs.

As prescribed in 808.405–570, insert the following clause:

SERVICE–DISABLED VETERAN–OWNED AND VETERAN–OWNED SMALL BUSINESS EVALUATION FACTORS—ORDERS OR BPAS (NOV 2022)

(a) In an effort to increase contracting opportunities for Veterans, depending on the evaluation factors included in the solicitation, VA will evaluate responses received based on the schedule Contractor's VIP-verified service-disabled veteran-owned small business/veteran-owned small business (SDVOSB/VOSB) status; and/or their proposed use of VIP-listed SDVOSB/VOSB as subcontractors or teaming partners.

(b) To receive credit under this clause a contractor or subcontractor must be listed, at time of submission of offer/quotes and at time of award, as an eligible SDVOSB/VOSB in the Vendor Information Pages (VIP) database at *https://www.vetbiz.va.gov/vip/.*

(c) A VIP-listed SDVOSB schedule holder will receive full credit, and a VIP-listed VOSB schedule holder will receive partial credit for the SDVOSB/VOSB status evaluation factor.

(d) Offerors other than SDVOSBs or VOSBs proposing to use VIP-listed SDVOSBs/VOSBs as subcontractors/teaming partners, will receive some consideration under this evaluation factor. To receive consideration, offerors must provide in their proposals:

(1) The name(s) and contact information of the VIP-listed SDVOSB(s)/VOSB(s) with whom they intend to team or subcontract.

(2) A brief description of the proposed team or subcontractor(s) arrangement.

(3) The approximate dollar value of the proposed teaming arrangements or subcontract(s).

(4) Evidence of teaming partner/subcontractor's VIP database registration and verification.

(e) Pursuant to 38 U.S.C. 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB/VOSB status is subject to debarment for a period of not less than five years. This includes the debarment of all principals in the business.

(End of clause)

[87 FR 63011, Oct. 18, 2022]

852.208–71 Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factor Commitments—Orders and BPAs.

As prescribed in 808.405–570, insert the following clause:

SERVICE–DISABLED VETERAN–OWNED AND VETERAN–OWNED SMALL BUSINESS EVALUATION FACTOR COMMITMENTS—ORDERS AND BPAS (NOV 2022)

(a) The Contractor agrees, if selected on the basis of service-disabled veteran-owned small business (SDVOSB) or veteran-owned small business (VOSB) status, to comply with the eligibility requirements in subpart 819.70, including the limitation on subcontracting requirements at 13 CFR 125.6.

(b) The Contractor agrees, if selected for award on the basis of teaming/subcontracting in accordance with 852.208–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors—Orders and BPAs, to use the evaluated firm(s) as proposed or if approved by contracting officer to substitute one or more VIP-verified SDVOSB/VOSB for work of the same or similar value.

(c) Pursuant to 38 U.S.C. 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB/VOSB status is subject to debarment for a period of not less than five years. This includes the debarment of all principals in the business.

(End of clause)

[87 FR 63011, Oct. 18, 2022]

852.209–70 Organizational Conflicts of Interest.

As prescribed in 809.507–1(b), insert the following provision:

ORGANIZATIONAL CONFLICTS OF INTEREST (OCT 2020)

(a) It is in the best interest of the Government to avoid situations which might create an organizational conflict of interest or where the Offeror's performance of work under the contract may provide the Contractor with an unfair competitive advantage. The term ''organizational conflict of interest'' means that because of other activities or relationships with other persons, a person is 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 the person has an unfair competitive advantage.

(b) The Offeror shall provide a statement with its offer which describes, in a concise manner, all relevant facts concerning any past, present, or currently planned interest (financial, contractual, organizational, or otherwise) or actual or potential organizational conflicts of interest relating to the services to be provided under this solicitation. The Offeror shall also provide statements with its offer containing the same information for any consultants and subcontractors identified in its proposal and which will provide services under the solicitation. The Offeror may also provide relevant facts that show how its organizational and/or management system or other actions would avoid or mitigate any actual or potential organizational conflicts of interest.

(c) Based on this information and any other information solicited or obtained by the Contracting Officer, the Contracting Officer may determine that an organizational conflict of interest exists which would warrant disqualifying the Contractor for award of the contract unless the organizational conflict of interest can be mitigated to the Contracting Officer's satisfaction by negotiating terms and conditions of the contract to that effect. If the conflict of interest cannot be mitigated and if the Contracting Officer finds that it is in the best interest of the United States to award the contract, the Contracting Officer shall request a waiver in accordance with FAR 9.503.

(d) Nondisclosure or misrepresentation of actual or potential organizational conflicts of interest at the time of the offer or arising as a result of a modification to the contract, may result in the termination of the contract at no expense to the Government.

(End of Provision)

[85 FR 60078, Sept. 24, 2020]

852.211–70 Equipment Operation and Maintenance Manuals.

As prescribed in 811.107–70, insert the following clause:

EQUIPMENT OPERATION AND MAINTENANCE MANUALS (NOV 2018)

The Contractor shall follow standard commercial practices to furnish manual(s), handbook(s) or brochure(s) containing operation, installation, and maintenance instructions, including pictures or illustrations, schematics, and complete repair/test guides, as necessary, for technical medical equipment and devices, and/or other technical and mechanical equipment provided per CLIN(s) #_____ [*Contracting Officer insert CLIN information*]. The manuals, handbooks or brochures shall be provided in hard copy, soft copy or with electronic access instructions, consistent with standard industry practices for the equipment or device. Where applicable, the manuals, handbooks or brochures will include electrical data and connection

diagrams for all utilities. The documentation shall also contain a complete list of all replaceable parts showing part number, name, and quantity required.

(End of clause)

[83 FR 49307, Oct. 1, 2018]

852.211–71 [Reserved]

852.211–72 Technical Industry Standards.

As prescribed in 811.204–70, insert the following clause:

TECHNICAL INDUSTRY STANDARDS (NOV 2018)

(a) The Contractor shall conform to the standards established by:_____ [*Contracting Officer: Insert name of organization establishing the requirement, reference title, cite and date, e.g., United States Department of Agriculture (USDA), Institutional Meat Purchase Specifications (IMPS), Series 100, Beef products, Jan 2010*] as to [*Contracting Officer: Insert item and CLIN, e.g., CLIN 0005 Ground Beef*].

(b) The Contractor shall submit proof of conformance to the standard. This proof may be a label or seal affixed to the equipment or supplies, warranting that the item(s) have been tested in accordance with the standards and meet the contract requirement. Proof may also be furnished by the organization listed above certifying that the item(s) furnished have been tested in accordance with and conform to the specified standards.

(c) Offerors may obtain the standards cited in this provision by submitting a request, including the solicitation number, title and number of the publication to: [Organization]_____ [Mail or email address] _____.

(d) The offeror shall contact the Contracting Officer if response is not received within two weeks of the request.

(End of clause)

[83 FR 49307, Oct. 1, 2018]

852.211–73—852.211–75 [Reserved]

852.211–76 Liquidated Damages—Reimbursement for Data Breach Costs.

As prescribed in 811.503–70, insert the following clause:

LIQUIDATED DAMAGES—REIMBURSEMENT FOR DATA BREACH COSTS (FEB 2023)

(a) *Definition.* As used in this clause, ''contract'' means any contract, agreement, order or other instrument and encompasses the definition set forth in FAR 2.101.

(b) *Non-disclosure requirements.* As a condition of performance under a contract, order, agreement, or other instrument that requires access to sensitive personal information as defined in VAAR 802.101, the following is expressly required—

(1) The Contractor, subcontractor, their employees or business associates shall not, directly or through an affiliate or employee of the Contractor, subcontractor, or business associate, disclose sensitive personal information to any other person unless the disclosure is lawful and is expressly permitted under the contract; and

(2) The Contractor, subcontractor, their employees or business associates shall immediately notify the Contracting Officer and the Contracting Officer's Representative (COR) of any security incident that occurs involving sensitive personal information.

(c) *Liquidated damages.* If the Contractor or any of its agents fails to protect VA sensitive personal information or otherwise engages in conduct which results in a data breach, the Contractor shall, in place of actual damages, pay to the Government liquidated damages of ____ [*Contracting Officer insert amount*] per affected individual in order to cover costs related to the notification, data breach analysis and credit monitoring. In the event the Contractor provides payment of actual damages in an amount determined to be adequate by the Contracting Officer, the Contracting Officer may forgo collection of liquidated damages.

(d) *Purpose of liquidated damages.* Based on the results from VA's determination that there was a data breach caused by Contractor's or any of its agents' failure to protect or otherwise engaging in conduct to cause a data breach of VA sensitive personal information, and as directed by the Contracting Officer, the Contractor shall be responsible for paying to the VA liquidated damages in the amount of ____ [*Contracting Officer insert amount*] per affected individual to cover the cost of the following:

(1) Notification related costs.

(2) Credit monitoring reports.

(3) Data breach analysis and impact.

(4) Fraud alerts.

(5) Identity theft insurance.

(e) *Relationship to termination clause, if applicable.* If the Government terminates this contract, purchase order, or agreement, in whole or in part under clause 52.249–8, Default—Fixed-Price Supply and Service, or any other related FAR or VAAR clause included in the contract, in addition to the required liquidated damages for data breach-related expenses specified in paragraph (c) above, the Contractor is liable for excess costs for those supplies and services for repurchase as may be required under the Termination clause.

(End of clause)

Alternate I (FEB 2023). In commercial products or commercial services acquisitions awarded under the procedures of FAR part 8 or 12, substitute this paragraph (e) in lieu of paragraph (e) in the basic clause:

(e) *Relationship to termination clause, if applicable.* If the Government terminates this contract in whole or in part under the Termination for cause paragraph, FAR 52.212–4(m), Contract Terms and Conditions—Commercial Products and Commercial Services, the Contractor is liable for damages accruing until the Government reasonably obtains delivery or performance of similar supplies or services. These damages are in addition to costs of repurchase as may be required under the Termination clause.

Alternate II (FEB 2023). In simplified acquisitions exceeding the micro-purchase threshold that are for other than commercial products or commercial services awarded under the procedures of FAR part 13 (*see* FAR 13.302–5(d)(1) and the clause at FAR 52.213–4), substitute this paragraph (e) in lieu of paragraph (e) in the basic clause:

(e) *Relationship to termination clause, if applicable.* If the Government terminates this contract in whole or in part under the Termination for cause paragraph, FAR 52.213–4(g), Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services), or any other applicable FAR or VAAR clause, the Contractor is liable for damages accruing until the Government reasonably obtains delivery or performance of similar supplies or services. These damages are in addition to costs of repurchase as may be required under the Termination clause.

[88 FR 4752, Jan. 25, 2023]

852.212–70 [Reserved]

852.212–71 Gray Market and Counterfeit Items.

As prescribed in 812.301(f), insert the following clause:

GRAY MARKET AND COUNTERFEIT ITEMS (FEB 2023)

(a) No used, refurbished, or remanufactured supplies or equipment/parts shall be provided. This procurement is for new Original Equipment Manufacturer (OEM) items only. No gray market items shall be provided. Gray market items are OEM goods intentionally or unintentionally sold outside an authorized sales territory or sold by non-authorized dealers in an authorized sales territory.

(b) No counterfeit supplies or equipment/parts shall be provided. Counterfeit items include unlawful or unauthorized reproductions, substitutions, or alterations that have been 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 substitutions include used items represented as new, or the false identification of grade, serial number, lot number, date code, or performance characteristics.

(c) Vendor shall be an OEM, authorized dealer, authorized distributor, or authorized reseller for the proposed equipment/system, verified by an authorization letter or other documents from the OEM. All software licensing, warranty and service associated with the equipment/system shall be in accordance with the OEM terms and conditions.

(End of clause)

[88 FR 4752, Jan. 25, 2023]

852.212–72 Gray Market and Counterfeit Items—Information Technology Maintenance Allowing Other-than-New Parts.

As prescribed in 812.301(f), insert the following clause:

GRAY MARKET AND COUNTERFEIT ITEMS—INFORMATION TECHNOLOGY MAINTENANCE ALLOWING OTHER-THAN-NEW PARTS (FEB 2023)

(a) Used, refurbished, or remanufactured parts may be provided. No gray market supplies or equipment shall be provided. Gray market items are Original Equipment Manufacturer (OEM) goods intentionally or unintentionally sold outside an authorized sales territory or sold by non-authorized dealers in an authorized sales territory.

(b) No counterfeit supplies or equipment shall be provided. Counterfeit items include unlawful or unauthorized reproductions, substitutions, or alterations that have been 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 substitutions include used items represented as new, or the false identification of grade, serial number, lot number, date code, or performance characteristics.

(c) Vendor shall be an OEM, authorized dealer, authorized distributor or authorized reseller for the proposed equipment/system, verified by an authorization letter or other documents from the OEM. All software licensing, warranty and service associated with the equipment/system shall be in accordance with the OEM terms and conditions.

(End of clause)

[88 FR 4752, Jan. 25, 2023]

852.214–70 [Reserved]

852.214–71 Restrictions on Alternate Item(s).

As prescribed in 814.201–6(a)(1), insert the following provision:

RESTRICTIONS ON ALTERNATE ITEM(S) (MAY 2018)

Bids on [ ]* will be considered only if acceptable bids on [ ]** are not received or do not satisfy the total requirement.

*Contracting Officer will insert an alternate item that is considered acceptable.

**Contracting Officer will insert the required item and item number.

(End of provision)

[83 FR 16210, Apr. 16, 2018]

852.214–72 Alternate Item(s).

As prescribed in 814.201–6(a)(2), insert the following provision:

ALTERNATE ITEM(S) (MAY 2018)

Bids on [ ]* will be given equal consideration along with bids on [ ]** and any such bids received may be accepted if to the advantage of the Government. Tie bids will be decided in favor of [ ].**

*Contracting Officer will insert an alternate item that is considered acceptable.

**Contracting Officer will insert the required item and item number.

(End of provision)

[83 FR 16210, Apr. 16, 2018]

852.214–73 Alternate Packaging and Packing.

As prescribed in 814.201–6(a)(3), insert the following provision:

ALTERNATE PACKAGING AND PACKING (MAY 2018)

The bidders offer must clearly indicate the quantity, package size, unit, or other different feature upon which the quote is made. Evaluation of the alternate or multiple alternates will be made on a common denominator such as per ounce, per pound, etc., basis.

(End of provision)

[83 FR 16210, Apr. 16, 2018]

852.214–74 Marking of Bid Samples.

As prescribed in 814.201–6(b), insert the following provision:

MARKING OF BID SAMPLES (MAY 2018)

Any bid sample(s) furnished must be in the quantities specified in the solicitation. Cases or packages must be plainly marked 'Bid Sample(s)'' with the complete lettering/numbering and description of the related bid item(s), the number of the Invitation for Bids, and the name of the bidder submitting the bid sample(s).

(End of provision)

[83 FR 16210, Apr. 16, 2018]

852.215–70 Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors.

As prescribed in 815.304–71(a), insert the following clause:

SERVICE-DISABLED VETERAN-OWNED AND VETERAN-OWNED SMALL BUSINESS EVALUATION FACTORS (OCT 2019)

(a) In an effort to achieve socioeconomic small business goals, VA shall evaluate offerors based on their service-disabled veteran-owned or veteran-owned small business status and their proposed use of eligible service-disabled veteran-owned small businesses (SDVOSBs) and veteran-owned small businesses (VOSBs) as subcontractors.

(b) Eligible service-disabled veteran-owned small businesses offerors will receive full credit, and offerors qualifying as veteran-owned small businesses will receive partial credit for the Service-Disabled Veteran-Owned and Veteran-Owned Small Business Status evaluation factor. To receive credit, an offeror must be registered and verified in the Vendor Information Pages (VIP) database.

(c) Non-Veteran offerors proposing to use SDVOSBs or VOSBs as subcontractors will receive some consideration under this evaluation factor. Offerors must state in their proposals the names of the SDVOSBs and

VOSBs with whom they intend to subcontract and provide a brief description of the proposed subcontracts and the approximate dollar values of the proposed subcontracts. In addition, the proposed subcontractors must be registered and verified in the VIP database.

(d) Pursuant to 38 U.S.C. 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB/VOSB status is subject to debarment for a period of not less than five years. This includes the debarment of all principals in the business.

(End of clause)

[84 FR 46454, Sept. 4, 2019]

852.215–71 Evaluation Factor Commitments.

As prescribed in 815.304–71(b), insert the following clause:

EVALUATION FACTOR COMMITMENTS (OCT 2019)

(a) The offeror agrees, if awarded a contract, to use the service-disabled veteran-owned small businesses (SDVOSBs) or veteran-owned small businesses (VOSBs) proposed as subcontractors in accordance with 852.215–70, Service-Disabled Veteran-Owned and Veteran-Owned Small Business Evaluation Factors, or to substitute one or more SDVOSBs or VOSBs for subcontract work of the same or similar value.

(b) Pursuant to 38 U.S.C. 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB/VOSB status is subject to debarment for a period of not less than five years. This includes the debarment of all principals in the business.

(End of clause)

[84 FR 46454, Sept. 4, 2019]

852.215–72 Notice of Intent to Re-Solicit.

As prescribed at 815.370–5, use the following provision:

NOTICE OF INTENT TO RE-SOLICIT (OCT 2019)

This solicitation provides offerors fewer than 30 days to submit proposals. In the event that only one offer is received in response to this solicitation, the Contracting Officer may cancel the solicitation and re-solicit for an additional period of at least 30 days in accordance with 815.370–2.

(End of provision)

[84 FR 46454, Sept. 4, 2019]

852.216–70 [Reserved]

852.216–71 Economic Price Adjustment of Contract Price(s) Based on a Price Index.

As prescribed in 816.203–4(e)(1), insert the following clause:

ECONOMIC PRICE ADJUSTMENT OF CONTRACT PRICE(S) BASED ON A PRICE INDEX (MAR 2018)

(a) To the extent that contract cost increases are provided for by this economic price adjustment clause, the Contractor warrants that the prices in this contract for the base period and any option periods do not include any amount to protect against such contingent cost increases.

(b) The Base and Adjusting Indexes, for the purpose of price adjustment under this clause, shall be _____,[1] as contained in _____,[2] as published by _____.[3] All adjustments authorized under this clause shall be made by using the Base Index and Adjusting Indexes, which are published _____.[4]

(1) The Base Index, for the purposes of price adjustment under this clause, shall be the most recent Index published prior to the date for receipt of offers, or the due date for receipt of best and final offers if discussions were held whichever is later. The Base Index shall remain constant for the entire term of the contract, including all option periods.

(2) The Adjusting Index shall be the most recent Index published prior to the date of contract adjustment, as specified in paragraph (d) of this clause.

(c) The percentage difference between the Base Index and the Adjusting Index, rounded to the nearest .01 percent (*e.g.*, 4.57%), will be used in calculating all adjustments to the

[1] The Contracting Officer shall conduct market research to determine a suitable Consumer Price Index or other independent broad-based index to use for the solicitation. For example, for medical services, an appropriate index may be the Consumer Price Index that tracks medical services.

[2] Specify where the Index can be found, such as in a solicitation for laboratory services, the Contracting Officer might enter ''Table 1, CPI–U: U.S. City Average, by expenditure category and commodity and service group, found at *http://www.bls.gov/news.release/cpi.t01.htm*''.

[3] Provide the information on who publishes the applicable Index used, *e.g.*, in the example for laboratory services, ''the U.S. Department of Labor''.

[4] State how often the Index is published, such as ''monthly, around the middle of the month''. Note that some Consumer Price Indexes are not published monthly. Ensure that the correct information is provided for the specific Index used.

following line items: _____.[5] The prices for these line items will be multiplied by the percentage increase or decrease and the resulting amount will be added to or deducted from the original line item price for that contract period (*e.g.*, Base Year) to arrive at the new contract price for those line items from the effective date of the adjustment to the beginning of the next contract adjustment period, rounded to the same number of decimal points as the prices originally bid. Calculations for option year contract terms will be based on the prices in the schedule for those option years.

(d) The dates of contract adjustment shall be _____[6] and the starting dates of each option year, if not already included in these dates. The Contracting Officer shall retain a copy of the Base Index in the contract file and, on each date of adjustment specified in this paragraph (d), shall obtain a copy of the Adjusting Index. The Contracting Officer shall calculate the adjustment due and shall, within 5 business days, issue a modification to the contract adjusting the unit or contract prices, as specified in paragraph (c). The adjusted unit or contract prices shall be effective for all orders placed or services provided after the date of contract adjustment as specified in this paragraph (d) until the beginning of the next contract adjustment period. If the Contracting Officer fails to act, the Contractor shall request in writing a contract adjustment and any subsequent adjustment shall be retroactive to the applicable date of contract adjustment specified in this paragraph (d). The Contractor's entitlement to price increases for a prior contract period (base year or option year) is waived unless the Contractor's written request for an adjustment under this clause is received by the Contracting Officer no later than 30 days following the end of the base year for changes applicable to the base year, or 30 days following the end of each option year for changes applicable to that option year. The Government's right to contract decreases for prior contract periods (base year or option year) is waived unless the Contracting Officer processes a contract modification no later than 30 days following the end of the base year for changes applicable to the base year, or 30 days following the end of each option year for changes applicable to that option year.

(e) An example of an adjustment calculation is provided herein for informational purposes only.

(1) The original contract price or line item prices for that contract term (*e.g.*, base year) shall be used for all calculations during that particular contract term and new calculations shall be made for each and every contract adjustment period specified in paragraph (d) during that contract term.

(2) For purposes of this example, the contract prices for the line items as specified in paragraph (c) will be adjusted by the percentage calculated as follows:

Adjusting Index for the current period	196.6
Minus the Base Index	−188.0
Equals the Index Point Change	8.6
Index Point Change Divided by the Base Index.	8.6/188.0 = .0457*
Result Multiplied by 100 Equals the Percentage Change.	4.57%
(The Index Point Change Percentage).	

*This figure shall be rounded to the fourth decimal place. When the fifth decimal is 1 to 4, the figure shall be rounded down, 5 to 9, rounded up.

(3) For a line item with an original bid price of $25.00 and a 4.57 percent Index Point Change increase as of the first contract adjustment period, as shown above, the calculations for a new contract price for the first contract adjustment period would be as follows: $25.00 × .0457 = $1.14, $25 + $1.14 = $26.14**. The new contract price for this line item from the beginning of that first contract adjustment period until the start of the next contract adjustment period would be $26.14 and the Contracting Officer would issue a contract modification reflecting this price change. **The unit price adjustment shall be rounded up or down, as in paragraph

[5] Enter the line items that will be subject to adjustment or revise this paragraph to otherwise state what prices are subject to adjustment under this clause.

[6] Establish time periods for when the Contracting Officer will process adjustments. This could be ''the first day of every quarter, January, April, July, and October'' or ''Annually on October 1st'' or some other similar time periods. Since the contracting officer is responsible for initiating the change, the Contracting Officer must establish a reminder mechanism to ensure that the adjustments are accomplished within the time period specified.

(e)(1) of this clause, to match the number of decimal places in the original bid.

(4) If the Adjusting Index went down for the second adjustment period, reflecting only a 3 percent Index Point Change increase over the Base Index, the new price for this sample line item would be reduced for the second contract adjustment period from $26.14 to $25.75 as follows: $25 × .03 = $0.75, $25 + $0.75 = $25.75. Note that the calculations for the second contract adjustment period are based on the original contract price for that contract term of $25.00. The contract price for this line item is modified to reflect this new price for the second contract adjustment period.

(5) At the start of the first option year and each subsequent option year period (as well as for each contract adjustment period specified in paragraph (d) during that option year, if different), the Contracting Officer shall recalculate the contract or unit prices for that first option year based on any changes between the Adjusting Index and the Base Index, from the original contract award date to the start of the first option period, and based on the Contractor's new option year prices. Assume the Contractor's bid price for the first option year for the above sample line item was $25.50 and the calculations shown in paragraph (e)(1) of this clause at the start of the first option period reflected a 6 percent Index Point Change. The new contract price for this sample line item at the start of the first option period would be calculated as follows: $25.50 × .06 = $1.53, $25.50 + $1.53 = $27.03. The Contracting Officer would process a contract modification reflecting a revised contract price of $27.03 for the first contract adjustment period in the first option year.

(f) Price adjustments pursuant to this clause, shall be documented by a contract modification issued by the Contracting Officer, show the Base Index (see paragraph (b)(1)), the Adjusting Index, the adjusted contract prices (see paragraph (c)), the mathematical calculations used to arrive at the adjusted contract prices, and the effective date of the adjustment (see paragraph (d)).

(g) At the start of each option year, the Contracting Officer shall, within 5 days of the start of the option year period, process a contract modification adjusting the option year prices by the then current Index Point Change percentage, if any, reflecting the new adjusted prices for that first contract adjustment period in that option year.

(h) In the event that _____[7] discontinues, or alters substantially, its method of calculating the Index cited herein, the parties shall mutually agree upon an appropriate substitute for determining the price adjustment described herein. If the Contracting Officer determines that the Index consistently and substantially fails to reflect market conditions, the Contracting Officer may modify the contract to specify the use of an appropriate substitute index, effective on the date the Index specified herein begins to consistently and substantially fail to reflect market conditions.

(i) Any dispute arising under this clause shall be resolved subject to the ''Disputes'' clause of the contract.

(End of clause)

[83 FR 7405, Feb. 21, 2018, as amended at 84 FR 46454, Sept. 4, 2019]

852.216–72 Proportional Economic Price Adjustment of Contract Price(s) Based on a Price Index.

As prescribed in 816.203–4(e)(2), insert the following clause:

PROPORTIONAL ECONOMIC PRICE ADJUSTMENT OF CONTRACT PRICE(S) BASED ON A PRICE INDEX (MAR 2018)

(a) To the extent that contract cost increases are provided for by this economic price adjustment clause, the Contractor warrants that the prices in this contract for any option periods do not include any amount to protect against such contingent cost increases.

(b) The cost index, for the purpose of price adjustment under this clause, shall be _____[1] as contained in _____[2]as published by

[7]Enter in the name of the entity whose index is used in the clause. In most cases when using this clause format, the index used would be a CPI–U Index and the Contracting Officer would enter ''the U.S. Department of Labor''.

[1]The Contracting Officer shall conduct market research to determine a suitable cost index for use in the solicitation. The index used is directly related to the type of commodity or service most likely to impact the Contractor and must approximately track the economic changes affecting the Contractor's costs. For transportation services, an appropriate index might be one that tracks the price of gasoline or diesel fuel. For example, in a solicitation for ambulance services, the Contracting Officer might enter into this block ''the ''Weekly U.S. Retail Gasoline Prices, Regular Grade'' Index for New England'' (or California or whichever index is the most appropriate).

[2]Specify where the index can be found, such as in an example for gasoline, ''the Energy Information Administration website (see VAAM M816.203–70).

_____.[3] All adjustments authorized under this clause shall be made by using the Base Index and Adjusting Indexes, which are published _____.[4]

(1) The *Base Index,* for the purposes of price adjustment under this clause, shall be the most recent Index published prior to the closing date for receipt of offers, or the due date for receipt of best and final offers if discussions are held. This Base Index shall remain constant throughout the life of the contract, including all options.

(2) The *Adjusting Index* shall be the most recent Index published prior to the date of contract adjustment, as specified in paragraph (f).

(c) For purposes of this clause, it will be conclusively presumed that _____ percent (%)[5] of the price of _____[6] represents the Base Cost of _____[7] and the resulting Base Cost will be the basis upon which adjustment will be made under this clause. This Base Cost will be used in calculating all adjustments to the following line items: _____.[8] A new Base Cost will be calculated for each option year period based on the new option year prices.

(d) The percentage of the price of the indexed commodity (see paragraph (c)) remains fixed throughout the life of the contract and is not subject to modification under this clause. Any pricing actions pursuant to the ''Changes'' clause or other clause or provision of the contract, except for this clause, will be priced as though there were no provisions for economic price adjustment.

(e) All price adjustments shall be applicable only to the specific contract adjustment period to which the calculations are made. For every contract adjustment period, new calculations shall be made and new prices determined. Every adjustment during the Base Year shall be based on the original contract prices for that contract year and every adjustment during an option year shall be based on the original contract prices for that option year. The Contracting Officer must make new calculations for each and every contract adjustment period specified in paragraph (f) and at the beginning of each new option year, if different.

(f) The dates of contract adjustment shall be _____[9] and the starting dates of each option year, if not already included in these dates. The Contracting Officer shall retain a copy of the Base Index in the contract file and, on each date of adjustment specified herein, obtain a copy of the Adjusting Index. The Contracting Officer shall calculate the adjustment due and shall, within 5 business days, issue a modification to the contract adjusting the contract or unit price(s). The adjusted contract or unit price(s) shall be effective for all orders placed or services provided after the date of contract adjustment, as specified in this paragraph (f), until the date of the next contract adjustment. If the Contracting Officer fails to act, the Contractor shall request a contract adjustment in writing and any subsequent adjustment shall be retroactive to the applicable date of

[3] Provide the information on who publishes the index, such as, in an example for gasoline, ''the U.S. Department of Energy.''

[4] State how often the index used is published, such as, in an example for an index for gasoline, ''weekly each Monday at 5:00 p.m. (Eastern time),'' or ''Tuesday if Monday is a holiday.''

[5] Prior to issuing the solicitation, the Contracting Officer must conduct market research to determine an appropriate percentage to include in this paragraph. The percentage should reflect that portion of the unit price for the services or supplies being acquired that is applicable to the indexed commodity. For instance, in the case of an ambulance contract, research might indicate that, at the time the solicitation is being drafted and based on prior per-mile bid prices, the cost of gasoline accounts for 10% of the per mile cost of operating an ambulance. For example, if the prior bid price had been $1.60 per mile, ambulances average 10 miles per gallon, and the cost of gasoline had been $1.559 per gallon, 1 mile's worth of gasoline ($.16) would be approximately ten (10) percent of the prior per mile bid price of $1.60 per mile. This percent must be stated in the solicitation so that the same figure applies to all bidders. This figure remains constant throughout the life of the contract.

[6] Enter in this block the portion of the contract that will be subject to price adjustment, *e.g.*, ''each one-way mile of ambulance services,'' or the line items that will be subject to price adjustment.

[7] Enter in this block the commodity applicable to the index being used, as in an example for an ambulance contract, ''regular grade gasoline''.

[8] Enter the line items that will be subject to adjustment, as in an example for an ambulance contract, the line items that reflect the one-way cost per mile for ambulance services for the base year and for each option year.

[9] Establish time periods for when the Contracting Officer will process adjustments. This could be ''the first day of each month'' or ''the first day of every quarter, January, April, July, and October'' or ''annually on October 1st'' or some other similar time periods. Since the Contracting Officer is responsible for initiating the change, the Contracting Officer must establish a reminder mechanism to ensure that the adjustments are accomplished on time.

contract adjustment. The Contractor's entitlement to price increases for a prior contract period (base year or option year) shall be waived unless the Contractor's written request for an adjustment under this clause is received by the Contracting Officer no later than 30 days following the end of the base year for changes applicable to the base year, or 30 days following the end of each option year for changes applicable to that option year. The Government's right to contract decreases for prior contract periods (base year or option year) shall be waived unless the Contracting Officer processes a contract modification no later than 30 days following the end of the base year for changes applicable to the base year, or 30 days following the end of each option year for changes applicable to that option year.

(g) An example of an adjustment calculation is provided herein for informational purposes only.

(1) For purposes of this example, assume that a contract is for ambulance services, that the contract price is $2.10 per mile one way, that price adjustments will be made on the basis of the cost of gasoline, that the cost of gasoline represents 10% of the total cost per mile (the Base Cost is 10% of $2.10 (the per mile one way price in Line Item X), or $0.21), and that contract adjustments will be made quarterly. If the Base Index (the price of gasoline the week prior to receipt of bids) is $1.559 per gallon and the price of gasoline at the first date of contract adjustment is $2.129 per gallon, the calculations for contract price adjustment would be as follows:

Adjusting Index (most recent Index cost of gasoline as of the date of the first adjustment period).	$2.129 per gallon.
Minus the Base Index (Index cost of gasoline as of the date of receipt of offers).	−$1.559 per gallon.
Equals increase (or decrease) to the Base Index.	$0.570.
Divide increase (or decrease) to the Base Index by the Base Index.	$0.570 + $1.559 = .3656* (36.56% increase).
Base Cost of $0.21 (10% of $2.10) multiplied by .3656 = $0.0768 unit price increase.New Unit price following the adjustment is $2.10 plus $0.0768 = $2.1768 per mile (rounded to $2.18)**.	

*This figure shall be rounded to the fourth decimal place. When the fifth decimal is 1 to 4, the figure shall be rounded down, 5 to 9, rounded up.

**The unit price adjustment shall be rounded up or down, as above, to match the number of decimal places in the original bid.

(2) For the second contract adjustment period, all calculations would be based on the original contract bid price for that contract year, $2.10 per mile in this example. If the price of gasoline goes down during the second adjustment period to the original Base Index price of $1.559 per gallon, the adjusted contract price for that second period would return to $2.10 per mile (there would be a zero percent increase or decrease to the Base Cost and thus no change to the original bid price for that contract adjustment period). The Contracting Officer would then issue a contract modification returning the contract price from $2.18 to $2.10 per mile for that contract adjustment period. If, on the other hand, the price of gasoline actually went below the Base Index price, say to $1.449 per gallon, the calculations for the second economic price adjustment period would be as follows:

Adjusting Index (most recent Index cost of gasoline as of the date of the second adjustment period).	$1.449 per gallon.
Minus the Base Index (Index cost of gasolineas of the date of receipt of offers).	−$1.559 per gallon.
Equals increase (or decrease) to Base Index.	($0.110) (a negative $.11).
Divide increase (or decrease) to theBase Index by the Base Index.	($0.11) + $1.559 = (.0706) (7.06% decrease).

Base Cost of $0.21 (10% of $2.10) multiplied by (.0706) = ($0.0148) unit price decrease.
New Unit price following the second economic price adjustment is $2.10 minus $0.0148 = $2.0852 per mile (rounded to $2.09).

(3) At the start of the first option year, the Contracting Officer shall recalculate the price per mile based on any changes in the price of gasoline from the original contract award date and based on the Contractor's new first option year price per mile. Assuming the Contractor's bid price per mile for the first option year was $2.25 per mile, the new Base Cost for gasoline would be 10% of $2.25, or $0.225 (note that the original percent figure from paragraph (c) (10% in this sample) stays constant throughout the life of the contract), but the Base Cost would change if the option year contract price changes. If the Adjusting Index for gasoline at the start of the first option year was now up to $1.899 per gallon, the new first option year price for the first contract adjustment period would be calculated as follows:

Adjusting Index (most recent Index cost of gasoline as of the first day of the first option period).	$1.899 per gallon.
Minus the Base Index (Index cost of gasoline as of the date of receipt of offers).	−$1.559 per gallon.
Equals increase (or decrease) to the Base Index.	$0.340.
Divide the increase (or decrease) to the Base Index by the Base Index.	$0.34 + $1.559 = .2181 (21.81% increase).
Base Cost of $0.225 (10%* of $2.25) multiplied by .2181 = $0.0491 unit price increase.	
New Unit price for the first contract adjustment period in the first option year is $2.25 plus $0.0491 = $2.2991 per mile (rounded to $2.30 per mile).	

*Note that the percentage remains constant (10%) but that the Base Cost has been increased for the first contract adjustment period in the first option year, since the Base Cost is a percentage of the first option year unit cost per mile (in this sample), and the unit cost per mile has increased in this sample for the first option year from $2.10 to $2.25.Although the new unit price for the first contract adjustment period of the first option year following application of the economic price adjustment in this sample would be $2.30 per mile, all economic price adjustment calculations made during that first option year would be based on the original first option year bid price ($2.25 in this sample). If in the second contract adjustment period of the first option year, the calculations resulted in a unit price increase for gasoline of $0.0332, the adjusted price for that period would be $2.25 + $0.0332 = $2.2832, rounded to $2.28 per mile.

(h) Price adjustments pursuant to this clause, which shall be made by contract modification issued by the Contracting Officer, shall show the Base Index (see paragraph (b)(1)), the Adjusting Index, the Base Cost (see paragraph (c)), the mathematical calculations used to arrive at the adjusted contract unit price, and the effective date of the adjustment.

(i) In the event that _____[10] discontinues, or alters substantially, its method of calculating the Index cited herein, the parties shall mutually agree upon an appropriate substitute for determining the price adjustment described herein. If the Contracting Officer determines that the Index consistently and substantially fails to reflect market conditions, the Contracting Officer may modify the contract to specify use of an appropriate substitute index, effective on the date the Index specified herein begins to consistently

[10] Enter in the name of the entity whose index is used in the clause. In the example for ambulance services using the ''Weekly U.S. Retail Gasoline Prices, Regular Grade'' index; the Contracting Officer would enter the ''Energy Information Administration, Department of Energy''.

and substantially fail to reflect market conditions.

(j) Any dispute arising under this clause shall subject to the ''Disputes'' clause of the contract.

(End of clause)

[83 FR 7406, Feb. 21, 2018, as amended at 84 FR 46454, Sept. 4, 2019]

852.216–73 Economic Price Adjustment—State Nursing Home Care for Veterans.

As prescribed in 816.203–4(e)(3), insert the following clause:

ECONOMIC PRICE ADJUSTMENT—STATE NURSING HOME CARE FOR VETERANS (MAR 2018)

This clause does not apply to rates for non-Medicaid nursing homes.

(a) *Rate Determination.* The per diem rate is established by the current Medicaid rate for Medicaid approved nursing home care plus a fair market amount (percentage) to cover the costs of supplies, services, and equipment above that provided under Medicaid established by the local State Medicaid Agency (SMA). Rates established after the effective date of this contract will require a modification to the contract by the Contacting Officer.

(1) The Medicaid rate covers room, board, and routine nursing care services.

(2) For all levels of nursing care a percentage is added for routine ancillary services/supplies, such as drugs, nursing supplies, oxygen (occasional use), x-ray, laboratory, physician visits, and rental equipment.

(3) Special equipment, *e.g.* Clinitron bed, is not considered routine ancillary services (and may not be provided by the VA).

(4) Drug costs which comprise more than eight and one-half percent (8.5%) of the per diem rate are generally not considered routine ancillary supplies (and may not be provided by the VA).

(5) Rehabilitation therapies will be provided as distinct levels of care, *i.e.,* skilled, intermediate, and custodial care. Hospice Care and Dialysis are not included in the rate. Payment for Hospices and Dialysis services is provided by the VA or other payers as determined by the Veteran with the VA's approval.

(b) *Economic Price Adjustment.* This clause does not apply to ancillary services that may be added or deleted from the agreement.

(1) The per diem rate(s) will apply throughout the term of this contract, including extension period(s). The rate(s) may be adjusted only to reflect a change in a Medicaid rate as authorized by the SMA. Normally, this will be on an annual basis. The negotiated percentage above the Medicaid rate, to cover the all-inclusive nature of the contract, will not be renegotiated; but will be applied and added to the new Medicaid rate for the adjusted per diem rate for each level of care item. In this regard, new rates will be negotiated requiring a modification to the contact. Each per diem price adjustment under this clause is subject to the following limitations:

(2) Any adjustment shall be limited to the effect of increases or decreases in the approved SMA's patient care components within the affected Medicaid groups.

(3) Adjustments will occur no more frequently than those issued by the SMA.

(4) No adjustments are made until the Contracting Officer receives from the SMA an authenticated copy of the new rates signed and dated at the top right of the document by the authorized nursing home official. Within ten days after this occurs, the Contracting Officer will execute an approval signature and date at the approximate locations of the nursing home official's signature, the action of which will serve as the effective date of the adjusted rate. A copy of the fully executed document will be sent to the nursing home official for record keeping purposes.

(End of clause)

[83 FR 7408, Feb. 21, 2018, as amended at 84 FR 46455, Sept. 4, 2019]

852.216–74 Economic Rice Adjustment—Medicaid Labor Rates.

As prescribed in 816.203–4(e)(4), insert the following clause:

ECONOMIC PRICE ADJUSTMENT—MEDICAID LABOR RATES (MAR 2018)

This clause does not apply to rates for non-Medicaid nursing homes.

(a) The Contractor shall notify the Contracting Officer if, at any time during contract performance, the Medicaid rate set by the State Medicaid Agency (SMA) for contract line item increases or decreases in the Schedule. 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 the amount of the increase or decrease and the amount of the Contractor's adjustment proposal.

(b) The Contracting Officer and the Contractor shall negotiate a price adjustment to the contract's unit prices and its effective

date upon receipt of the notice and data under paragraph (a) of this clause. However, the Contracting Officer may postpone the negotiations until an accumulation of increases and decreases of the Medicaid labor rates (including fringe benefits) shown in the Schedule results in an adjustment allowable under paragraph (c)(3) of this clause. The Contracting Officer shall modify this contract as follows:

(1) Include the price adjustment and its effective date;

(2) Revise the Medicaid labor rates (including fringe benefits) as shown in the Schedule to reflect the increases or decreases resulting from the SMA 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) Adjustment shall be limited to the effect on unit prices of the increases or decreases of the Medicaid rates of pay for labor (including fringe benefits) shown in the Schedule. There shall be no adjustment for changes in rates or unit prices other than those shown in the Schedule.

(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 three percent of the then-current total contract price. This limitation shall not apply, however, if, after final delivery of all contract 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 made under this clause.

(d) The Contracting Officer, precluding certified cost and pricing data 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)

[83 FR 7408, Feb. 21, 2018, as amended at 84 FR 46455, Sept. 4, 2019]

852.216–75 Economic Price Adjustment—Fuel Surcharge.

As prescribed in 816.203–4(e)(5), insert the following clause:

ECONOMIC PRICE ADJUSTMENT—FUEL SURCHARGE (NOV 2021)

(a) To the extent that contract fuel cost increases are provided for by this economic price adjustment clause, the Contractor warrants that the prices in this contract for any option periods do not include any amount to protect against such contingent fuel cost increases.

(b) The fuel cost index, for the purpose of price adjustment under this clause, shall be the ''Weekly Retail On-Highway Diesel Prices Index.''

The Base Fuel Cost, for the purpose of price adjustments under this clause, shall be the most recent Index Weekly Average Diesel Fuel Price per gallon published prior to the closing date for receipt of offers, or the due date for receipt of final proposal revisions if discussions are held.

(c) For purposes of this clause, it will be conclusively presumed that x% increase or decrease of the Base Fuel Cost represents a reasonable fluctuation of diesel fuel prices. The Base Fuel Cost (±) x% price range will be determined for the base contract year and will remain constant throughout the life of the contract, including option years. Base Fuel Cost price range is documented at time of contract award.

(d) Increases (or decreases) in the diesel fuel costs (Base Fuel Cost x%) as listed on the Index two weeks prior to the end of each calendar quarter can trigger a request from the Contractor to the Government (or from the Government to the Contractor) for cost adjustments. Notice must be in writing to the Subsistence Prime Vendor (SPV) Contracting Officer (or Contracting Officer's Representative) no less than ten days prior to the beginning of the next quarter.

(e) Since fuel cost is only a part of the SPV Contracted distribution cost, the adjustment will be made as a penny per delivered case for every ten cent fuel price per gallon increase or decrease to the Base Fuel Cost x%. The difference is rounded down to the nearest whole cent and will be added to last line of each invoice noted as ''Fuel Adjustment''.

Example calculation of fuel price change:. Price $2.50 Base (+ or −) 15% Average National Diesel Fuel $2.88 − $2.13.

3rd QTR (3rd week June) first year. Fuel Price $3.05 Calculation:	$3.05 − 2.88 = $.17 (rounded down to 10 cents) Add one cent per delivered case to each invoice, starting first Monday of July.
3rd QTR Diesel Fuel Price decrease.	$2.13 − 1.80 = $ .33 (rounded down to $.30 cents) Credit each invoice.
$1.80 Calculation:	$.03 cents per delivered case.

(f) Once approved, the date for contract fuel price adjustment will be the first Monday of the first month of each quarter unless otherwise designated at time of contract award.

(g) The Contracting Officer shall retain a copy of the Base Fuel Index establishing the Base Fuel Cost and the calculation of the price range incorporating the (±) x% adjustment in the contract file. All subsequent changes will be documented within the contract file and communicated to the Contractor and VA SPV customers via email one week prior to the fuel price adjustment implementation.

(h) Any adjustments for fuel price changes will only be implemented if requested in writing, reviewed by both parties, and provided within the designated time frames. No retroactive cost adjustments will be made. A contract modification will be issued at inception of first increase or decrease detailing Base Fuel Cost, price range, and calculation of first fuel adjustment charge. Adjustment will remain in effect with quarterly calculation changes as needed until price falls within Base Fuel Cost price range. A contract modification will be issued to terminate the adjustment when price returns to Base Fuel Cost (±) x% price range.

(i) In the event that ''the Energy Information Administration, Department of Energy'' discontinues, or substantially alters its method of calculating the national average diesel fuel prices cited herein, the parties shall mutually agree upon an appropriate substitute for determining the price adjustment described herein. If the Contracting Officer determines the Index consistently and substantially fails to reflect market conditions, the Contracting Officer may modify the contract to specify use of an appropriate substitute Index, effective on the date the Index specified herein begins to consistently and substantially fail to reflect market conditions.

(j) Any dispute arising under this clause shall be determined in accordance with and subject to the ''Disputes'' clause of the contract.

(End of clause)

[83 FR 7409, Feb. 21, 2018, as amended at 84 FR 46455, Sept. 4, 2019; 86 FR 54404, Oct. 1, 2021]

852.216–76 Requirements—Supplement for Mortuary Services.

As prescribed in 816.506–70, insert the following clause:

REQUIREMENTS—SUPPLEMENT FOR MORTUARY SERVICES (OCT 2019)

(a) Except as provided in paragraphs (c) and (d) of this clause, the Government will order from the Contractor all of its requirements in the area of performance for the supplies and services listed in the schedule of this contract.

(b) Each order will be issued as a delivery order and will list—

(1) The supplies or services being ordered;

(2) The quantities to be furnished;

(3) Delivery or performance dates;

(4) Place of delivery or performance;

(5) Packing and shipping instructions;

(6) The address to send invoices; and

(7) The funds from which payment will be made.

(c) The Government may elect not to order supplies and services under this contract in instances where the body is removed from the area for medical, scientific, or other reason.

(d) In an epidemic or other emergency, the contracting activity may obtain services beyond the capacity of the Contractor's facilities from other sources.

(e) Contracting Officers of the following activities may order services and supplies under this contract:

(End of clause)

[84 FR 46455, Sept. 4, 2019]

852.217–70 Contract Action Definitization.

As prescribed in 817.7005(a), insert the following clause:

CONTRACT ACTION DEFINITIZATION (JUL 2019)

(a) A [*Insert specific type of contract action*] is contemplated. The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive contract action that will include all clauses required by the Federal Acquisition Regulation (FAR) on the date of execution of the

undefinitized contract action, all clauses required by law on the date of execution of the definitive contract action, and any other mutually agreeable clauses, terms, and conditions. The Contractor agrees to submit a _____ [*Insert type of proposal, e.g., fixed-price, or cost-and-fee*] proposal with cost or pricing data, as appropriate, supporting it.

(b) The schedule for definitizing this contract action is as follows [*Insert target date for definitization of the contract action and dates for submission of proposal, beginning of negotiations, and, if appropriate, submission of the make-or-buy plans, subcontracting plans, and cost or pricing data*].

(c) If agreement on a definitive contract action to supersede this undefinitized contract action is not reached by the target date in paragraph (b) of this clause, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of a Contracting Officer one level above, determine a reasonable price or fee in accordance with FAR subpart 15.4 and FAR part 31, 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 FAR 52.216–24, Limitation of Government Liability.

(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 undefinitized contract action for either fixed-price or cost-reimbursement contracts, as determined by the Contracting Officer under this paragraph (c);

(ii) All clauses required by law as of the date of the Contracting Officer's determination; and

(iii) Any other clauses, terms, and conditions mutually agreed upon.

(2) To the extent consistent with paragraph (c)(1) of this clause, all clauses, terms, and conditions included in this undefinitized contract action shall continue in effect, except those that by their nature apply only to an undefinitized contract action.

(d) The definitive contract action resulting from this undefinitized contract action will include a negotiated _____ [*Insert ''cost/price ceiling'' or ''firm-fixed-price''*] in no event to exceed _____ [*Insert the not-to-exceed amount*].)

(End of clauspe

[84 FR 29394, June, 24, 2019]

852.219–70 VA Small Business Subcontracting Plan Minimum Requirements.

As prescribed in 819.708, insert the following clause:

VA SMALL BUSINESS SUBCONTRACTING PLAN MINIMUM REQUIREMENTS (NOV 2022)

(a) This clause does not apply to small business concerns.

(b) If the offeror is required to submit an individual subcontracting plan, the minimum goals for award of subcontracts to VA verified service-disabled veteran-owned small business and veteran-owned small business SDVOSB/VOSB shall be at least commensurate with the Department's annual SDVOSB/VOSB subcontracting goals.

(c) For a commercial plan, the minimum goals for award of subcontracts to SDVOSB/VOSB shall be at least commensurate with the Department's annual service-disabled veteran-owned small business and veteran-owned small business subcontracting goals for the total value of projected subcontracts to support the sales for the commercial plan.

(d) To be credited toward goal achievements, SDVOSB/VOSBs must be verified as eligible in the VA's Vendor Information Pages (VIP) database at *https://www.vetbiz.va.gov/vip/*. A contractor may reasonably rely on a subcontractor's status as shown in the VIP database as of the date of subcontract award, provided the contractor retains records of the results of the VIP database query.

(e) The Contractor shall annually submit a listing of SDVOSB/VOSB (for which credit toward goal achievement is to be applied) for review by personnel in the Office of Small and Disadvantaged Business Utilization. Use VA Form 0896A, Report of Subcontracts to Small and Veteran-Owned Business.

(f) Pursuant to 38 U.S.C. 8127(g), any business concern that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB/VOSB status is subject to debarment for a period of not less than five years. This includes the debarment of all principals in the business.

(End of clause)

[87 FR 63011, Oct. 18, 2022]

852.219–71 Notification of Competition Limited to Eligible 8(a) Participants.

As prescribed in 819.811–370, when FAR 52.219–18, Notification of Competition Limited to Eligible 8(a) Participants, is utilized, use this clause in conjunction with the FAR clause.

NOTIFICATION OF COMPETITION LIMITED TO ELIGIBLE 8(A) PARTICIPANTS (NOV 2022)

Substitute paragraph (c) in FAR Clause 52.219–18 as follows:

(c) Any award resulting from this solicitation will be made directly by the Contracting Officer to the successful 8(a) offeror. Although SBA is not identified as such in the award form, SBA is still the Prime Contractor. Contractor shall comply with the limitations on subcontracting as provided in 13 CFR 125.6 and other 8(a) program requirements, as set forth in 13 CFR part 124.

(End of clause)

[87 FR 63011, Oct. 18, 2022]

852.219–72 Notification of Section 8(a) Direct Award.

As prescribed in 819.811–370, paragraph (a), insert the following clause:

NOTIFICATION OF SECTION 8(A) DIRECT AWARD (NOV 2022)

(a) Offers are solicited only from small business concerns expressly certified by the Small Business Administration (SBA) for participation in the SBA's 8(a) Program. By submission of its offer, the Offeror represents that it is in good standing and that it meets all of the criteria for participation in the program in accordance with 13 CFR part 124.

(b) Any award resulting from this solicitation will be made directly by the Contracting Officer to the successful 8(a) offeror. Although SBA is not identified as such in the award form, SBA is still the Prime Contractor.

(c) This contract is issued as a direct award between the contracting activity and the 8(a) Contractor pursuant to the Partnership Agreement (PA) between the Small Business Administration (SBA) and the Department of Veterans Affairs.

(d) SBA retains responsibility for 8(a) certification, 8(a) eligibility determinations and related issues, and providing counseling and assistance to the 8(a) Contractor under the 8(a) program. The cognizant SBA district office is:

[To be completed by the Contracting Officer at the time of award]

(e) The contracting activity is responsible for administering the contract and taking any action on behalf of the Government under the terms and conditions of the contract. However, the contracting activity shall give advance notice to the SBA before it issues a final notice terminating performance, either in whole or in part, under the contract. The contracting activity shall obtain SBA's approval prior to processing any novation agreement(s). The contracting activity may assign contract administration functions to a contract administration office.

(f) The Contractor agrees:

(1) To notify the Contracting Officer, simultaneous with its notification to SBA (as required by SBA's 8(a) regulations), when the owner or owners upon whom 8(a) eligibility is based plan to relinquish ownership or control of the concern.

(2) Consistent with 15 U.S.C. 637(a)(21), transfer of ownership or control shall result in termination of the contract for convenience, unless SBA waives the requirement for termination prior to the actual relinquishing of ownership and control.

(3) It will adhere to the requirements of 52.219–14, Limitations of Subcontracting and other requirements in 13 CFR part 124 and 13 CFR 125.6, as applicable

(g) Any proposed joint venture involving an 8(a) Participant must be approved by SBA before contracts are awarded.

(End of clause)

[87 FR 63011, Oct. 18, 2022]

852.219–73 VA Notice of Total Set-Aside for Verified Service-Disabled Veteran-Owned Small Businesses.

As prescribed in 819.7011, insert the following clause:

VA NOTICE OF TOTAL SET-ASIDE FOR VERIFIED SERVICE–DISABLED VETERAN–OWNED SMALL BUSINESSES (NOV 2022)

(a) *Definition.* for the Department of Veterans Affairs, ''*Service-disabled Veteran-owned small business concern or SDVOSB'':*

(1) Means a small business concern—

(i) Not less than 51 percent of which is owned 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 or eligible surviving spouses (see VAAR 802.101, Surviving Spouse definition);

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

(iii) The business meets Federal small business size standards for the applicable North American Industry Classification System (NAICS) code identified in the solicitation document;

(iv) The business has been verified for ownership and control pursuant to 38 CFR part 74 and is listed in VA's Vendor Information Pages (VIP) database at *https://www.vetbiz.va.gov/vip/;* and

(v) The business will comply with VAAR subpart 819.70 and Small Business Administration (SBA) regulations regarding small business size and government contracting programs at 13 CFR parts 121 and 125, provided that any reference therein to a service-disabled veteran-owned small business concern or SDVO SBC, is to be construed to apply to a VA verified and VIP-listed SDVOSB, unless otherwise stated in this clause.

(2) The term ''Service-disabled Veteran'' 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).

(3) The term ''small business concern'' has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(4) The term ''small business concern owned and controlled by Veterans with service-connected disabilities'' has the meaning given the term ''*small business concern owned and controlled by service-disabled veterans*'' under section 3(q)(2) of the Small Business Act (15 U.S.C. 632(q)(2)), except that for a VA contract the firm must be listed in the VIP database (see paragraph (a)(1)(iv) of this clause).

(b) *General.* (1) Offers are solicited only from VIP-listed SDVOSBs. Offers received from entities that are not VIP-listed SDVOSBs at the time of offer shall not be considered.

(2) Any award resulting from this solicitation shall be made to a VIP-listed SDVOSB who is eligible at the time of submission of offer(s) and at the time of award.

(3) The requirements in this clause apply to any contract, order or subcontract where the firm receives a benefit or preference from its designation as an SDVOSB, including set-asides, sole source awards, and evaluation preferences.

(c) *Representation.* Pursuant to 38 U.S.C. 8127(e), only VIP-listed SDVOSBs are considered eligible to receive award of a resulting contract. By submitting an offer, the prospective contractor represents that it is an eligible SDVOSB as defined in this clause, 38 CFR part 74, and VAAR subpart 819.70.

(d) *Agreement.* When awarded a contract action, including orders under multiple-award contracts, an SDVOSB agrees that in the performance of the contract, the SDVOSB shall comply with requirements in VAAR subpart 819.70 and SBA regulations on small business size and government contracting programs at 13 CFR part 121 and part 125, including the non-manufacturer rule and limitations on subcontracting requirements in 13 CFR 121.406(b) and 13 CFR 125.6. Unless otherwise stated in this clause, a requirement in 13 CFR parts 121 and 125 that applies to an SDVO SBC, is to be construed to also apply to a VIP-listed SDVOSB. For the purpose of limitations on subcontracting, only VIP-listed SDVOSBs (including independent contractors) shall be considered eligible and/or ''similarly situated'' (*i.e.,* a firm that has the same small business program status as the prime contractor). An otherwise eligible firm further agrees to comply with the required certification requirements in this solicitation (see 852.219–75 or 852.219–76 as applicable). These requirements are summarized as follows:

(1) *Services.* In the case of a contract for services (except construction), the SDVOSB prime contractor will not pay more than 50% of the amount paid by the government to the prime for contract performance to firms that are not VIP-listed SDVOSBs (excluding direct costs to the extent they are not the principal purpose of the acquisition and the SDVOSB/VOSB does not provide the service, such as airline travel, cloud computing services, or mass media purchases). When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract

(2) *Supplies/products.* (i) In the case of a contract for supplies or products (other than from a non-manufacturer of such supplies), the SDVOSB prime contractor will not pay more than 50% of the amount paid by the government to the prime for contract performance, excluding the cost of materials, to firms that are not VIP-listed SDVOSBs. When a contract includes both supply and services, the 50 percent limitation shall apply only to the supply portion of the contract.

(ii) In the case of a contract for supplies from a non-manufacturer, the SDVOSB prime contractor will supply the product of a domestic small business manufacturer or processor, unless a waiver as described in 13 CFR 121.406(b)(5) has been granted. Refer to 13 CRF 125.6(a)(2)(ii) for guidance pertaining to multiple item procurements.

(3) *General construction.* In the case of a contract for general construction, the SDVOSB prime contractor will not pay more than 85% of the amount paid by the government to the prime for contract performance, excluding the cost of materials, to firms that are not VIP-listed SDVOSBs.

(4) *Special trade construction contractors.* In the case of a contract for special trade contractors, no more than 75% of the amount paid by the government to the prime for contract performance, excluding the cost of materials, may be paid to firms that are not VIP-listed SDVOSBs.

(5) *Subcontracting.* An SDVOSB must meet the NAICS size standard assigned by the prime contractor and be listed in VIP to count as similarly situated. Any work that a first tier VIP-listed SDVOSB subcontractor further subcontracts will count towards the percent of subcontract amount that cannot be exceeded. For supply or construction contracts, the cost of materials is excluded and not considered to be subcontracted. When a

contract includes both services and supplies, the 50 percent limitation shall apply only to the portion of the contract with the preponderance of the expenditure upon which the assigned NAICS is based. For information and more specific requirements, refer to 13 CFR 125.6.

(e) *Required limitations on subcontracting compliance measurement period.* An SDVOSB shall comply with the limitations on subcontracting as follows:

[*Contracting Officer check as appropriate.*]

___By the end of the base term of the contract or order, 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.

(f) *Joint ventures.* A joint venture may be considered eligible as an SDVOSB if the joint venture is listed in VIP and complies with the requirements in 13 CFR 125.18(b), provided that any requirement therein that applies to an SDVO SBC is to be construed to apply to a VIP-listed SDVOSB. A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (d) of this clause will be performed by the aggregate of the joint venture participants.

(g) *Precedence.* The VA Veterans First Contracting Program, as defined in VAAR 802.101, subpart 819.70, and this clause, takes precedence over any inconsistencies between the requirements of the SBA Program for SDVO SBCs, and the VA Veterans First Contracting Program.

(h) *Misrepresentation.* Pursuant to 38 U.S.C. 8127(g), any business concern, including all its principals, that is determined by VA to have willfully and intentionally misrepresented a company's SDVOSB status is subject to debarment from contracting with the Department for a period of not less than five years (see VAAR 809.406–2 Causes for Debarment).

(End of clause)

[87 FR 63012, Oct. 18, 2022; 87 FR 71262, Nov. 22, 2022]

852.219–74 VA Notice of Total Set-Aside for Verified Veteran-Owned Small Businesses.

As prescribed in 819.7011, insert the following clause:

VA NOTICE OF TOTAL SET-ASIDE FOR VERIFIED VETERAN-OWNED SMALL BUSINESSES (NOV 2022)

(a) *Definition.* For the Department of Veterans Affairs, ''*Veteran-owned small business or VOSB'':*

(1) Means a small business concern—

(i) Not less than 51 percent of which is owned by one or more 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 Veteran(s);

(ii) The management and daily business operations of which are controlled by one or more Veteran(s);

(iii) The business meets Federal small business size standards for the applicable North American Industry Classification System (NAICS) code identified in the solicitation document;

(iv) The business has been verified for ownership and control pursuant to 38 CFR part 74 and is listed in VA's Vendor Information Pages (VIP) database at: *https://www.vetbiz.va.gov/vip/;* and

(v) The business will comply with VAAR subpart 819.70 and Small Business Administration (SBA) regulations regarding small business size and government contracting programs at 13 CFR parts 121 and 125, provided that any requirement therein that applies to a service-disabled veteran-owned small business concern or SDVO SBC, is to be construed to also apply to a VA verified and VIP-listed VOSB, unless otherwise stated in this clause.

(vi) The term VOSB includes VIP-listed service-disabled veteran-owned small businesses (SDVOSB).

(2) ''*Veteran*'' is defined in 38 U.S.C. 101(2).

(3) The term ''*small business concern*'' has the meaning given that term under section 3 of the Small Business Act (15 U.S.C. 632).

(4) The term ''*small business concern owned and controlled by Veterans*'' has the meaning given that term under section 3(q)(3) of the Small Business Act (15 U.S.C. 632(q)(3)), except that for a VA contract the firm must be listed in the VIP database (see paragraph (a)(1)(iv) of this clause).

(b) *General.* (1) Offers are solicited only from VIP-listed VOSBs, including VIP-listed SDVOSBs. Offers received from entities that are not VIP-listed at the time of offer shall not be considered.

(2) Any award resulting from this solicitation shall be made only to a VIP-listed VOSB who is eligible at the time of submission of offer(s) and at time of award.

(3) The requirements in this clause apply to any contract, order or subcontract where the firm receives a benefit or preference from its designation as a VOSB, including set-asides, sole source awards, and evaluation preferences.

(c) *Representation.* Pursuant to 38 U.S.C. 8127(e), only VIP-listed VOSBs are considered eligible to receive award of a resulting contract. By submitting an offer, the prospective contractor represents that it is an eligible VOSB as defined in this clause, 38 CFR part 74, and VAAR subpart 819.70.

(d) *Agreement.* When awarded a contract action, including orders under multiple-award

contracts, a VOSB agrees that in the performance of the contract, the VOSB shall comply with requirements in VAAR subpart 819.70 and SBA regulations on small business size and government contracting programs at 13 CFR parts 121 and 125, including the non-manufacturer rule and limitations on subcontracting requirements in 13 CFR 121.406(b) and 125.6. Unless otherwise stated in this clause, any requirement in 13 CFR parts 121 and 125 that applies to an SDVO SBC, is to be construed to also apply to a VIP-listed VOSB. For the purpose of the limitations on subcontracting, only VIP-listed VOSB, (including independent contractors) is considered eligible and/or ''similarly situated'' (*i.e.,* a firm that has the same small business program status as the prime contractor). An otherwise eligible firm further agrees to comply with the required certification requirements in this solicitation (see 852.219–75 and/or 852.219–76 as applicable). These requirements are summarized as follows:

(1) *Services.* In the case of a contract for services (except construction), the VOSB prime contractor will not pay more than 50% of the amount paid by the government to the prime for contract performance to firms that are not VIP-listed VOSBs (excluding direct costs to the extent they are not the principal purpose of the acquisition and the SDVOSB/VOSB does not provide the service, such as airline travel, cloud computing services, or mass media purchases). When a contract includes both services and supplies, the 50 percent limitation shall apply only to the service portion of the contract.

(2) *Supplies/products.* (i) In the case of a contract for supplies or products (other than from a non-manufacturer of such supplies), the VOSB prime contractor will not pay more than 50% of the amount paid by the government to the prime for contract performance, excluding the cost of materials, to firms that are not VIP-listed VOSBs. When a contract includes both supply and services, the 50 percent limitation shall apply only to the supply portion of the contract.

(ii) In the case of a contract for supplies from a non-manufacturer, the VOSB prime contractor will supply the product of a domestic small business manufacturer or processor, unless a waiver as described in 13 CFR 121.406(b)(5) has been granted. Refer to 13 CFR 125.6(a)(2)(ii) for guidance pertaining to multiple item procurements.

(3) *General construction.* In the case of a contract for general construction, the VOSB prime contractor will not pay more than 85% of the amount paid by the government to the prime for contract performance, excluding the cost of materials, to firms that are not VIP-listed VOSBs.

(4) *Special trade construction contractors.* In the case of a contract for special trade contractors, no more than 75% of the amount paid by the government to the prime for contract performance, excluding the cost of materials, may be paid to firms that are not VIP-listed VOSBs.

(5) *Subcontracting.* A VOSB must meet the NAICS size standard assigned by the prime contractor and be listed in VIP to count as similarly situated. Any work that a first tier VIP-listed VOSB subcontractor further subcontracts will count towards the percent of subcontract amount that cannot be exceeded. For supply or construction contracts, the cost of materials is excluded and not considered to be subcontracted. When a contract includes both services and supplies, the 50 percent limitation shall apply only to the portion of the contract with the preponderance of the expenditure upon which the assigned NAICS is based. For information and more specific requirements, refer to 13 CFR 125.6.

(e) *Required limitations on subcontracting compliance measurement period.* A VOSB shall comply with the limitations on subcontracting as follows:

[*Contracting Officer check as appropriate.*]

____By the end of the base term of the contract or order, 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.

(f) *Joint ventures.* A joint venture may be considered eligible as a VOSB if the joint venture is listed in VIP and complies with the requirements in 13 CFR 125.18(b), provided that any requirement therein that applies to an SDVO SBC is to be construed to also apply to a VIP-listed VOSB. A joint venture agrees that, in the performance of the contract, the applicable percentage specified in paragraph (d) of this clause will be performed by the aggregate of the joint venture participants.

(g) *Precedence.* The VA Veterans First Contracting Program, as defined in VAAR 802.101, subpart 819.70, and this clause, takes precedence over any inconsistencies between the requirements of the SBA Program for SDVO SBCs and the VA Veterans First Contracting Program.

(h) *Misrepresentation.* Pursuant to 38 U.S.C. 8127(g), any business concern, including all its principals, that is determined by VA to have willfully and intentionally misrepresented a company's VOSB status is subject to debarment from contracting with the Department for a period of not less than five years (see VAAR 809.406–2, Causes for Debarment).

(End of clause)

[87 FR 63013, Oct. 18, 2022; 87 FR 71262, Nov. 22, 2022]

852.219–75 VA Notice of Limitations on Subcontracting—Certificate of Compliance for Services and Construction.

As prescribed in 819.7011(b), insert the following clause:

VA NOTICE OF LIMITATIONS ON SUBCONTRACTING—CERTIFICATE OF COMPLIANCE FOR SERVICES AND CONSTRUCTION (NOV 2022)

(a) Pursuant to 38 U.S.C. 8127(k)(2), the offeror certifies that—

(1) If awarded a contract (see FAR 2.101 definition), it will comply with the limitations on subcontracting requirement as provided in the solicitation and the resultant contract, as follows: [*Contracting Officer check the appropriate box below based on the predominant NAICS code assigned to the instant acquisition as set forth in FAR 19.102.*]

(i) ☐ *Services.* In the case of a contract for services (except construction), the contractor will not pay more than 50% of the amount paid by the government to it to firms that are not VIP-listed SDVOSBs as set forth in 852.219–73 or VOSBs as set forth in 852.219–74. Any work that a similarly situated VIP-listed subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded. Other direct costs may be excluded to the extent they are not the principal purpose of the acquisition and small business concerns do not provide the service as set forth in 13 CFR 125.6.

(ii) ☐ *General construction.* In the case of a contract for general construction, the contractor will not pay more than 85% of the amount paid by the government to it to firms that are not VIP-listed SDVOSBs as set forth in 852.219–73or VOSBs as set forth in 852.219–74. Any work that a similarly situated VIP-listed subcontractor further subcontracts will count towards the 85% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(iii) ☐ *Special trade construction contractors.* In the case of a contract for special trade contractors, the contractor will not pay more than 75% of the amount paid by the government to it to firms that are not VIP-listed SDVOSBs as set forth in 852.219–73 or VOSBs as set forth in 852.219–74. Any work that a similarly situated subcontractor further subcontracts will count towards the 75% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(2) The offeror acknowledges that this certification concerns a matter within the jurisdiction of an Agency of the United States. The offeror further acknowledges that this certification is subject to Title 18, United States Code, Section 1001, and, as such, a false, fictitious, or fraudulent certification may render the offeror subject to criminal, civil, or administrative penalties, including prosecution.

(3) If VA determines that an SDVOSB/VOSB awarded a contract pursuant to 38 U.S.C. 8127 did not act in good faith, such SDVOSB/VOSB shall be subject to any or all of the following:

(i) Referral to the VA Suspension and Debarment Committee;

(ii) A fine under section 16(g)(1) of the Small Business Act (15 U.S.C. 645(g)(1)); and

(iii) Prosecution for violating section 1001 of title 18.

(b) The offeror represents and understands that by submission of its offer and award of a contract it may be required to provide copies of documents or records to VA that VA may review to determine whether the offeror complied with the limitations on subcontracting requirement specified in the contract. Contracting officers may, at their discretion, require the contractor to demonstrate its compliance with the limitations on subcontracting at any time during performance and upon completion of a contract if the information regarding such compliance is not already available to the contracting officer. Evidence of compliance includes, but is not limited to, invoices, copies of subcontracts, or a list of the value of tasks performed.

(c) The offeror further agrees to cooperate fully and make available any documents or records as may be required to enable VA to determine compliance with the limitations on subcontracting requirement. The offeror understands that failure to provide documents as requested by VA may result in remedial action as the Government deems appropriate.

(d) Offeror completed certification/fill-in required. The formal certification must be completed, signed and returned with the offeror's bid, quotation, or proposal. The Government will not consider offers for award from offerors that do not provide the certification, and all such responses will be deemed ineligible for evaluation and award.

CERTIFICATION

I hereby certify that if awarded the contract, [*insert name of offeror*] will comply with the limitations on subcontracting specified in this clause and in the resultant contract. I further certify that I am authorized to execute this certification on behalf of [*insert name of offeror*].

Printed Name of Signee: _____

Printed Title of Signee: _____

Signature: _____

Date: _____

Company Name and Address: _____

(End of clause)

[87 FR 63014, Oct. 18, 2022]

852.219–76 VA Notice of Limitations on Subcontracting—Certificate of Compliance for Supplies and Products.

As prescribed in 819.7011(c), insert the following clause. The contracting officer shall tailor the clause in paragraph (a)(2)(iii) as appropriate:

VA NOTICE OF LIMITATIONS ON SUBCONTRACTING—CERTIFICATE OF COMPLIANCE FOR SUPPLIES AND PRODUCTS (NOV 2022)

(a) Pursuant to 38 U.S.C. 8127(k)(2), the offeror certifies that—

(1) If awarded a contract (see FAR 2.101 definition), it will comply with the limitations on subcontracting requirement as provided in the solicitation and the resultant contract, as follows: [*Offeror check the appropriate box*]

(i) ☐ In the case of a contract for supplies or products (other than from a non-manufacturer of such supplies), it will not pay more than 50% of the amount paid by the government to it to firms that are not VIP-listed SDVOSBs as set forth in 852.219–73 or VOSBs as set forth in 852.219–74. Any work that a similarly situated VIP-listed subcontractor further subcontracts will count towards the 50% subcontract amount that cannot be exceeded. Cost of materials are excluded and not considered to be subcontracted.

(ii) ☐ In the case of a contract for supplies from a nonmanufacturer, it will supply the product of a domestic small business manufacturer or processor, unless a waiver as described in 13 CFR 121.406(b)(5) is granted. The offeror understands that, as provided in 13 CFR 121.406(b)(7), such a waiver has no effect on requirements external to the Small Business Act, such as the Buy American Act or the Trade Agreements Act.

(2) Manufacturer or nonmanufacturer representation and certification. [*Offeror fill-in—check each applicable box below. The offeror must select the applicable provision below, identifying itself as either a manufacturer or nonmanufacturer*]:

(i) ☐ *Manufacturer or producer*. The offeror certifies that it is the manufacturer or producer of the end item being procured, and the end item is manufactured or produced in the United States, in accordance with paragraph (a)(1)(i).

(ii) ☐ *Nonmanufacturer*. The offeror certifies that it qualifies as a nonmanufacturer in accordance with the requirements of 13 CFR 121.406(b) and paragraph (a)(1)(ii). The offeror further certifies it meets each element below as required in order to qualify as a nonmanufacturer. [*Offeror fill-in—check each box below.*]

☐ The offeror certifies that it does not exceed 500 employees (or 150 employees for the Information Technology Value Added Reseller exception to NAICS code 541519, which is found at 13 CFR 121.201, footnote 18).

☐ The offeror certifies that it is primarily engaged in the retail or wholesale trade and normally sells the type of item being supplied.

☐ The offeror certifies that it will take ownership or possession of the item(s) with its personnel, equipment, or facilities in a manner consistent with industry practice.

(iii) ☐ The offeror certifies that it will supply the end item of a small business manufacturer, processor, or producer made in the United States, unless a waiver as provided in 13 CFR 121.406(b)(5) has been issued by SBA. [*Contracting Officer fill-in or removal (see 13 CFR 121.1205). This requirement must be included for a single end item. However, if SBA has issued an applicable waiver of the nonmanufacturer rule for the end item, this requirement must be removed in the final solicitation or contract.*]

or [*Contracting officer tailor clause to remove one or other block under subparagraph (iii).*]

☐ If this is a multiple item acquisition, the offeror certifies that at least 50% of the estimated contract value is composed of items that are manufactured by small business concerns. [*Contracting Officer fill-in or removal. See 13 CFR 121.406(d) for multiple end items. If SBA has issued an applicable nonmanufacturer rule waiver, this requirement must be removed in the final solicitation or contract.*]

(3) The offeror acknowledges that this certification concerns a matter within the jurisdiction of an Agency of the United States. The offeror further acknowledges that this certification is subject to Title 18, United States Code, Section 1001, and, as such, a false, fictitious, or fraudulent certification may render the offeror subject to criminal, civil, or administrative penalties, including prosecution.

(4) If VA determines that an SDVOSB/VOSB awarded a contract pursuant to 38 U.S.C. 8127 did not act in good faith, such SDVOSB/VOSB shall be subject to any or all of the following:

(i) Referral to the VA Suspension and Debarment Committee;

(ii) A fine under section 16(g)(1) of the Small Business Act (15 U.S.C. 645(g)(1)); and

(iii) Prosecution for violating section 1001 of title 18.

(b) The offeror represents and understands that by submission of its offer and award of a contract it may be required to provide copies of documents or records to VA that VA may review to determine whether the offeror complied with the limitations on subcontracting requirement specified in the contract or to determine whether the offeror

qualifies as a manufacturer or nonmanufacturer in compliance with the limitations on subcontracting requirement. Contracting officers may, at their discretion, require the contractor to demonstrate its compliance with the limitations on subcontracting at any time during performance and upon completion of a contract if the information regarding such compliance is not already available to the contracting officer. Evidence of compliance includes, but is not limited to, invoices, copies of subcontracts, or a list of the value of tasks performed.

(c) The offeror further agrees to cooperate fully and make available any documents or records as may be required to enable VA to determine compliance. The offeror understands that failure to provide documents as requested by VA may result in remedial action as the Government deems appropriate.

(d) Offeror completed certification/fill-in required. The formal certification must be completed, signed and returned with the offeror's bid, quotation, or proposal. The Government will not consider offers for award from offerors that do not provide the certification, and all such responses will be deemed ineligible for evaluation and award.

CERTIFICATION

I hereby certify that if awarded the contract, [*insert name of offeror*] will comply with the limitations on subcontracting specified in this clause and in the resultant contract. I further certify that I am authorized to execute this certification on behalf of [*insert name of offeror*].

Printed Name of Signee: _____

Printed Title of Signee: _____

Signature: _____

Date: _____

Company Name and Address: _____

_____

(End of clause)

[87 FR 63014, Oct. 18, 2022]

852.222–70 Contract Work-Hours and Safety Standards—Nursing Home Care for Veterans.

As prescribed in 822.305, insert the following clause:

CONTRACT WORK HOURS AND SAFETY STANDARDS—NURSING HOME CARE FOR VETERANS (MAY 2018)

(a) No Contractor and subcontractor under this contract shall prohibit the payment of overtime wages to their employees for work in excess of 40 hours in any workweek, which would otherwise be a violation of Contract Work Hours and Safety Standards (the statute) (40 U.S.C. 3701, *et seq.*), provided—

(1) The Contractor or subcontractor is primarily engaged in the care of nursing home patients residing on the contractor's or subcontractor's premises;

(2) There is an agreement or understanding between the Contractor or subcontractor and their employees, before performance of work, that a work period of 14 consecutive days is acceptable in lieu of a work period of 7 consecutive days for the purpose of overtime compensation;

(3) Employees receive overtime compensation at a rate no less than 1½ times the employees' regular hourly rate of pay for work in excess of 80 hours in any 14 day period; and

(4) Pay is otherwise computed in accordance with the requirements of the Fair Labor Standards Act of 1938, as amended.

(b) *Subcontracts.* The Contractor shall insert the text of this clause, including this paragraph (b), in subcontracts at any tier. The Contractor shall be responsible for compliance by any subcontractor or lower-tier subcontractor with the provisions set forth in paragraphs (a) through (b) of this clause.

(End of clause)

[83 FR 16210, Apr. 16, 2018]

852.223–70 Instructions to Offerors—Sustainable Acquisition Plan.

As prescribed in 823.103–71, when the Contracting Officer deems a Sustainable Acquisition Plan necessary, the Contracting Officer shall insert the following provision:

INSTRUCTIONS TO OFFERORS—SUSTAINABLE ACQUISITION PLAN (SEP 2019)

Offerors shall include a Sustainable Acquisition Plan in their technical proposals. The plan must describe the approach and quality assurance mechanisms for applying FAR subpart 23.1, Sustainable Acquisition Policy and other Federal laws, regulations and Executive Orders governing sustainable acquisition. The plan shall clearly identify those products and services included in the proposal.

(End of provision)

[84 FR 45682, Aug. 30, 2019]

852.223–71 Safety and Health.

As prescribed by 823.303–70, the Contracting Officer shall insert the following clause:

SAFETY AND HEALTH (SEP 2019)

(a) To help ensure the protection of the life and health of all persons, and to help prevent

damage to property, the Contractor shall comply with all Federal, State, and local laws and regulations applicable to the work being performed under this contract. These laws are implemented or enforced by the Environmental Protection Agency (EPA), Occupational Safety and Health Administration (OSHA) and other regulatory/enforcement agencies at the Federal, State, and local levels.

(1) Additionally, the Contractor shall comply with the following regulations when developing and implementing health and safety operating procedures and practices for both personnel and facilities involving the use or handling of hazardous materials and the conduct of research, development, or test projects:

(i) 29 CFR 1910.1030, Bloodborne pathogens; 29 CFR 1910.1450, Occupational exposure to hazardous chemicals in laboratories. These regulations are available at *https://www.osha.gov/*.

(ii) Nuclear Regulatory Commission Standards and Regulations, pursuant to the Energy Reorganization Act of 1974 (42 U.S.C. 5801 *et seq.*) Copies are available from the U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

(2) The following Government guidelines are recommended for developing and implementing health and safety operating procedures and practices for both personnel and facilities:

(i) Biosafety in Microbiological and Biomedical Laboratories, Centers for Disease Control and Prevention (CDC), available at *http://www.cdc.gov/biosafety/publications/index.htm*.

(ii) Prudent Practices in the Laboratory, National Research Council, National Academy Press, Washington, DC 20001, available at *http://www.nap.edu*.

(b)(1) The Contractor shall maintain an accurate record of, and promptly report to the Contracting Officer, all accidents or incidents resulting in the exposure of persons to toxic substances, hazardous materials; the injury or death of any person; or damage to property incidental to work performed under the contract resulting from toxic or hazardous materials and resulting in any or all violations for which the Contractor has been cited by any Federal, State or local regulatory/enforcement agency.

(2) The report shall include a copy of the notice of violation and the findings of any inquiry or inspection, and an analysis addressing the impact these violations may have on the work remaining to be performed. The report shall also state the required action(s), if any, to be taken to correct any violation(s) noted by the Federal, State, or local regulatory/enforcement agency and the time frame allowed by the agency to accomplish the necessary corrective action.

(c) If the Contractor fails or refuses to comply with the Federal, State or local regulatory/enforcement agency's directive(s) regarding any violation(s) and prescribed corrective action(s), the Contracting Officer may issue an order stopping all or part of the work until satisfactory corrective action (as approved by the Federal, State, or local regulatory/enforcement agencies) has been taken and documented to the Contracting Officer. No part of the time lost due to any such stop work order shall form the basis for a request for extension or costs or damages by the Contractor.

(d) The Contractor shall insert this clause in each subcontract involving toxic substances or hazardous materials. The Contractor is responsible for the compliance of its subcontractors with the provisions of this clause.

(End of clause)

[84 FR 45682, Aug. 30, 2019]

852.228–70 Bond Premium Adjustment.

As prescribed in 828.106–70, insert the following clause:

BOND PREMIUM ADJUSTMENT (JAN 2008)

When net changes in original contract price affect the premium of a Corporate Surety Bond by $5 or more, the Government, in determining the basis for final settlement, will provide for bond premium adjustment computed at the rate shown in the bond.

(End of clause)

852.228–71 Indemnification and Insurance.

As prescribed in 828.306, insert the following clause:

INDEMNIFICATION AND INSURANCE (MAR 2018)

(a) *Indemnification.* The Contractor expressly agrees to indemnify and save the Government, its officers, agents, servants, and employees harmless from and against any and all claims, loss, damage, injury, and liability, however caused, resulting from, arising out of, or in any way connected with the performance of work under this contract. Further, it is agreed that any negligence or alleged negligence of the Government, its officers, agents, servants, and employees, shall not be a bar to a claim for indemnification unless the act or omission of the Government, its officers, agents, servants, and employees is the sole, competent, and producing cause of such claims, loss, damage, injury, and liability. At the option of the Contractor, and subject to the approval by the Contracting Officer, insurance coverage may be employed as guaranty of indemnification.

(b) *Insurance.* Satisfactory insurance coverage is a condition precedent to award of this contract. In general, a successful bidder must present satisfactory evidence of full compliance with State and local requirements, or those below stipulated, whichever are the greater. More specifically, workers' compensation and employer's liability coverage will conform to applicable State law requirements for the service defined, whereas general liability and automobile liability of comprehensive type shall, in the absence of higher statutory minimums, be required in the amounts per vehicle used of not less than $200,000 per person and $500,000 per occurrence for bodily injury and $20,000 per occurrence for property damage. State-approved sources of insurance coverage ordinarily will be deemed acceptable to the Department of Veterans Affairs, subject to timely certifications by such sources of the types and limits of the coverages afforded by the sources to the bidder. [Contracting Officer's Note: In those instances where airplane service is to be used, substitute the word ''aircraft'' for ''automobile'' and ''vehicle'' and modify coverage to require aircraft public and passenger liability insurance of at least $200,000 per passenger 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 shall be at least $200,000 multiplied by the number of seats or passengers, whichever is greater.]

(End of clause)

[83 FR 7409, Feb. 21, 2018, as amended at 84 FR 46455, Sept. 4, 2019]

852.228–72 Assisting Service-Disabled Veteran-Owned and Veteran-Owned Small Businesses in Obtaining Bonds.

As prescribed in 828.106–71, insert the following clause:

ASSISTING SERVICE-DISABLED VETERAN-OWNED SMALL BUSINESSES AND VETERAN-OWNED SMALL BUSINESSES IN OBTAINING BONDS (DEC 2009)

Prime contractors are encouraged to assist service-disabled veteran-owned and veteran-owned small business potential subcontractors in obtaining bonding, when required. Mentor firms are encouraged to assist protégé firms under VA's Mentor-Protégé Program in obtaining acceptable bid, payment, and performance bonds, when required, as a prime contractor under a solicitation or contract and in obtaining any required bonds under subcontracts.

[74 FR 64638, Dec. 8, 2009]

852.228–73 Indemnification of Contractor—Hazardous Research Projects.

As prescribed in 828.7003, insert the following clause:

INDEMNIFICATION OF CONTRACTOR—HAZARDOUS RESEARCH PROJECTS (MAR 2018)

(a) This contract involves work with a risk of an unusually hazardous nature as specifically defined in the contract. The government shall indemnify the Contractor, including subcontractors of any tier, against losses or liability specified in paragraphs (b) and (c) of this clause if—

(1) The losses or liability arise out of or results from a risk defined in this contract as unusually hazardous; and

(2) The losses or liability are not covered by the financial protection required by paragraph (c).

(b) The Government shall indemnify a Contractor for—

(1) Liability (including reasonable expenses of litigation or settlement) to third persons for death, bodily injury, or loss of or damage to property from a risk that the contract defines as unusually hazardous. This indemnification shall not cover liability under State or Federal worker's injury compensation laws to employees of the Contractor who are both:

(i) Employed at the site of the contract work; and

(ii) Working on the contract for which indemnification is granted.

(2) The Government shall also indemnify the Contractor for loss of or damage to property of the Contractor from a risk that the contract defines as unusually hazardous.

(c) A Contractor shall have and maintain an amount of financial protection to cover liability to third persons and loss of or damage to the Contractor's property. Financial protection may include private insurance, private contractual indemnities, self-insurance, other proof of financial responsibility, or a combination that provides the maximum amount required. The financial protection provided must meet one of the following—

(1) The maximum amount of insurance available from private sources; or

(2) A lesser amount that the Secretary establishes after taking into consideration the cost and terms of private insurance.

(d) Actions in event of a claim—

(1) The Contractor shall notify the Contracting Officer of any claim or suit against the Contractor for death, bodily injury, or loss of or damage to property; and

(2) The Government may elect to control or assist in the defense of any suit or claim for which indemnification is provided in the contract.

(End of clause)

[83 FR 7410, Feb. 21, 2018, as amended at 84 FR 46455, Sept. 4, 2019]

852.229–70—852.229–71 [Reserved]

852.232–70 Payments Under Fixed-Price Construction Contracts (Without NAS–CPM).

As prescribed in 832.111–70, insert the following clause in contracts that do not contain a section entitled ''Network Analysis System—Critical Path''

PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (WITHOUT NAS–CPM) (NOV 2018)

The clause FAR 52.232–5, Payments Under Fixed-Price Construction Contracts, is implemented as follows:

(a) *Retainage.* (1) The Contracting Officer may retain funds—

(i) Where performance under the contract has been determined to be deficient or the Contractor has performed in an unsatisfactory manner in the past; or

(ii) As the contract nears completion, to ensure that deficiencies will be corrected and that completion is timely.

(2) Examples of deficient performance justifying a retention of funds include, but are not restricted to, the following—

(i) Unsatisfactory progress as determined by the Contracting Officer;

(ii) Failure to meet schedule in Schedule of Work Progress;

(iii) Failure to present submittals in a timely manner; or

(iv) Failure to comply in good faith with approved subcontracting plans, certifications, or contract requirements.

(3) Any level of retention shall not exceed 10 percent either where there is determined to be unsatisfactory performance, or when the retainage is to ensure satisfactory completion. Retained amounts shall be paid promptly upon completion of all contract requirements, but nothing contained in this paragraph (a)(3) shall be construed as limiting the Contracting Officer's right to withhold funds under other provisions of the contract or in accordance with the general law and regulations regarding the administration of Government contracts.

(b) The Contractor shall submit a schedule of cost to the Contracting Officer for approval within 30 calendar days after date of receipt of notice to proceed. Such schedule will be signed and submitted in triplicate. The approved cost schedule will be one of the bases for determining progress payments to the Contractor for work completed. This schedule shall show cost by the work activity/event for each building or unit of the contract, as instructed by the resident engineer.

(1) The work activities/events shall be subdivided into as many sub-activities/events as are necessary to cover all component parts of the contract work.

(2) Costs as shown on this schedule must be true costs and the resident engineer may require the Contractor to submit the original estimate sheets or other information to substantiate the detailed makeup of the schedule.

(3) The sums of the sub-activities/events, as applied to each work activity/event, shall equal the total cost of such work activity/event. The total cost of all work activities/events shall equal the contract price.

(4) Insurance and similar items shall be prorated and included in the cost of each branch of the work.

(5) The cost schedule shall include separate cost information for the systems listed in the table in this paragraph (b)(5). The percentages listed in the following table are proportions of the cost listed in the Contractor's cost schedule and identify, for payment purposes, the value of the work to adjust, correct and test systems after the material has been installed. Payment of the listed percentages will be made only after the Contractor has demonstrated that each of the systems is substantially complete and operates as required by the contract.

VALUE OF ADJUSTING, CORRECTING, AND TESTING SYSTEM

System	Percent
Pneumatic tube system	10
Incinerators (medical waste and trash)	5
Sewage treatment plant equipment	5
Water treatment plant equipment	5
Washers (dish, cage, glass, etc.)	5
Sterilizing equipment	5
Water distilling equipment	5
Prefab temperature rooms (cold, constant temperature)	5
Entire air-conditioning system (Specified under 600 Sections)	5
Entire boiler plant system (Specified under 700 Sections)	5
General supply conveyors	10
Food service conveyors	10
Pneumatic soiled linen and trash system	10
Elevators and dumbwaiters	10
Materials transport system	10

VALUE OF ADJUSTING, CORRECTING, AND TESTING SYSTEM—Continued

System	Percent
Engine-generator system	5
Primary switchgear	5
Secondary switchgear	5
Fire alarm system	5
Nurse call system	5
Intercom system	5
Radio system	5
TV (entertainment) system	5

(c) In addition to this cost schedule, the Contractor shall submit such unit costs as may be specifically requested. The unit costs shall be those used by the Contractor in preparing its bid and will not be binding as pertaining to any contract changes.

(d) The Contracting Officer will consider for monthly progress payments material and/or equipment procured by the Contractor and stored on the construction site, as space is available, or at a local approved location off the site, under such terms and conditions as the Contracting Officer approves, including but not limited to the following—

(1) The materials or equipment are in accordance with the contract requirements and/or approved samples and shop drawings;

(2) The materials and/or equipment are approved by the resident engineer;

(3) The materials and/or equipment are stored separately and are readily available for inspection and inventory by the resident engineer;

(4) The materials and/or equipment are protected against weather, theft and other hazards and are not subjected to deterioration; and

(5) The Contractor obtains the concurrence of its surety for off-site storage.

(e) The Government reserves the right to withhold payment until samples, shop drawings, engineer's certificates, additional bonds, payrolls, weekly statements of compliance, proof of title, nondiscrimination compliance reports, or any other requirements of this contract, have been submitted to the satisfaction of the Contracting Officer.

(f) The Contracting Officer will notify the Contractor in writing within 10 calendar-days of exercising retainage against any payment in accordance with FAR clause 52.232–5(e). The notice shall disclose the amount of the retainage in value and percent retained from the payment, and provide explanation for the retainage.

(End of clause)

Alternate I (Nov 2018). If the specifications include guarantee period services, the Contracting Officer shall include the following paragraphs as additions to paragraph (b) of the basic clause:

(6)(i) The Contractor shall at the time of contract award furnish the total cost of the guarantee period services in accordance with specification section(s) covering guarantee period services. The Contractor shall submit, within 15 calendar days of receipt of the notice to proceed, a guarantee period performance program that shall include an itemized accounting of the number of work-hours required to perform the guarantee period service on each piece of equipment. The Contractor shall also submit the established salary costs, including employee fringe benefits, and what the Contractor reasonably expects to pay over the guarantee period, all of which will be subject to the Contracting Officer's approval.

(ii) The cost of the guarantee period service shall be prorated on an annual basis and paid in equal monthly payments by VA during the period of guarantee. In the event the installer does not perform satisfactorily during this period, all payments may be withheld and the Contracting Officer shall inform the Contractor of the unsatisfactory performance, allowing the Contractor 10 days to correct deficiencies and comply with the contract. The guarantee period service is subject to those provisions as set forth in the Payments and Default clauses.

[83 FR 49307, Oct. 1, 2018]

852.232–71 Payments Under Fixed-Price Construction Contracts (Including NAS–CPM).

As prescribed in 832.111–70, insert the following clause in contracts that contain a section entitled ''Network Analysis System—Critical Path Method (NAS–CPM).''

PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (INCLUDING NAS–CPM) (NOV 2018)

The clause FAR 52.232–5, Payments Under Fixed-Price Construction Contracts, is implemented as follows:

(a) *Retainage.* (1) The Contracting Officer may retain funds—

(i) Where performance under the contract has been determined to be deficient or the Contractor has performed in an unsatisfactory manner in the past; or

(ii) As the contract nears completion, to ensure that deficiencies will be corrected and that completion is timely.

(2) Examples of deficient performance justifying a retention of funds include, but are not restricted to, the following—

(i) Unsatisfactory progress as determined by the Contracting Officer;

(ii) Failure to meet schedule in Schedule of Work Progress;

(iii) Failure to present submittals in a timely manner; or

(iv) Failure to comply in good faith with approved subcontracting plans, certifications, or contract requirements.

(3) Any level of retention shall not exceed 10 percent either where there is determined to be unsatisfactory performance, or when the retainage is to ensure satisfactory completion. Retained amounts shall be paid promptly upon completion of all contract requirements, but nothing contained in this paragraph (a)(3) shall be construed as limiting the Contracting Officer's right to withhold funds under other provisions of the contract or in accordance with the general law and regulations regarding the administration of Government contracts.

(b) The Contractor shall submit a schedule of costs in accordance with the requirements of section ''Network Analysis System—Critical Path Method (NAS–CPM)'' to the Contracting Officer for approval within 90 calendar days after date of receipt of notice to proceed. The approved cost schedule will be one of the bases for determining progress payments to the Contractor for work completed.

(1) Costs as shown on this schedule must be true costs and the resident engineer may require the Contractor to submit its original estimate sheets or other information to substantiate the detailed makeup of the cost schedule.

(2) The total costs of all work activities/events shall equal the contract price.

(3) Insurance and similar items shall be prorated and included in each work activity/event cost of the critical path method (CPM).

(4) The CPM shall include a separate cost loaded activity for adjusting and testing of the systems listed in the table in paragraph (b)(5) of this clause. The percentages listed in paragraph (b)(5) will be used to determine the cost of adjust and test work activities/events and identify, for payment purposes, the value of the work to adjust, correct and test systems after the material has been installed.

(5) Payment for adjust and test activities will be made only after the Contractor has demonstrated that each of the systems is substantially complete and operates as required by the contract.

VALUE OF ADJUSTING, CORRECTING, AND TESTING SYSTEM

System	Percent
Pneumatic tube system	10
Incinerators (medical waste and trash)	5
Sewage treatment plant equipment	5
Water treatment plant equipment	5
Washers (dish, cage, glass, etc.)	5
Sterilizing equipment	5
Water distilling equipment	5
Prefab temperature rooms (cold, constant temperature)	5
Entire air-conditioning system (Specified under 600 Sections)	5
Entire boiler plant system (Specified under 700 Sections)	5
General supply conveyors	10
Food service conveyors	10
Pneumatic soiled linen and trash system	10
Elevators and dumbwaiters	10
Materials transport system	10
Engine-generator system	5
Primary switchgear	5
Secondary switchgear	5
Fire alarm system	5
Nurse call system	5
Intercom system	5
Radio system	5
TV (entertainment) system	5

(c) In addition to this cost schedule, the Contractor shall submit such unit costs as may be specifically requested. The unit costs shall be those used by the Contractor in preparing its bid and will not be binding as pertaining to any contract changes.

(d) The Contracting Officer will consider for monthly progress payments material and/

or equipment procured by the Contractor and stored on the construction site, as space is available, or at a local approved location off the site, under such terms and conditions as the Contracting Officer approves, including but not limited to the following—

(1) The materials or equipment are in accordance with the contract requirements and/or approved samples and shop drawings;

(2) The materials and/or equipment are approved by the resident engineer;

(3) The materials and/or equipment are stored separately and are readily available for inspection and inventory by the resident engineer;

(4) The materials and/or equipment are protected against weather, theft and other hazards and are not subjected to deterioration; and

(5) The Contractor obtains the concurrence of its surety for off-site storage.

(e) The Government reserves the right to withhold payment until samples, shop drawings, engineer's certificates, additional bonds, payrolls, weekly statements of compliance, proof of title, nondiscrimination compliance reports, or any other requirements of this contract, have been submitted to the satisfaction of the Contracting Officer.

(f) The Contracting Officer will notify the Contractor in writing within 10 calendar-days of exercising retainage against any payment in accordance with FAR clause 52.232–5(e). The notice shall disclose the amount of the retainage in value and percent retained from the payment, and provide explanation for the retainage.

(End of clause)

Alternate I (Nov 2018). If the specifications include guarantee period services, the Contracting Officer shall include the following paragraphs as additions to paragraph (b) of the basic clause:

(6)(i) The Contractor shall show on the critical path method (CPM) the total cost of the guarantee period services in accordance with the guarantee period service section(s) of the specifications. This cost shall be priced out when submitting the CPM cost loaded network. The cost submitted shall be subject to the approval of the Contracting Officer. The activity on the CPM shall have money only and not activity time.

(ii) The Contractor shall submit with the CPM a guarantee period performance program which shall include an itemized accounting of the number of work-hours required to perform the guarantee period service on each piece of equipment. The Contractor shall also submit the established salary costs, including employee fringe benefits, and what the Contractor reasonably expects to pay over the guarantee period, all of which will be subject to the Contracting Officer's approval.

(iii) The cost of the guarantee period service shall be prorated on an annual basis and paid in equal monthly payments by VA during the period of guarantee. In the event the installer does not perform satisfactorily during this period, all payments may be withheld and the Contracting Officer shall inform the Contractor of the unsatisfactory performance, allowing the Contractor 10 days to correct and comply with the contract. The guarantee period service is subject to those provisions as set forth in the Payments and Default clauses.

[83 FR 49309, Oct. 1, 2018]

852.232–72 Electronic Submission of Payment Requests.

As prescribed in 832.7001–2, insert the following clause:

ELECTRONIC SUBMISSION OF PAYMENT REQUESTS (NOV 2018)

(a) *Definitions.* As used in this clause—

(1) *Contract financing payment* has the meaning given in FAR 32.001;

(2) *Designated agency office* means the office designated by the purchase order, agreement, or contract to first receive and review invoices. This office can be contractually designated as the receiving entity. This office may be different from the office issuing the payment;

(3) *Electronic form* means an automated system transmitting information electronically according to the accepted electronic data transmission methods and formats identified in paragraph (c) of this clause. Facsimile, email, and scanned documents are not acceptable electronic forms for submission of payment requests;

(4) *Invoice payment* has the meaning given in FAR 32.001; and

(5) *Payment request* means any request for contract financing payment or invoice payment submitted by the Contractor under this contract.

(b) *Electronic payment requests.* Except as provided in paragraph (e) of this clause, the Contractor shall submit payment requests in electronic form. Purchases paid with a Government-wide commercial purchase card are considered to be an electronic transaction for purposes of this rule, and therefore no additional electronic invoice submission is required.

(c) *Data transmission.* A Contractor must ensure that the data transmission method and format are through one of the following:

(1) VA's Electronic Invoice Presentment and Payment System at the current website address provided in the contract.

(2) Any system that conforms to the X12 electronic data interchange (EDI) formats established by the Accredited Standards Center (ASC) and chartered by the American National Standards Institute (ANSI).

(d) *Invoice requirements.* Invoices shall comply with FAR 32.905.

(e) *Exceptions.* If, based on one of the circumstances in this paragraph (e), the Contracting Officer directs that payment requests be made by mail, the Contractor shall submit payment requests by mail through the United States Postal Service to the designated agency office. Submission of payment requests by mail may be required for—

(1) Awards made to foreign vendors for work performed outside the United States;

(2) Classified contracts or purchases when electronic submission and processing of payment requests could compromise the safeguarding of classified or privacy information;

(3) Contracts awarded by Contracting Officers in the conduct of emergency operations, such as responses to national emergencies;

(4) Solicitations or contracts in which the designated agency office is a VA entity other than the VA Financial Services Center in Austin, Texas; or

(5) Solicitations or contracts in which the VA designated agency office does not have electronic invoicing capability as described above.

(End of clause)

[83 FR 49310, Oct. 1, 2018]

852.233–70 Protest Content/Alternative Dispute Resolution.

As prescribed in 833.106–70(a), insert the following provision:

PROTEST CONTENT/ALTERNATIVE DISPUTE RESOLUTION (SEP 2018)

(a) Any protest filed by an interested party shall—

(1) Include the name, address, fax number, email and telephone number of the protester;

(2) Identify the solicitation and/or contract number;

(3) Include an original signed by the protester or the protester's representative and at least one copy;

(4) Set forth a detailed statement of the legal and factual grounds of the protest, including a description of resulting prejudice to the protester, and provide copies of relevant documents;

(5) Specifically request a ruling of the individual upon whom the protest is served;

(6) State the form of relief requested; and

(7) Provide all information establishing the timeliness of the protest.

(b) Failure to comply with the above may result in dismissal of the protest without further consideration.

(c) Bidders/offerors and Contracting Officers are encouraged to use alternative dispute resolution (ADR) procedures to resolve protests at any stage in the protest process. If ADR is used, the Department of Veterans Affairs will not furnish any documentation in an ADR proceeding beyond what is allowed by the Federal Acquisition Regulation.

(End of provision)

[83 FR 46417, Sept. 13, 2018]

852.233–71 Alternate Protest Procedure.

As prescribed in 833.106–70(b), insert the following provision:

ALTERNATE PROTEST PROCEDURE (SEP 2018)

(a) As an alternative to filing a protest with the Contracting Officer, an interested party may file a protest by mail or electronically with: Executive Director, Office of Acquisition and Logistics, Risk Management and Compliance Service (003A2C), Department of Veterans Affairs, 810 Vermont Avenue NW, Washington, DC 20420 or Email: *EDProtests@va.gov*.

(b) The protest will not be considered if the interested party has a protest on the same or similar issue(s) pending with the Contracting Officer.

(End of provision)

[83 FR 46418, Sept. 13, 2018]

852.235–70 Research Misconduct.

As prescribed at 835.003–71, insert the following clause:

RESEARCH MISCONDUCT (DEC 2022)

(a) The Contractor is responsible for maintaining the integrity of research performed pursuant to this contract award including the prevention, detection and remediation of research misconduct as defined in 835.001–70.

(b) The Contractor shall notify the Contracting Officer within 7 business days of any research misconduct allegations received by the facility concerning this contract award.

(c) The Contractor shall conduct an initial inquiry into any allegation of research misconduct. If the Contractor determines that there is sufficient evidence to proceed to an investigation,

the Contractor shall notify the Contracting Officer and, unless otherwise instructed shall—

(1) Conduct an investigation to develop a complete factual record and an examination of such record leading to either a finding of research misconduct and an identification of appropriate remedies, or a recommendation that no further action is warranted;

(2) When the investigation results in a research misconduct finding, ensure the matter is adjudicated by a responsible official who was not involved in the inquiry or investigation and is organizationally separated from the element which conducted the investigation. The adjudication shall include a review of the investigation record and a recommendation of appropriate corrective actions and sanctions; and

(3) When an investigation is complete, the Contractor shall forward to the Contracting Officer a copy of the evidentiary record, the investigative report, any recommendations made to the Contractor's adjudicating official, the adjudicating official's recommendation and notification of any proposed corrective action, and the subject's written response, if any. The Contracting Officer will review the documentation to determine whether the proposed corrective action can proceed.

(d) The VA may elect to act in lieu of the Contractor in conducting an inquiry or investigation into an allegation of research misconduct if the Contracting Officer finds that—

(1) The research organization is not prepared to handle the allegation in a manner consistent with this clause and it is believed it cannot reasonably conduct the inquiry;

(2) VA involvement is necessary to ensure the public health, safety, and security, or to prevent harm to the public interest; or

(3) The allegation involves possible criminal misconduct.

(e) The Contractor shall provide safeguards for information received and protect informants, witnesses and respondents of allegations as follows:

(1) The Contractor shall provide safeguards to ensure that individuals may bring allegations of research misconduct made in good faith to the attention of the Contractor without suffering retribution. Safeguards include: protection against retaliation; fair and objective procedures for examining and resolving allegations; and diligence in protecting positions and reputations.

(2) The Contractor shall also assure the respondent that their rights are protected and that the mere filing of an allegation of research misconduct will not result in an adverse action. Safeguards include timely written notice regarding substantive allegations against them, a description of the allegations and reasonable access to any evidence submitted to support each allegation. Respondents must be given the opportunity to prepare a response to an allegation and notice of any findings of research misconduct.

(f) *Objectivity and expertise.* The Contractor shall select individual(s) to inquire, investigate, and adjudicate allegations of research misconduct who have appropriate expertise and have no unresolved conflict of interest. The individual(s) who conducts the adjudication must not be the same individual(s) who conducted the inquiry or investigation and must be separate organizationally from the element that conducted the inquiry or investigation.

(End of clause)

[87 FR 70749, Nov. 21, 2022]

852.235–71 Protection of Human Subjects.

As prescribed at 835.003–72, insert the following clause:

PROTECTION OF HUMAN SUBJECTS (DEC 2022)

(a) Research involving human subjects is not permitted under this award unless expressly authorized in writing by the Contracting Officer. Such authorization will specify the details of the approved research involving human subjects and will be incorporated by reference into this contract.

(b) The Federal Policy for the Protection of Human Subjects (the ''Common Rule''), adopted by VA (see 38 CFR part 16), requires Contractors to maintain appropriate policies and procedures for the protection of human subjects in research. The Common Rule defines a ''human subject'' as a living

individual about whom an investigator conducting research obtains data through intervention or interaction with the individual, or identifiable private information. The term ''research'' means a systematic investigation, including research development and/or testing and evaluation, designed to develop or contribute to generalized knowledge. The Common Rule also sets forth categories of research that may be considered exempt from 15 CFR part 27. These categories may be found at 15 CFR 27.101.

(c) Should research involving human subjects be included in the proposal, prior to issuance of an award, the Contractor shall submit the following documentation to the Contracting Officer:

(1) Documentation to verify that the Contractor has established a relationship with an appropriate Institutional Review Board (''cognizant IRB''). An appropriate IRB is one that is located within the United States and within the community in which the research will be conducted;

(2) Documentation to verify that the cognizant IRB possesses a valid registration with the United States Department of Health and Human Services' Office for Human Research Protections (''OHRP'');

(3) Documentation to verify that the Contractor has a valid Federal-wide Assurance (FWA) issued by OHRP.

(d) Prior to starting any research involving human subjects, the Contractor shall submit appropriate documentation to the Contracting Officer for institutional review and approval. This documentation may include:

(1) Copies of the research protocol, all questionnaires, surveys, advertisements, and informed consent forms approved by the cognizant IRB;

(2) Documentation of approval for the research protocol, questionnaires, surveys, advertisements, and informed consent forms by the cognizant IRB;

(3) Documentation of continuing IRB approval by the cognizant IRB at appropriate intervals as designated by the IRB, but not less than annually; and/or

(4) Documentation to support an exemption for the project from the Common Rule (Note: this option is not available for activities that fall under 45 CFR part 46, subpart C).

(e) Additionally, if the Contractor modifies a research protocol, questionnaire, survey, advertisement, or informed consent form approved by the cognizant IRB, the Contractor shall submit a copy of all modified material along with documentation of approval for said modification by the cognizant IRB to the Contracting Officer for institutional review and approval. The Contractor shall not implement any IRB approved modification without written approval by the Contracting Officer.

(f) No work involving human subjects may be undertaken, conducted, or costs incurred and/or charged to the project, until the Contracting Officer approves the required appropriate documentation in writing.

(g) The Contractor shall bear full responsibility for the performance of all work and services involving the use of human subjects under this contract in a proper manner and as safely as is feasible. The parties hereto agree that the Contractor retains the right to control and direct the performance of all work under this contract. Nothing in this contract shall be deemed to constitute the Contractor or any subcontractor, agent or employee of the Contractor, or any other person, organization, institution, or group of any kind whatsoever, as the agency or employee of the Government. The Contractor agrees that it has entered into this contract and will discharge its obligations, duties, and undertakings and the work pursuant thereto, whether requiring professional judgement or otherwise, as an independent Contractor without imputing liability on the part of the Government for the acts of the Contractor or its employees.

(h) If at any time during performance of this contract, the Contracting Officer determines, in consultation with the Office for Protection from Research Risks (OPRR), National Institutes of Health (NIH), that the Contractor is not in compliance with any of the requirements, the Contracting Officer may immediately suspend the research and further payments under this contract until the Contractor corrects such noncompliance. Notice of

the suspension may be communicated by telephone and confirmed in writing. If the Contractor fails to complete the corrective action within the period of time designated in the Contracting Officer's written notice of suspension, the Contracting Officer may, in consultation with OPRR, NIH, terminate this contract and the Contractor's name may be removed from the list of those Contractors with approved Department of Health and Human Services Human Subject Assurances.

(End of clause)

[87 FR 70749, Nov. 21, 2022]

852.235–72 Animal Welfare.

As prescribed in 835.003–73, insert the following clause:

ANIMAL WELFARE (DEC 2022)

(a) The Contractor shall—

(1) Use the Veterans Affairs (VA), Office of Research Oversight (ORO) Laboratory Animal Welfare Checklist;

(2) Comply with the United States Department of Agriculture (USDA) Animal Welfare Act and Animal Welfare Regulations at *https://www.aphis.usda.gov/animal_welfare*, and the Animal Welfare Information Center's (AWIC) information for improved animal care and use in research, testing, and teaching provided at *https://www.nal.usda.gov/awic;*

(3) Develop and provide to the Contracting Officer a written plan of providing adequate veterinary care to laboratory animals, including—

(i) The frequency of visits; and

(ii) Provisions for after-hours, weekend and holiday veterinary coverage.

(b) The Contracting Officer may immediately suspend the work by issuance of a stop work order and suspend further payments under this contract for failure to comply with the requirements of this clause.

(c) The suspension will stay in effect until the Contractor complies with the requirements. Failure to complete corrective action within the time specified by the Contracting Officer may result in termination of this contract.

(d) The Contractor shall include the substance of this clause, in all subcontracts involving research and development, testing, evaluation or training that use live vertebrate animals.

(End of clause)

[87 FR 70750, Nov. 21, 2022]

852.235–73 Facilities.

As prescribed at 835.003–74, insert the following clause:

FACILITIES (DEC 2022)

(a) The facilities specified in the contract are considered essential to the work being performed under this contract. Therefore, prior to removing, replacing, or diverting any of the listed or specified facilities, the Contractor shall—

(1) Notify the Contracting Officer in writing; and

(2) Submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the potential impact on this contract.

(b) The Contractor shall make no removal, replacement or diversion of facilities without the Contracting Officer's written consent.

(End of clause)

[87 FR 70750, Nov. 21, 2022]

852.235–74 Acknowledgement of Support and Disclaimer.

As prescribed at 835.003–75, insert the following clause:

ACKNOWLEDGEMENT OF SUPPORT AND DISCLAIMER (DEC 2022)

(a) The Contractor shall include an acknowledgment of the Government's support in the publication of any material based on or developed under this contract, stated in the following terms: This material is based upon work supported by the (name of contracting agency) under this VA contract.

(b) All material, except scientific articles or papers published in scientific journals, must, in addition to any notices or disclaimers by the Contractor, also contain the following disclaimer:

Any opinions, findings, conclusions or recommendations expressed in this material are those of the author(s) and do not necessarily reflect the views of the VA.

(End of clause)

[87 FR 70750, Nov. 21, 2022]

852.235–75 Scientific and Technical Reports.

As prescribed at 835.010, insert the following clause:

SCIENTIFIC AND TECHNICAL REPORTS (DEC 2022)

The Contractor shall submit an electronic copy of the approved scientific technical reports, not a summary, delivered under this contract to the National Technical Information Service (NTIS) as delineated at FAR 35.010.

(End of clause)

[87 FR 70750, Nov. 21, 2022]

852.236–70 [Reserved]

852.236–71 Specifications and Drawings for Construction.

As prescribed in 836.521, insert the following clause:

SPECIFICATIONS AND DRAWINGS FOR CONSTRUCTION (APR 2019)

The clause entitled ''Specifications and Drawings for Construction'' in FAR52.236–21 is supplemented as follows:

(a) The Contracting Officer's interpretation of the drawings and specifications will be final, subject to the Disputes clause.

(b) The Contractor shall—

(1) Check all drawings and specifications furnished immediately upon receipt;

(2) Compare all drawings and the specifications, and verify the figures before laying out the work;

(3) Promptly notify the Contracting Officer of any discrepancies;

(4) Be responsible for any errors that might have been avoided by complying with this paragraph (b); and

(5) Reproduce and print contract drawings and specifications as needed.

(c) In general—

(1) Drawings of greater detail shall govern over drawings of lesser detail unless specifically noted otherwise; and

(2) Figures and numerical quantities noted on drawings govern over scale measurements.

(d) Omissions from the drawings or specifications or the misdescription of details of work that are manifestly necessary to carry out the intent of the drawings and specifications, or that are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work. The Contractor shall perform such details as if fully and correctly set forth and described in the drawings and specifications.

(e) The work shall conform to the specifications and the contract drawings identified on the following index of drawings:

Title File Drawing No.

(End of clause)

[84 FR 9974, Mar. 19, 2019]

852.236–72 Performance of Work by the Contractor.

As prescribed in 836.501, insert the following clause:

PERFORMANCE OF WORK BY THE CONTRACTOR (APR 2019)

(a) In accordance with FAR 52.236–1, the contract work accomplished on the site by laborers, mechanics, and foreman/superintendent on the Contractor's payroll and under their direct supervision shall be used in establishing the percent of work to be performed by the Contractor. Cost of material and equipment installed by such labor may be included. The work by the Contractor's executive, administrative and clerical forces shall be excluded in establishing compliance with the requirements of this clause.

(b) The Contractor shall submit, simultaneously with the schedule of costs required by the Payments under Fixed-Price Construction Contracts clause of the contract, a statement designating the portions of contract work to be performed with the Contractor's own forces. The approved schedule of costs will be used in determining the value of a work activity/event, or portions thereof, of the work for the purpose of this article.

(c) Changes to established activity/event identifiers or responsibility codes for Contractor activities shall not be made without approval from the Contracting Officer.

(d) In the event the Contractor fails to comply with FAR 52.236–1, Performance of Work by the Contractor, the Contracting Officer will withhold retention in the amount of 15% of the value of any work activity/element being invoiced that was not authorized by the Contracting Officer to be performed by someone other than the prime Contractor's own workforce.

(End of clause)

Alternate I (APR 2019). For requirements which include a Network Analysis System (NAS), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) The Contractor shall submit, simultaneously with the cost per activity of the construction schedule required by Section 01310

or 01311, NETWORK ANALYSIS SYSTEM, a responsibility code for all activities of the network for which the Contractor's forces will perform the work. The cost of these activities will be used in determining the portions of the total contract work to be executed by the Contractor's forces for the purpose of this article.

[84 FR 9974, Mar. 19, 2019]

852.236–73—852.236–78 [Reserved]

852.236–79 Contractor Production Report.

As prescribed in 836.573, insert the following clause:

CONTRACTOR PRODUCTION REPORT (APR 2019)

(a) The Contractor shall furnish to the resident engineer, for each workday, a consolidated report for the preceding workday. Reporting shall begin from date of mobilization until the date of final acceptance except for authorized holidays. VA Form 10101, Contractor Production Report, or a Contractor generated form containing the same type of information shall be signed, dated and submitted by the Contractor superintendent.

(b) Each report shall include and specifically identify at least one safety topic germane to the jobsite that day.

(End of clause)

[84 FR 9974, Mar. 19, 2019]

852.236–80 Subcontracts and Work Coordination.

As prescribed in 836.574, insert the following clause:

SUBCONTRACTS AND WORK COORDINATION (APR 2019)

(a) Nothing contained in this contract shall be construed as creating any contractual relationship between any subcontractor and the Government. Divisions or sections of specifications are not intended to control the Contractor in dividing work among subcontractors, or to limit work performed by any trade.

(b) The Contractor shall be responsible to the Government for acts and omissions of his/her own employees, and of the subcontractors and their employees. The Contractor shall also be responsible for coordination of the work of the trades, subcontractors, and material suppliers.

(c) The Government or its representatives will not undertake to settle any differences between the Contractor and subcontractors or between subcontractors.

(d) The Government reserves the right to refuse to permit employment on the work, or require dismissal from the work, of any subcontractor or subcontractor employee who, by reason of previous unsatisfactory work on Department of Veterans Affairs projects or for any other reason, is considered by the Contracting Officer to be incompetent, careless, or otherwise objectionable.

(End of clause)

Alternate I (APR 2019). For new construction work with complex mechanical-electrical work, the following paragraph relating to work coordination may be substituted for paragraph (b) of the basic clause:

(b) The Contractor shall be responsible to the Government for acts and omissions of his/her own employees, and subcontractors and their employees. The Contractor shall also be responsible for coordination of the work of the trades, subcontractors, and material suppliers. The Contractor shall, in advance of the work, prepare coordination drawings showing the location of openings through slabs, the pipe sleeves and hanger inserts, as well as the location and elevation of utility lines, including, but not limited to, conveyor systems, pneumatic tubes, ducts, and conduits and pipes two inches and larger in diameter. These drawings, including plans, elevations, and sections as appropriate, shall clearly show the manner in which the utilities fit into the available space and relate to each other and to existing building elements. Drawings shall be of appropriate scale to satisfy the previously stated purposes, but not smaller than ⅜-inch scale. Drawings may be composite (with distinctive colors for the various trades) or may be separate but fully coordinated drawings (such as sepias or photographic paper reproducibles) of the same scale. Separate drawings shall depict identical building areas or sections and shall be capable of being overlaid in any combination. The submitted drawings for a given area of the project shall show the work of all trades that will be involved in that particular area. Six complete composite drawings or six complete sets of separate reproducible drawings shall be received by the Government not less than 20 days prior to the scheduled start of the work in the area illustrated by the drawings, for the purpose of showing the Contractor's planned methods of installation. The objectives of such drawings are to promote carefully planned work sequence and proper trade coordination, in order to assure the expeditious solutions of problems and the installation of lines and equipment as contemplated by the contract documents while avoiding or minimizing additional costs to the Contractor and to the Government. In the event the Contractor, in coordinating the various installations and in planning the

method of installation, finds a conflict in location or elevation of any of the utilities with themselves, with structural items or with other construction items, he/she shall bring this conflict to the attention of the Contracting Officer immediately. In doing so, the Contractor shall explain the proposed method of solving the problem or shall request instructions as to how to proceed if adjustments beyond those of usual trades' coordination are necessary. Utilities installation work will not proceed in any area prior to the submission and completion of the Government review of the coordinated drawings for that area, nor in any area in which conflicts are disclosed by the coordination drawings, until the conflicts have been corrected to the satisfaction of the Contracting Officer. It is the responsibility of the Contractor to submit the required drawings in a timely manner consistent with the requirements to complete the work covered by this contract within the prescribed contract time.

[84 FR 9974, Mar. 19, 2019]

852.236–81—852.236–89 [Reserved]

852.236–90 Restriction on Submission and Use of Equal Products.

As prescribed in 836.202–70, insert the following clause in solicitations and contracts when it is determined that only one product will meet the Government's minimum needs and the submission of ''equal'' products is not permitted:

RESTRICTION ON SUBMISSION AND USE OF EQUAL PRODUCTS (APR 2019)

(a) This clause applies to the following items: [*Contracting Officer fill-in]*

(b) Notwithstanding the ''Material and Workmanship'' clause of this contract, FAR 52.236–5(a), nor any other clause or provision, only brand name products for the items listed above will be authorized for use on this contract.

(End of clause)

[84 FR 9975, Mar. 19, 2019]

852.236–92 Notice to Bidders—Additive or Deductive Bid Line Items.

As prescribed in 836.580, insert the following provision:

NOTICE TO BIDDERS—ADDITIVE OR DEDUCTIVE BID LINE ITEMS (APR 2019)

(a) Additive or deductive line items in the bid schedule shall be evaluated to determine the low offeror and the items to be awarded. The evaluation shall be made as follows—

(1) Prior to the opening of bids, the Government will determine the amount of funds available for the project.

(2) The low bid shall be the Bidder that—

(i) Is otherwise eligible for award; and

(ii) Offers the lowest aggregate amount for the first or base line item, plus or minus (in the order stated in the list of priorities in the bid schedule) those additive or deductive line items that provide the most features within the funds determined available.

(3) All bids shall be evaluated on the basis of the same additive or deductive line items.

(i) If adding another item from the bid schedule list of priorities would make the award exceed the available funds for all offerors, the Contracting Officer will skip that item and go to the next item from the bid schedule of priorities; and

(ii) Add that next item if an award may be made that includes that line item and is within the available funds.

(b) The Contracting Officer will use the list of priorities in the bid schedule only to determine the low offeror. After determining the low offeror, an award may be made on any combination of items if—

(1) It is in the best interest of the Government;

(2) Funds are available at the time of award; and

(3) The low offeror's price for the combination to be awarded is less than the price offered by any other responsive, responsible offeror.

(c) Example: ''The amount available is $100,000. Offeror A's base bid and four additives (in the order stated in the list of priorities in the bid schedule) are $85,000, $10,000, $8,000, $6,000, and $4,000. Offeror B's base bid and four additives are $80,000, $16,000, $9,000, $7,000, and $4,000. Offeror A is the low offeror. The aggregate amount of offeror A's bid for purposes of award would be $99,000, which includes a base bid plus the first and fourth additives. The second and third additives were skipped because each of them would cause the aggregate bid to exceed $100,000.''

(End of provision)

[84 FR 9975, Mar. 19, 2019]

852.237–70 Indemnification and Medical Liability Insurance.

As prescribed in 837.403–70(a), insert the following clause:

INDEMNIFICATION AND MEDICAL LIABILITY INSURANCE (OCT 2019)

(a) It is expressly agreed and understood that this is a non-personal services contract, as defined in Federal Acquisition Regulation (FAR) 37.101, under which the professional services rendered by the Contractor or its health-care providers 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 or its health-care providers' professional medical judgment, diagnosis, or specific medical treatments. The Contractor and its health-care providers shall be liable for their liability-producing acts or omissions. The Contractor shall maintain or require all health-care providers performing under this contract to maintain, during the term of this contract, professional liability insurance issued by a responsible insurance carrier of not less than the following amount(s) per specialty per occurrence: [*Contracting Officer's Note: Insert the dollar amount value(s) of standard coverage(s) prevailing within the local community as to the specific medical specialty, or specialties, concerned, or such higher amount as the Contracting Officer deems necessary to protect the Government's interests.*] However, if the Contractor is an entity or a subdivision of a State that either provides for self-insurance or limits the liability or the amount of insurance purchased by State entities, then the insurance requirement of this contract shall be fulfilled by incorporating the provisions of the applicable State law.

(b) An apparently successful offeror, upon request of the Contracting Officer, shall, prior to contract award, furnish evidence of the insurability of the offeror and/or of all health-care providers who will perform under this contract. The submission shall provide evidence of insurability concerning the medical liability insurance required by paragraph (a) of this clause or the provisions of State law as to self-insurance, or limitations on liability or insurance.

(c) The Contractor shall, prior to commencement of services under the contract, provide to the Contracting Officer Certificates of Insurance or insurance policies evidencing the required insurance coverage and an endorsement stating 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. Certificates or policies shall be provided for the Contractor and/or each health-care provider who will perform under this contract.

(d) The Contractor shall notify the Contracting Officer within 5 days of becoming aware of a change in insurance providers during the performance period of this contract for all health-care providers performing under this contract. The notification shall provide evidence that the Contractor and/or health-care providers will meet all the requirements of this clause, including those concerning liability insurance and endorsements. These requirements may be met either under the new policy, or a combination of old and new policies, if applicable.

(e) The Contractor shall insert the substance of this clause, including this paragraph (e), in all subcontracts for health-care services under this contract. The Contractor shall be responsible for compliance by any subcontractor or lower-tier subcontractor with the provisions set forth in 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)

[84 FR 46455, Sept. 4, 2019]

852.237–71 Nonsmoking Policy for Children's Services.

As prescribed in 837.403–70(b), insert the following clause:

NONSMOKING POLICY FOR CHILDREN'S SERVICES (OCT 2019)

(a) Smoking in facilities where certain federally funded children's services are provided shall be prohibited. The Pro-Children Act of 2001 (20 U.S.C. 7181–7183) prohibits smoking within any indoor facility (or portion thereof), whether owned, leased, or contracted for, that is used for the routine or regular provision of health or day care services that are provided to children under the age of 18. The statutory prohibition also applies to indoor facilities that are constructed, operated, or maintained with Federal funds.

(b) By acceptance of this contract or order, the Contractor agrees to comply with the requirements of the Act. The Act also applies to all subcontracts awarded under this contract for the specified children's services. Accordingly, the Contractor shall ensure that each of its employees, and any subcontractor staff, is made aware of, understands, and complies with the provisions of the Act. Failure to comply with the Act may result in the imposition of a civil monetary penalty in an amount not to exceed $1,000 for each violation and/or the imposition of an administrative compliance order on the responsible entity. Each day a violation continues constitutes a separate violation.

(End of clause)

[84 FR 46455, Sept. 4, 2019]

852.237–72 Crime Control Act—Reporting of Child Abuse.

As prescribed in 837.403–70(c), insert the following clause:

CRIME CONTROL ACT—REPORTING OF CHILD ABUSE (OCT 2019)

(a) Public Law 101–647, also known as the Crime Control Act of 1990 (Act), imposes responsibilities on certain individuals who, while engaged in a professional capacity or activity, as defined in the Act, on Federal land or in a federally-operated (or contracted) facility, learn of facts that give the individual reason to suspect that a child has suffered an incident of child abuse.

(b) The Contractor shall comply with the requirements of the Act. The Act also applies to all applicable subcontracts awarded under this contract. Accordingly, the Contractor shall ensure that each of its employees, and any subcontractor staff, is made aware of, understands, and complies with the provisions of the Act.

(End of clause)

[84 FR 46456, Sept. 4, 2019]

852.237–73 Crime Control Act—Requirement for Background Checks.

As prescribed in 837.403–70(d), insert the following clause:

CRIME CONTROL ACT—REQUIREMENT FOR BACKGROUND CHECKS (OCT 2019)

(a) Public Law 101–647, also known as the Crime Control Act of 1990 (Act), requires that all individuals involved with the provision of child care services, as defined in the Act, to children under the age of 18 undergo a criminal background check.

(b) The Contracting Officer will provide the necessary information to the Contractor regarding the process for obtaining the background check. The Contractor may hire a staff person provisionally prior to the completion of a background check, if at all times prior to the receipt of the background check during which children are in the care of the newly-hired person, the person is within the sight and under the supervision of a previously investigated staff person.

(c) The Contractor shall comply with the requirements of the Act. The Act also applies to all applicable subcontracts awarded under the contract. Accordingly, the Contractor shall ensure that each of its employees, and any subcontractor staff, is made aware of, understands, and complies with the provisions of the Act.

(End of clause)

[84 FR 46456, Sept. 4, 2019]

852.237–74 Non-discrimination in Service Delivery.

As prescribed in 837.110–70(a), the Contracting Officer shall insert the following clause in solicitations and contracts:

NON-DISCRIMINATION IN SERVICE DELIVERY (OCT 2019)

It is the policy of the Department of Veterans Affairs that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of VA programs and services based on non-merit factors such as race, color, national origin, religion, sex, gender identity, sexual orientation, or disability (physical or mental). By acceptance of this contract, the Contractor agrees to comply with this policy in supporting the program and in performing the services called for under this contract. The Contractor shall include this clause in all subcontracts awarded under this contract for supporting or performing the specified program and services. Accordingly, the Contractor shall ensure that each of its employees, and any subcontractor staff, is made aware of, understands, and complies with this policy.

(End of clause)

[84 FR 46456, Sept. 4, 2019]

852.237–75 Key Personnel.

As prescribed in 837.110–70(b), insert the following clause:

KEY PERSONNEL (OCT 2019)

The key personnel specified in this contract are considered to be essential to work performance. At least 30 days prior to the Contractor voluntarily diverting any of the specified individuals to other programs or contracts the Contractor shall notify the Contracting Officer and shall submit a justification for the diversion or replacement and a request to replace the individual. The request must identify the proposed replacement and provide an explanation of how the replacement's skills, experience, and credentials meet or exceed the requirements of the contract. If the employee of the Contractor is terminated for cause or separates from the contractor voluntarily with less than thirty days notice, the Contractor shall provide the

maximum notice practicable under the circumstances. The Contractor shall not divert, replace, or announce any such change to key personnel without the written consent of the Contracting Officer. The contract will be modified to add or delete key personnel as necessary to reflect the agreement of the parties.

(End of clause)

[84 FR 46456, Sept. 4, 2019]

852.237–76 Award to Single Offeror.

As prescribed in 837.7001(a)(1), insert the following provision:

AWARD TO SINGLE OFFEROR (OCT 2019)

(a) Award shall be made to a single offeror.
(b) Offerors shall include unit prices for each item. Failure to include unit prices for each item will be cause for rejection of the entire offer.
(c) The Government will evaluate offers on the basis of the estimated quantities shown.
(d) Award will be made to that responsive, responsible offeror whose total aggregate offer is the lowest price to the Government.

(End of provision)

Alternate I (OCT 2019). As prescribed in 837.7001(a)(2), insert the following paragraph (d) in lieu of paragraph (d) of the basic provision:

(d) Award will be made to that responsive, responsible offeror whose total aggregate offer is in the best interest of the Government.

[84 FR 46456, Sept. 4, 2019]

852.237–77 Area of Performance.

As prescribed in 837.7001(b)(1), insert the following clause:

AREA OF PERFORMANCE (OCT 2019)

(a) The area of performance is as specified in the contract.
(b) The Contractor shall take possession of the remains at the place where they are located, transport them to the Contractor's place of preparation, and later transport them to a place designated by the Contracting Officer.
(c) The Contractor will not be reimbursed for transportation when both the place where the remains were located and the delivery point are within the area of performance.
(d) If remains are located outside the area of performance, the Contracting Officer may place an order with the Contractor under this contract or may obtain the services elsewhere. If the Contracting Officer requires the Contractor to transport the remains into the area of performance, the Contractor shall be paid the amount per mile in the schedule for the number of miles required to transport the remains by a reasonable route from the point where located to the boundary of the area of performance.
(e) The Contracting Officer may require the Contractor to deliver remains to any point within 100 miles of the area of performance. In this case, the Contractor shall be paid the amount per mile in the schedule for the number of miles required to transport the remains by a reasonable route from the boundary of the area of performance to the delivery point.

(End of clause)

[84 FR 46456, Sept. 4, 2019]

852.237–78 Performance and Delivery.

As prescribed in 837.7001(b)(2), insert the following clause:

PERFORMANCE AND DELIVERY (OCT 2019)

(a) The Contractor shall furnish the material ordered and perform the services specified as promptly as possible, but not later than 36 hours after receiving notification to remove the remains, excluding the time necessary for the Government to inspect and check results of preparation.
(b) The Government may, at no additional charge, require the Contractor to hold the remains for an additional period not to exceed 72 hours from the time the remains are casketed and final inspection is completed.

(End of clause)

[84 FR 46457, Sept. 4, 2019]

852.237–79 Subcontracting.

As prescribed in 837.7001(b)(3), insert the following clause:

SUBCONTRACTING (OCT 2019)

The Contractor shall not subcontract any work under this contract without the Contracting Officer's written approval. This clause does not apply to contracts of employment between the Contractor and its personnel.

(End of clause)

[84 FR 46457, Sept. 4, 2019]

852.237–80 Health Department and Transport Permits.

As prescribed in 837.7001(b)(4), insert the following clause:

HEALTH DEPARTMENT AND TRANSPORT PERMITS (OCT 2019)

The Contractor shall meet all State and local licensing requirements and obtain and furnish all necessary health department and shipping permits at no additional cost to the Government. The Contractor shall ensure that all necessary health department permits are in order for disposition of the remains.

(End of clause)

[84 FR 46457, Sept. 4, 2019]

852.239–70 Security Requirements for Information Technology Resources.

As prescribed in 839.106–70, insert the following clause:

SECURITY REQUIREMENTS FOR INFORMATION TECHNOLOGY RESOURCES (FEB 2023)

(a) *Definitions.* As used in this clause—

Information technology has the same meaning in FAR 2.101 and also *means* Information and Communication Technology (ICT).

Information system security plan means a formal document that provides an overview of the security equirements for an information system and describes the security controls in place or planned for meeting those requirements.

(b) *Responsibilities.* The Contractor shall be responsible for information system security for all systems connected to a Department of Veterans Affairs (VA) network or operated by the Contractor for VA, regardless of location. This clause is applicable to all or any part of the contract that includes information technology resources or services in which the Contractor has physical or other system access to VA information that directly supports the mission of VA. Examples of tasks that require security provisions include—

(1) Hosting of VA e-Government sites or other information technology operations;

(2) Acquisition, transmission, or analysis of data owned by VA with significant replacement cost should the contractor's copy be corrupted; and

(3) Access to VA general support systems/major applications at a level beyond that granted the general public, *e.g.,* bypassing a firewall.

(c) *Information system security plan.* The Contractor shall develop, provide, implement, and maintain an Information System Security Plan. VA information systems must have an information system security plan that provides an overview of the security requirements for the system and describes the security controls in place or the plan for meeting those requirements. This plan shall describe the processes and procedures that the Contractor will follow to ensure appropriate security of information system resources developed, processed, or used under this contract. The information system security plan should include implementation status, responsible entities, resources, and estimated completion dates. Information system security plans may also include, but are not limited to, a compiled list of system characteristics, and key security-related documents such as a risk assessment, PIA, system interconnection agreements, contingency plan, security configurations, configuration management plan, and incident response plan. The plan shall address the specific contract requirements regarding information systems related support or services included in the contract, to include the performance work statement (PWS) or statement of work (SOW). The Contractor's Information System Security Plan shall comply with applicable Federal Laws that include, but are not limited to, 40 U.S.C. 11331, the Federal Information Security Modernization Act (FISMA) of 2014 and the E-Government Act of 2002. The plan shall meet information system security requirements in accordance with Federal and VA policies and procedures, and as amended during the term of this contract, and include, but are not limited to the following.

(1) OMB Circular A–130, Managing Information as a Strategic Resource;

(2) National Institute of Standards and Technology (NIST) Guidelines; and

(3) VA Directive 6500, VA Cybersecurity Program, and the directives and handbooks in the VA 6500 series related to VA information (including VA sensitive information and sensitive personal information and information systems security and privacy), as well as those set forth in the contract specifications, statement of work, or performance work statement. These include, but are not limited to, VA Handbook 6500.6, Contract Security; and VA Directive and Handbook 0710, Personnel Security and Suitability Program, which establishes VA's procedures, responsibilities, and processes for complying with current Federal law, Executive Orders, policies, regulations, standards and guidance for protecting VA information, information systems (see 802.101, Definitions) security and privacy, and adhering to personnel security requirements when accessing VA information or information systems.

(d) *Submittal of plan.* Within 90 days after contract award, the Contractor shall submit the Information System Security Plan to the Contracting Officer for review and approval.

(e) *Security accreditation.* As required by current VA policy, the Contractor shall submit written proof of information system security accreditation to the Contracting Officer for non-VA owned systems. Such written proof may be furnished either by the Contractor or by a third party. Accreditation

shall be in accordance with VA policy available from the Contracting Officer upon request. The Contractor shall submit for acceptance by the Contracting Officer along with this accreditation a final information system security plan, such as a risk assessment, security test and evaluation, and disaster recovery plan/continuity of operations plan. The accreditation and the final information system security plan and the accompanying documents, such as a risk assessment, security test and evaluation, and disaster recovery/continuity of operations plan.

(f) *Annual validation.* On an annual basis, the Contractor shall verify in writing to the Contracting Officer that the Information System Security Plan remains valid.

(g) *Banners.* The Contractor shall ensure that the official VA banners are displayed on all VA systems (both public and private) operated by the Contractor that contain Privacy Act information before allowing anyone access to the system. The Office of Information Technology will make official VA banners available to the Contractor.

(h) *Screening and access.* The Contractor shall screen all personnel requiring privileged access or limited privileged access to systems operated by the Contractor for VA or interconnected to a VA network in accordance with VA Directives and Handbooks referenced in paragraph (c) of this clause.

(i) *Training.* The Contractor shall ensure that its employees performing services under this contract complete VA security awareness training on an annual basis. This includes signing an acknowledgment that they have read, understand, and agree to abide by the VA Information Security Rules of Behavior (VA National Rules of Behavior) as required by 38 U.S.C. 5723; FAR 39.105, Privacy; clause 852.204–71, Information and Information Systems Security, and this clause on an annual basis.

(j) *Government access.* The Contractor shall provide the Government access to the Contractor's and subcontractors' facilities, installations, operations, documentation, databases, and personnel used in performance of the contract. The Contractor shall provide access to enable a program of information system inspection (to include vulnerability testing), investigation and audit (to safeguard against threats and hazards to the integrity, availability and confidentiality of VA data or to the function of information systems operated on behalf of VA), and to preserve evidence of computer crime.

(k) *Notification of termination of employees.* The Contractor shall immediately notify the Contracting Officer when an employee who has access to VA information systems or data terminates employment.

(l) *Subcontractor flow down requirement.* The Contractor shall incorporate and flow down the substance of this clause to all subcontracts that meet the conditions in paragraph (a) of this clause.

(End of clause)

[88 FR 4753, Jan. 25, 2023]

852.239–71 Information System Security Plan and Accreditation.

As prescribed in 839.106–70, insert the following provision:

INFORMATION SYSTEM SECURITY PLAN AND ACCREDITATION (FEB 2023)

All offers submitted in response to this solicitation or request for quotation shall address the approach for completing the security plan and accreditation requirements in clause 852.239–70, Security Requirements for Information Technology Resources.

(End of provision)

[88 FR 4753, Jan. 25, 2023]

852.239–72 Information System Design and Development.

As prescribed in 839.106–70, insert the following clause:

INFORMATION SYSTEM DESIGN AND DEVELOPMENT (FEB 2023)

(a) *Design or development at non-VA facilities.* Information systems that are designed or developed for or on behalf of VA at non-VA facilities shall comply with all VA directives developed in accordance with the Federal Information Security Modernization Act (FISMA), Health Insurance Portability and Accountability Act (HIPAA) regulations, NIST, and related VA security and privacy control requirements for Federal information systems. This includes standards for the protection of electronic protected health information (PHI), outlined in 45 CFR part 164, subpart C, information and system security categorization level designations in accordance with FIPS 199 and FIPS 200 with implementation of all baseline security controls commensurate with the FIPS 199 system security categorization and the Trusted Internet Connections (TIC) Reference Architecture).

(b) *Privacy Impact Assessment.* During the development cycle a Privacy Impact Assessment (PIA) must be completed, provided to the COR, and approved by the VA Privacy Service in accordance with VA Directive 6508, Implementation of Privacy Threshold Analysis and Privacy Impact Assessment.

(c) *Security of procured or developed systems and technologies.* The Contractor shall ensure the security of all procured or developed systems and technologies, including their subcomponents (hereinafter referred to as

''Systems''), throughout the life of the contract and any extension, warranty, or maintenance periods. This includes, but is not limited to, workarounds, patches, hotfixes, upgrades, and any physical components (hereafter referred to as Security Fixes) which may be necessary to fix all security vulnerabilities published or known to the Contractor anywhere in the Systems, including Operating Systems and firmware. The Contractor shall ensure that Security Fixes shall not negatively impact the Systems.

(d) *Subcontract flow down requirements.* The Contractor shall include the clause at 52.224–1, Privacy Act Notification, in every solicitation and/or subcontract awarded by the Contractor when the clause FAR 52.224–1 is included in its contract.

(End of clause)

[88 FR 4754, Jan. 25, 2023]

852.239–73 Information System Hosting, Operation, Maintenance, or Use.

As prescribed in 839.106–70, insert the following clause:

INFORMATION SYSTEM HOSTING, OPERATION, MAINTENANCE, OR USE (FEB 2023)

(a) *Definitions.* As used in this clause—

Assessment and Authorization (A&A) means the process used to ensure information systems including Major Applications and General Support Systems have effective security safeguards which have been implemented, planned for, and documented in an Information Technology Security Plan. The A&A process per applicable VA policies and procedures is the mechanism by which VA provides an Authorization to Operate (ATO), the official management decision given by the VA to authorize operation of an information system (see VA Handbook 6500 for additional details).

Information system security plan means a formal document that provides an overview of the security requirements for an information system and describes the security controls in place or planned for meeting those requirements.

(b) *Hosting, operation, maintenance, or use at non-VA facilities.* For information systems that are hosted, operated, maintained, or used on behalf of VA at non-VA facilities, Contractors/subcontractors are fully responsible and accountable for ensuring compliance with the applicable Health Insurance Portability and Accountability (HIPAA) Act of 1996 (HIPAA) Privacy and Security Rules, the Privacy Act and other required VA confidentiality statutes included in VA's mandatory yearly training and privacy handbooks, Federal Information Security Modernization Act (FISMA), National Institute of Standards and Technology (NIST), Federal Information Processing Standards (FIPS), and VA security and privacy directives and handbooks. This includes conducting compliant risk assessments, routine vulnerability scanning, system patching and change management procedures, and the completion of an acceptable contingency plan for each system. The Contractor's security control procedures must be equivalent to or exceed, those procedures used to secure VA systems. A Privacy Impact Assessment (PIA) must also be provided to the COR and approved by VA Privacy Service prior to approval to operate. All external internet connections to VA's network involving VA information must be in accordance with the Trusted internet Connections (TIC) Reference Architecture and reviewed and approved by VA prior to implementation. For Cloud Services hosting, the Contractor shall also ensure compliance with the Federal Risk and Authorization Management Program (FedRAMP).

(c) *Collecting, processing, transmitting, and storing of VA sensitive information.* Adequate security controls for collecting, processing, transmitting, and storing of VA sensitive information, must be in place, tested, and approved by VA prior to hosting, operation, maintenance, or use of the information system, or systems by or on behalf of VA. These security controls are to be assessed and stated within the Information System Security Plan and if these controls are determined not to be in place, or inadequate, a Plan of Action and Milestones (POA&M) must be submitted and approved prior to the collection, processing, transmitting, and storing of VA sensitive information.

(d) *Annual FISMA security controls assessment.* The Contractor/subcontractor's system must adhere to all FISMA, FIPS, and NIST standards related to the annual FISMA security controls assessment and review and update the Privacy Impact Assessment. Any deficiencies noted during this assessment must be provided to the Contracting Officer for entry into VA's POA&M management process. The Contractor/subcontractor must use VA's POA&M process to document planned remedial actions to address any deficiencies in information security policies, procedures, and practices, and the completion of those activities. Security deficiencies must be corrected within the timeframes specified by the VA in the performance work statement (PWS) or statement of work (SOW), or in the approved remediation plan through the VA POA&M process. Contractor/subcontractor procedures are subject to periodic, unannounced assessments by VA officials, including the VA Office of Inspector General. The physical security aspects associated with Contractor/subcontractor activities must also be subject to such assessments. The results of an annual review or a

major change in the cybersecurity posture at any time may indicate the need for reassessment and reauthorization of the system. If major changes to the system occur that may affect the privacy or security of the data or the system, the A&A of the system may need to be reviewed, retested and re-authorized per VA Handbook 6500. This may require reviewing and updating all of the documentation as described in VA Handbook 6500.6 (*e.g.*, System Security Plan, Contingency Plan). See VA Handbook 6500.6 for a list of documentation. The VA Information System Risk Management (ISRM) office can provide guidance on whether a new A&A would be necessary.

(e) *Annual self-assessment.* The Contractor/subcontractor must conduct an annual self-assessment on all systems and outsourced services as required. Both hard copy and electronic copies of the assessment must be provided to the COR. VA reserves the right to conduct such an assessment using government personnel or another Contractor/subcontractor. The Contractor/subcontractor must take appropriate and timely action, as may be specifically addressed in the contract, to correct or mitigate any weaknesses discovered during such testing, at no additional cost to the Government to correct Contractor/subcontractor systems and outsourced services.

(f) *Prohibition of installation and use of personally-owned or Contractor-owned equipment or software on VA networks.* VA prohibits the installation and use of personally-owned or Contractor/subcontractor-owned equipment or software on VA networks. If non-VA owned equipment must be used to fulfill the requirements of a contract, it must be stated in the service agreement, PWS, SOW or contract. All of the security controls required for government furnished equipment (GFE) must also be utilized in approved other equipment (OE) at the Contractor's expense. All remote systems must be equipped with, and use, a VA-approved antivirus (AV) software and a personal (host-based or enclave based) firewall that is configured with a VA-approved configuration. Software must be kept current, including all critical updates and patches. Owners of approved OE are responsible for providing and maintaining the anti-viral software and the firewall on the non-VA owned OE.

(g) *Disposal or return of electronic storage media on non-VA leased or non-VA owned IT equipment.* All electronic storage media used on non-VA leased or non-VA owned IT equipment that is used to store, process, or access VA information must be handled in adherence with NIST 800–88, Rev. 1, ''Guidelines for Media Sanitization,'' and VA Directive 6500, VA Cybersecurity Program, paragraph 2(b)(5), Media Sanitization including upon—

(1) Completion or termination of the contract; or

(2) Disposal or return of the IT equipment by the Contractor/subcontractor or any person acting on behalf of the Contractor/subcontractor, whichever is earlier. Media (*e.g.*, hard drives, optical disks, CDs, back-up tapes) used by the Contractors/subcontractors that contain VA information must be returned to the VA for sanitization or destruction or the Contractor/subcontractor must self-certify that the media has been disposed of per VA Handbook 6500.1 requirements. This must be completed within 30 days of termination of the contract.

(h) *Bio-Medical devices and other equipment or systems.* Bio-Medical devices and other equipment or systems containing media (*e.g.*, hard drives, optical disks) with VA sensitive information will not be returned to the Contractor at the end of lease, for trade-in, or other purposes. For purposes of these devices and protection of VA sensitive information the devices may be provided back to the Contractor under one of three scenarios—

(1) The Contractor must accept the system without the drive;

(2) A spare drive must be installed in place of the original drive at time of turn-in if VA's initial medical device purchase included a spare drive; or

(3) The Contractor may request reimbursement for the drive at a reasonable open market replacement cost to be separately negotiated by the Contracting Officer and the Contractor at time of contract closeout.

(End of clause)

[88 FR 4754, Jan. 25, 2023]

852.239–74 Security Controls Compliance Testing.

As prescribed in 839.106–70(d), insert the following clause:

SECURITY CONTROLS COMPLIANCE TESTING (FEB 2023)

On a periodic basis, VA, including the Office of Inspector General, reserves the right to evaluate any or all of the security and privacy controls implemented by the Contractor under the clauses contained within the contract. With 10 working-days' notice, at the request of the government, the Contractor must fully cooperate and assist in a government-sponsored security controls assessment at each location wherein VA information is processed or stored, or information systems are developed, operated, maintained, or used on behalf of VA, including those initiated by the Office of Inspector General. The government may conduct a security control assessment on shorter notice, to include unannounced assessments, as determined by VA in the event of a security incident or at any other time.

(End of clause)

[88 FR 4755, Jan. 25, 2023]

852.239–75 Information and Communication Technology Accessibility Notice.

As prescribed in 839.203–70(a), insert the following provision:

INFORMATION AND COMMUNICATION TECHNOLOGY ACCESSIBILITY NOTICE (FEB 2023)

(a) Any offeror responding to this solicitation must comply with established VA Information and Communication Technology (ICT) (formerly Electronic and Information (EIT)) accessibility standards. Information about Section 508 is available at *http://www.section508.va.gov/.*

(b) The Section 508 accessibility standards applicable to this solicitation are stated in the clause at 852.239–75, Information and Communication Technology Accessibility. In order to facilitate the Government's determination whether proposed ICT supplies meet applicable Section 508 accessibility standards, offerors must submit appropriate VA Section 508 Checklists, in accordance with the checklist completion instructions. The purpose of the checklists is to assist VA acquisition and program officials in determining whether proposed ICT supplies, or information, documentation and services conform to applicable Section 508 accessibility standards. The checklists allow offerors or developers to self-evaluate their supplies and document—in detail—whether they conform to a specific Section 508 accessibility standard, and any underway remediation efforts addressing conformance issues.

(c) Respondents to this solicitation must identify any exception to Section 508 requirements. If an offeror claims its supplies or services meet applicable Section 508 accessibility standards, and it is later determined by the Government, *i.e.,* after award of a contract or order, that supplies or services delivered do not conform to the described accessibility standards, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its expense.

(End of provision)

[88 FR 4755, Jan. 25, 2023]

852.239–76 Information and Communication Technology Accessibility.

As prescribed in 839.203–70(b), insert the following clause:

INFORMATION AND COMMUNICATION TECHNOLOGY ACCESSIBILITY (FEB 2023)

(a) All information and communication technology (ICT) (formerly referred to as electronic and information technology (EIT)) supplies, information, documentation and services support developed, acquired, maintained or delivered under this contract or order must comply with the ''Architectural and Transportation Barriers Compliance Board Electronic and Information Technology (EIT) Accessibility Standards'' (*see* 36 CFR part 1194). Information about Section 508 is available at *http://www.section508.va.gov/.*

(b) The Section 508 accessibility standards applicable to this contract or order are identified in the specification, statement of work, or performance work statement. If it is determined by the Government that ICT supplies and services provided by the Contractor do not conform to the described accessibility standards in the contract, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(c) The Section 508 accessibility standards applicable to this contract are: ____ [*Contracting Officer: insert the applicable Section 508 accessibility standards*].

(d) In the event of a modification(s) to this contract or order, which adds new EIT supplies or services or revises the type of, or specifications for, supplies or services, the Contracting Officer may require that the Contractor submit a completed VA Section 508 Checklist and any other additional information necessary to assist the Government in determining that the ICT supplies or services conform to Section 508 accessibility standards. If it is determined by the Government that ICT supplies and services provided by the Contractor do not conform to the described accessibility standards in the contract, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(e) If this is an Indefinite-Delivery type contract, a Blanket Purchase Agreement or a Basic Ordering Agreement, the task/delivery order requests that include ICT supplies or services will define the specifications and accessibility standards for the order. In those cases, the Contractor may be required to provide a completed VA Section 508 Checklist and any other additional information necessary to assist the Government in determining that the ICT supplies or services conform to Section 508 accessibility standards. If it is determined by the Government that ICT supplies and services provided by the Contractor do not conform to the described accessibility standards in the provided documentation, remediation of the

supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(End of clause)

[88 FR 4755, Jan. 25, 2023]

852.241–70 Disputes—Utility Contracts.

As prescribed in 841.501–70, insert the following clause:

DISPUTES—UTILITY CONTRACTS (SEP 2020)

(a) *Definition.* As used in this clause, *Independent regulatory body* means the Federal Energy Regulatory Commission, a state-wide agency, or an agency with less than statewide jurisdiction when operating pursuant to state authority. The body has the power to fix, establish, or control the rates and services of utility suppliers.

(b) *Independent Regulatory Body determinations.* The requirements of the Disputes clause at FAR 52.233–1 are supplemented to provide that matters involving the interpretation of tariffed retail rates, tariff rate schedules, and tariffed terms provided under this contract are subject to any determinations by the independent regulatory body having jurisdiction.

(End of Clause)

[85 FR 60078, Sept. 24, 2020]

852.242–70 Government Construction Contract Administration.

As prescribed in 842.272, insert the following clause. This is a fill-in clause.

GOVERNMENT CONSTRUCTION CONTRACT ADMINISTRATION (OCT 2020)

(a) Contract administration functions set forth in FAR 42.302 are hereby delegated to:

[*Insert name and office address of Contracting Officer*]

[*Note: If any of the functions set forth in FAR 42.302 are to be retained by the Contracting Officer, identify those as well with the notation: ''With the exception of the following contract administration functions: _____.'' Delete this notation if not required.*]

(b) The following functions will be retained by the Contracting Officer or Administrative Contracting Officer (ACO) and are not redelegable to Resident Engineers:

(1) Award of contract modifications either through supplemental agreements or change orders that exceed the ACO's appointed warrant limitations.

(2) Issuance of default letters.

(3) Issuance of Cure or Show-Cause Notices.

(4) Suspension of work letters and/or modifications.

(5) Issuance of Contracting Officer final determination letters.

(6) Issuance of termination notices.

(7) Authorization of final payment.

(c) The work will be under the direction of a Department of Veterans Affairs Contracting Officer, who may designate another VA employee to act as resident engineer at the construction site who possesses limited warranted authority.

(d) Except as provided below, the resident engineer's directions will not conflict with or change contract requirements. Within the limits of any specific authority delegated by the Contracting Officer, the resident engineer may, by written direction, make changes in the work. The Contractor shall be advised of the extent of such authority prior to execution of any work under the contract.

(e) The Contracting Officer or an Administrative Contracting Officer identified in paragraph (a) may further delegate limited authority and specialized support services responsibilities below to the following warranted Resident Engineer personnel on site, not to exceed the dollar value and threshold of their warrant:

[*Insert name and office address of Resident Engineer with limited authority*]

(1) Conduct post-award orientation conferences.

(2) Issue administrative changes (see FAR 43.101) correcting errors or omissions, contractor address, facility or activity code, remittance address, computations which do not required additional contract funds, and other such changes.

(3) For actions not to exceed $ [*Insert dollar amount*] negotiate and execute supplemental agreements resulting from change orders issued under the Changes clause.

(4) Negotiate and execute supplemental agreements changing contract delivery schedules where the time extension does not exceed [*Insert number*] calendar days.

(End of Clause)

[85 FR 60078, Sept. 24, 2020]

852.242–71 Administrative Contracting Officer.

As prescribed in 842.271, insert the following clause:

ADMINISTRATIVE CONTRACTING OFFICER (OCT 2020)

The Contracting Officer reserves the right to designate an Administrative Contracting Officer (ACO) for the purpose of performing certain tasks/duties in the administration of the contract. Such designation will be in

writing through an ACO Letter of Delegation and will identify the responsibilities and limitations of the ACO. A copy of the ACO Letter of Delegation will be furnished to the Contractor.

(End of Clause)

[85 FR 60079, Sept. 24, 2020]

852.243–70 Construction Contract Changes—Supplement.

As prescribed in 843.205–70, the Contracting Officer shall insert this clause in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold. The Contracting Officer shall fill in the number of days in which a Contractor must assert its right to an equitable adjustment; however, such amount shall not exceed 60 calendar days.

CONSTRUCTION CONTRACT CHANGES—SUPPLEMENT (SEP 2019)

The FAR clauses 52.236–2, Differing Site Conditions; 52.243–4, Changes; and 52.243–5, Changes and Changed Conditions, are supplemented as follows:

(a) Submission of request for equitable adjustment proposals. When directed by the Contracting Officer or requested by the Contractor, the Contractor shall, in accordance with FAR 15.403–5, submit proposals for changes in the work exceeding $500,000 in writing to the Contracting Officer or Administrative Contracting Officer (ACO), and to the resident engineer.

(1) The Contractor must provide an itemized breakdown for changes exceeding the micro-purchase threshold (see FAR 2.101).

(2) The itemized breakdown shall include materials, quantities, unit prices, labor costs (separated into trades), construction equipment, etc. Labor costs shall be identified with specific material placed or operation performed.

(3) Proposals shall be submitted to the Contracting Officer or ACO and the resident engineer as expeditiously as possible, but not later than [*fill-in*] calendar days, after receipt of a written change order by the Contracting Officer.

(4) Proposals shall be signed by each subcontractor participating in the change.

(5) The Contracting Officer will consider issuing a settlement by determination to the contract if the Contractor's proposal required by paragraph (a)(3) of this clause is not received within the time period specified in paragraph (a)(3), or if agreement has not been reached.

(b) Paragraphs (a)(1) through (5) of this clause and the following paragraphs (b)(1) and (2) apply to proposals for changes in the work $500,000 or less:

(1) As a basis for negotiation, allowances not to exceed 10 percent each for overhead and profit for the party performing the work will be based on the value of labor, material, and equipment required to accomplish the change. As the value of the change increases, a declining scale will be used in negotiating the percentage of overhead and profit. This declining scale will also be used to negotiate the prime Contractor's or upper-tier subcontractor's fee when work is performed by lower-tier subcontractors (to a maximum of three tiers) and will be based on the net increased cost to the prime or upper-tier subcontractor, as applicable. Profit (fee) shall be computed by multiplying the profit percentage by the sum of the direct costs and computed overhead costs. Allowable percentages on changes will not exceed the following:

(i) 10 percent overhead and/or 10 percent profit (fee) on the first $20,000.

(ii) 7.5 percent overhead and/or 7.5 percent profit (fee) on the next $30,000.

(iii) 5 percent overhead and/or 5 percent profit (fee) on a balance over $50,000.

(2) The Contracting Officer will consider issuing a settlement by determination to the contract if the Contractor's proposal required by paragraph (3) is not received within 30 calendar days, or if agreement has not been reached.

(c)(1) Overhead and Contractor's fee percentages shall be considered to include insurance other than mentioned herein, field and office supervisors and assistants, security police, use of small tools, incidental job burdens, and general home office expenses and no separate allowance will be made. Assistants to office supervisors include all clerical, stenographic and general office help. Incidental job burdens include, but are not necessarily limited to, office equipment and supplies, temporary toilets, telephone and conformance to OSHA requirements. Items such as, but not necessarily limited to, review and coordination, estimating and expediting relative to contract changes are associated with field and office supervision and are considered to be included in the Contractor's overhead and/or fee percentage.

(2) Where the Contractor's or subcontractor's portion of a change involves credit items, such items must be deducted prior to adding overhead and profit for the party performing the work. The Contractor's fee is limited to the net increase to Contractor or subcontractors' portions of cost computed in accordance with this clause.

(3) Where a change involves credit items only, a proper measure of the amount of downward adjustment in the contract price is the reasonable cost to the Contractor if it had performed the deleted work. A reasonable allowance for overhead and profit are

properly includable as part of the downward adjustment for a deductive change. The amount of such allowance is subject to negotiation.

(End of clause)

[84 FR 45683, Aug. 30, 2019]

852.246–70 [Reserved]

852.246–71 Rejected Goods.

As prescribed in 846.370–1, insert the following clause:

REJECTED GOODS (OCT 2018)

(a) *Supplies and equipment.* Rejected goods will be held subject to Contractor's order for not more than 15 days, after which the rejected merchandise will be returned to the Contractor's address at the Contractor's risk and expense. Expenses incident to the examination and testing of materials or supplies that have been rejected will be charged to the Contractor.

(b) *Perishable supplies.* The Contractor shall remove rejected perishable supplies within 48 hours after notice of rejection. Supplies determined to be unfit for human consumption will not be removed without permission of the local health authorities. Supplies not removed within the allowed time may be destroyed. The Department of Veterans Affairs will not be responsible for, nor pay for, products rejected. The Contractor will be liable for costs incident to examination of rejected products.

(End of Clause)

[83 FR 48262, Sept. 24, 2018]

852.246–72 Frozen Processed Foods.

As prescribed in 846.370–2, insert the following clause:

FROZEN PROCESSED FOODS (OCT 2018)

The products delivered under this contract shall be in excellent condition, shall not show evidence of defrosting, refreezing, or freezer burn and shall be transported and delivered to the consignee at a temperature of 0 degrees Fahrenheit or lower.

(End of Clause)

[83 FR 48262, Sept. 24, 2018]

852.246–73 Noncompliance with Packaging, Packing, and/or Marking Requirements.

As prescribed in 846.370–3, insert the following clause:

NONCOMPLIANCE WITH PACKAGING, PACKING AND/OR MARKING REQUIREMENTS (OCT 2018)

Failure to comply with the packaging, packing and/or marking requirements indicated herein, or incorporated herein by reference, may result in rejection of the merchandise and request for replacement or repackaging, repacking, and/or marking. The Government reserves the right, without obtaining authority from the Contractor, to perform the required repackaging, repacking, and/or marking services and charge the Contractor at the actual cost to the Government for the same or have the required repackaging, repacking, and/or marking services performed commercially under Government order and charge the Contractor at the invoice rate. In connection with any discount offered, time will be computed from the date of completion of such repackaging, repacking and/or marking services.

(End of Clause)

[83 FR 48262, Sept. 24, 2018]

852.246–74 [Reserved]

852.246–75 Warranty of Construction—Guarantee Period Services.

As prescribed in 846.702–70(e), insert the following clause:

WARRANTY OF CONSTRUCTION—GUARANTEE PERIOD SERVICES (OCT 2018)

The clause 52.246–21, Warranty of Construction, is supplemented as follows:

Should the Contractor fail to complete the work or fail to proceed promptly to provide guarantee period services after notification by the Contracting Officer, the Government may, subject to the default clause contained at FAR 52.249–10, Default (Fixed-Price Construction), and after allowing the Contractor 10 days to correct and comply with the contract, terminate the right to proceed with the work (or the separable part of the work) that has been delayed or unsatisfactorily performed. 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 damages to the Government resulting from the Contractor's refusal or failure to complete the work within this 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.

(End of Clause)

[83 FR 48262, Sept. 24, 2018]

852.246–76 Purchase of Shellfish.

As prescribed in 846.370–4 insert the following clause:

PURCHASE OF SHELLFISH (OCT 2018)

The supplier certifies that oysters, clams, and mussels will be furnished only from plants approved by and operated under the supervision of shellfish authorities of States whose certifications are endorsed currently by the U.S. Public Health Service, and the names and certificate numbers of those shellfish dealers must appear on current lists published by the U.S. Public Health Service. These items shall be packed and delivered in approved containers, sealed in such manner that tampering is easily discernible, and marked with packer's certificate number impressed or embossed on the side of such containers and preceded by the State abbreviation. Containers shall be tagged or labeled to show the name and address of the approved producer or shipper, the name of the State of origin, and the certificate number of the approved producer or shipper.

(End of Clause)

[83 FR 48262, Sept. 24, 2018]

852.247–70 Determining Transportation Costs for Evaluation of Offers.

As prescribed in 847.305–70, insert the following provision:

DETERMINING TRANSPORTATION COSTS FOR EVALUATION OF OFFERS (OCT 2018)

For the purpose of evaluating bids and for no other purpose, the delivered price per unit will be determined by adding the nationwide average transportation charge to the f.o.b. origin bid prices. The nationwide average transportation charge will be determined by applying the following formula: Multiply the guaranteed shipping weight by the freight, parcel post, or express rate, whichever is proper, to each destination shown below and then multiply the resulting transportation charges by the anticipated demand factor shown for each destination. Total the resulting weighted transportation charges for all destinations and divide the total by 20 to give the nationwide average transportation charge.

ANTICIPATED DEMAND

Area destination	Factor
Oakland, California	3
Dallas, Texas	2
Omaha, Nebraska	3
Fort Wayne, Indiana	4
Atlanta, Georgia	3
New York, New York	5
Total of factors	20

(End of Provision)

[83 FR 48262, Sept. 24, 2018]

852.247–71 Delivery Location.

As prescribed in 847.302, insert a clause substantially as follows:

DELIVERY LOCATION (OCT 2018)

Shipment of deliverable items, other than reports, shall be to: ____ [*Contracting Officer shall insert appropriate identifying data*].

(End of Clause)

[83 FR 48263, Sept. 24, 2018]

852.247–72 Marking Deliverables.

As prescribed in 847.305–10(a) insert a clause substantially the same as:

MARKING DELIVERABLES (OCT 2018)

(a) The contract number shall be placed on or adjacent to all exterior mailing or shipping labels of deliverable items called for by the contract.

(b) Mark deliverables, except reports, for: ____[*Contracting Officer shall insert appropriate identifying data*].

(End of Clause)

[83 FR 48263, Sept. 24, 2018]

852.247–73 Packing for Domestic Shipment.

As prescribed in 847.305–10(b), insert the following clause:

PACKING FOR DOMESTIC SHIPMENT (OCT 2018)

Material shall be packed for shipment in such a manner that will insure acceptance by common carriers and safe delivery at destination. Containers and closures shall comply with regulations of carriers as applicable to the mode of transportation.

(End of Clause)

[83 FR 48263, Sept. 24, 2018]

852.247–74 Advance Notice of Shipment.

As prescribed in 847.305–71(a), insert the following clause:

ADVANCE NOTICE OF SHIPMENT (OCT 2018)

____ [*Insert number of work days*] work days prior to shipping item(s)

____ [*Insert items to be shipped*], the Contractor shall furnish the anticipated shipment date, bill of lading number (if applicable), and carrier identity to ____ [*Insert individual(s) to receive notification*] and to the Contracting Officer.

(End of Clause)

[83 FR 48263, Sept. 24, 2018]

852.247–75 Bills of Lading.

As prescribed in 847.305–71(b), insert the following clause:

BILLS OF LADING (OCT 2018)

The purpose of this clause is to define when a commercial bill of lading or a Government bill of lading is to be used when shipments of deliverable items under this contract are f.o.b. origin.

(a) *Commercial bills of lading.* All domestic shipments shall be made via commercial bills of lading (CBLs). The Contractor shall prepay domestic transportation charges. The Government shall reimburse the Contractor for these charges if they are added to the invoice as a separate line item supported by the paid freight receipts. If paid receipts in support of the invoice are not obtainable, a statement as described below must be completed, signed by an authorized company representative, and attached to the invoice.

''I certify that the shipments identified below have been made, transportation charges have been paid by ____ [*company name*], and paid freight or comparable receipts are not obtainable.

Contract or Order Number: ____

Destination: ____.''

(b) *Government bills of lading.* (1) International (export) and domestic overseas shipments of items deliverable under this contract shall be made by Government bills of lading (GBLs). As used in this clause, ''domestic overseas'' means non-continental United States, *i.e.,* Hawaii, Commonwealth of Puerto Rico, and possessions of the United States.

(2) At least 15 days before shipment, the Contractor shall request in writing GBLs from: ____ [*Insert name, title, and mailing address of designated transportation officer or other official delegated responsibility for GBLs*]. If time is limited, requests may be by telephone: ____ [*Insert appropriate telephone number*]. Requests for GBLs shall include the following information.

(i) Item identification/description.

(ii) Origin and destination.

(iii) Individual and total weights.

(iv) Dimensional weight.

(v) Dimensions and total cubic footage.

(vi) Total number of pieces.

(vii) Total dollar value.

(viii) Other pertinent data.

(End of Clause)

[83 FR 48263, Sept. 24, 2018]

852.249–70 Termination for Default—Supplement for Mortuary Services.

As prescribed in 849.504–70, insert the following clause:

TERMINATION FOR DEFAULT—SUPPLEMENT FOR MORTUARY SERVICES (MAY 2020)

The FAR clause entitled Default (Fixed-Price Supply and Service), at 52.249–8, is supplemented as follows:

The Contracting Officer may terminate this contract for default by written notice without the ten-day notice required by paragraph (a)(2) of the Default clause if—

(a) The Contractor, through circumstances reasonably within its control or that of its employees, performs any act under or in connection with this contract, or fails in the performance of any service under this contract and the act or failures may reasonably be considered to reflect discredit upon the Department of Veteran Affairs in fulfilling its responsibility for proper care of remains;

(b) The Contractor, or its employees, solicits relatives or friends of the deceased to purchase supplies or services not under this contract. (The Contractor may furnish supplies or arrange for services not under this contract, only if representatives of the deceased voluntarily request, select, and pay for them.);

(c) The services or any part of the services are performed by anyone other than the Contractor or the Contractor's employees without the written authorization of the Contracting Officer;

(d) The Contractor refuses to perform the services required for any particular remains; or

(e) The Contractor mentions or otherwise uses this contract in its advertising in any way.

(End of clause)

[85 FR 36349, June 16, 2020]

852.252–70 Solicitation Provisions or Clauses Incorporated by Reference.

As prescribed in 852.102(a), insert the following provision:

SOLICITATION PROVISIONS OR CLAUSES INCORPORATED BY REFERENCE (JAN 2008)

The following provisions or clauses incorporated by reference in this solicitation must be completed by the offeror or prospective contractor and submitted with the quotation or offer. Copies of these provisions or clauses are available on the Internet at the Web sites provided in the provision at FAR 52.252–1, Solicitation Provisions Incorporated by Reference, or the clause at FAR 52.252–2, Clauses Incorporated by Reference. Copies may also be obtained from the contracting officer.

[*Contracting officer shall list all FAR and 48 CFR Chapter 8 (VAAR) provisions and clauses incorporated by reference that must be completed by the offeror or prospective contractor and submitted with the quotation or offer*.]

(End of provision)

852.271–70—852.271–71 [Reserved]

852.271–72 Time Spent by Counselee in Counseling Process.

As prescribed in 871.211, insert the following clause:

TIME SPENT BY COUNSELEE IN COUNSELING PROCESS (NOV 2021)

The Contractor agrees that no counselee referred under the provisions of this agreement will be required to participate or engage in additional sessions or expend any extra time in connection with the counseling process, to supply test results or other information, for purposes other than those specified in this contract.

(End of clause)

[86 FR 54406, Oct. 1, 2021]

852.271–73 Use and Publication of Counseling Results.

As prescribed in 871.211, insert the following clause:

USE AND PUBLICATION OF COUNSELING RESULTS (NOV 2021)

The Contractor agrees that none of the information or data gathered in connection with the services specified in this contract, or studies or materials based thereon or relating thereto, will be publicized without the prior approval of the Under Secretary for Benefits or his/her designee.

(End of clause)

[86 FR 54406, Oct. 1, 2021]

852.271–74 Inspection of Instruction, Counseling or Testing Operations.

As prescribed in 871.211, insert the following clause:

INSPECTION OF INSTRUCTION, COUNSELING OR TESTING OPERATIONS (NOV 2021)

The Contractor shall permit the duly authorized representative of the Department of Veterans Affairs to visit the place of instruction or the counseling and testing operations as may be necessary and to examine the training facilities, the work of the Veterans in training under this contract, and the records of these operations, along with any other rights to examine records and conduct inspections in accordance with the Federal Acquisition Regulation and clauses contained in the contract or order.

(End of clause)

[86 FR 54406, Oct. 1, 2021]

852.271–75 [Reserved]

852.273–70 Late offers.

As prescribed in 873.110(a), insert the following provision:

LATE OFFERS (NOV 2021)

This provision replaces paragraph (f) of FAR provision 52.212–1, Instructions to Offerors—Commercial Items. Offers or modifications of offers received after the time set forth in a request for quotations or request for proposals may be considered, at the discretion of the Contracting Officer, if determined to be in the best interest of the Government. Late bids submitted in response to an invitation for bid (IFB) will not be considered.

(End of provision)

[86 FR 54118, Sept. 30, 2021]

852.273–71 Alternative negotiation techniques.

As prescribed in 873.110(b), insert the following provision:

ALTERNATIVE NEGOTIATION TECHNIQUES (NOV 2021)

The Contracting Officer may elect to use the alternative negotiation techniques described in 873.111(d) in conducting this procurement. If used, Offerors may respond by maintaining offers as originally submitted,

revising offers, or submitting an alternative offer. The Government may consider initial offers unless revised or withdrawn, revised offers, and alternative offers in making the award. Revising an offer does not guarantee an offeror an award.

(End of provision)

[86 FR 54118, Sept. 30, 2021]

852.273–72 Alternative evaluation.

As prescribed in 873.110(c), insert the following provision:

ALTERNATIVE EVALUATION (NOV 2021)

(a) The Government will award a contract resulting from this solicitation to the responsible Offeror submitting the lowest priced offer that conforms to the solicitation. During the specified period for receipt of offers, the amount of the lowest offer will be posted and may be viewed by [*Contracting Officer insert description of how the information may be viewed electronically or otherwise*]. Offerors may revise offers anytime during the specified period. At the end of the specified time period for receipt of offers, the responsible Offeror submitting the lowest priced offer will be in line for award.

(b) Except when it is determined not to be in the Government's best interest, 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 materially unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s).

(End of provision)

[86 FR 54118, Sept. 30, 2021]

852.273–73 Evaluation—Health-Care Resources.

As prescribed in 873.110(d), in lieu of FAR provision 52.212–2, the Contracting Officer may insert a provision substantially as follows:

EVALUATION—HEALTH–CARE RESOURCES (NOV 2021)

(a) The Government will award a contract resulting from this solicitation to the responsible Offeror whose proposal, conforming to the solicitation, will be most advantageous to the Government, price and other factors considered. The following information or factors shall be used to evaluate offers: [*Contracting Officer insert evaluation information or factors, such as technical capability to meet the Government's requirements, past performance, or such other evaluation information or factors as the Contracting Officer deems necessary to evaluate offers. Price must be evaluated in every acquisition. The Contracting Officer may include the evaluation information or factors in their relative order of importance, such as in descending order of importance. The relative importance of any evaluation information must be stated in the solicitation.*]

(b) Except when it is determined not to be in the Government's best interest, 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 materially unbalanced. Evaluation of options shall not obligate the Government to exercise the option(s). The Government may reject any or all proposals if such action is in the Government's interest. Additionally, the Government may waive informalities and minor irregularities in proposals received.

(c) If this solicitation is a request for proposals (RFP), a written notice of award or acceptance of a proposal, mailed or otherwise 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 by the Contracting Officer before award.

(End of provision)

[86 FR 54118, Sept. 30, 2021]

852.273–74 Award without exchanges.

As prescribed in 873.110(e), insert the following provision:

AWARD WITHOUT EXCHANGES (NOV 2021)

The Government intends to evaluate proposals and award a contract without exchanges with Offerors. Therefore, each initial proposal should contain the Offeror's best terms from a cost or price and technical standpoint. However, the Government reserves the right to conduct exchanges if later determined by the Contracting Officer to be necessary.

PART 853—FORMS

Sec.
853.000 Scope of part.

Subpart 853.1—General

853.107 Obtaining forms.

Subpart 853.2—Prescription of Forms

853.219 Small business forms.
853.236 Construction and architect-engineer contracts.
853.236–70 VA Form 6298, Architect-Engineer Fee Proposal.
853.236–71 VA Form 2138, Order for Supplies or Services (Including Task Orders for Construction or A–E Services).
853.236–72 VA Form 10101, Contractor Production Report

Subpart 853.3—Illustration of Forms

853.300 Scope of subpart.

AUTHORITY: 40 U.S.C. 121(c); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 73 FR 2717, Jan. 15, 2008, unless otherwise noted.

853.000 Scope of part.

This part prescribes VA forms for use in the acquisition of goods and services. It only identifies forms that are used between VA and its contractors or the general public. It does not identify forms for uses internal to VA or between VA and another Federal agency.

Subpart 853.1—General

853.107 Obtaining forms.

VA forms may be obtained online at *https://www.va.gov/vaforms/* or upon request from any VA contracting office.

[84 FR 9976, Mar. 19, 2019]

Subpart 853.2—Prescription of Forms

SOURCE: 86 FR 54405, Oct. 1, 2021, unless otherwise noted.

853.219 Small business forms.

(a) *VA Form 2268, Small Business Program and Contract Bundling Review.* VA Form 2268 is prescribed for use to document actions and recommendations related to small business, as specified in 819.202.

(b) *VA Form 0896A, Report of Subcontracts to Small and Veteran-Owned Businesses.* VA Form 0896A is prescribed for use to submit subcontracting information, as specified in 819.704–70.

(c) *Availability.* Forms are available at *https://www.va.gov/vaforms.*

[87 FR 63015, Oct. 18, 2022]

853.236 Construction and architect-engineer contracts.

853.236–70 VA Form 6298, Architect-Engineer Fee Proposal.

VA Form 6298 is prescribed for use by contractors to submit proposals, as specified in 836.7001(a).

853.236–71 VA Form 2138, Order for Supplies or Services (Including Task Orders for Construction or A–E Services).

VA Form 2138 is prescribed for use to order supplies or services, including task orders for construction or A–E services, as specified in 836.7001(b).

853.236–72 VA Form 10101, Contractor Production Report.

VA Form 10101 is prescribed for use by contractors to submit required information to the resident engineer, as specified in 836.7001(c).

Subpart 853.3—Illustration of Forms

853.300 Scope of subpart.

VA Forms will not be illustrated in this VAAR. Persons wishing to obtain copies of VA forms prescribed in the VAAR may do so in accordance with 853.107. VA forms may also be available on the Web at *http://www.va.gov/vaforms/.*

SUBCHAPTER I—DEPARTMENT SUPPLEMENTARY REGULATIONS

PART 870 [RESERVED]

PART 871—VOCATIONAL REHABILITATION AND EMPLOYMENT PROGRAMS

Subpart 871.1 [Reserved]

Subpart 871.2—Vocational Rehabilitation and Employment Service

871.200 Scope of subpart.
871.201 General.
871.201–1 Requirements for the use of contracts.
871.205 Proration of charges.
871.206 Other fees and charges.
871.207 Payment of tuition or fees.
871.208 Rehabilitation facilities.
871.209 Prohibition on advertising—training of Veterans.
871.210 Contract clauses.

AUTHORITY: 38 U.S.C. chapter 31; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 86 FR 54406, Oct. 1, 2021, unless otherwise noted.

Subpart 871.1—[Reserved]

Subpart 871.2—Vocational Rehabilitation and Employment Service

871.200 Scope of subpart.

This subpart establishes policy and procedures for the vocational rehabilitation and employment services as it pertains to the following:

(a) Contracts for training and rehabilitation services.

(b) Approval of institutions (including rehabilitation facilities), training establishments, and employers under 38 U.S.C. chapter 31.

(c) Contracts for counseling services under 38 U.S.C. chapters 30, 31, 32, 35, and 36.

871.201 General.

871.201–1 Requirements for the use of contracts.

The costs for tuition, fees, books, supplies, and other expenses are allowable under a contract with an institution, training establishment, or employer for the training and rehabilitation of eligible Veterans under 38 U.S.C. chapter 31, provided the services meet the conditions in the following definitions:

(a) *Courses of instruction by correspondence* means a course of education or training conducted by mail consisting of regular lessons or reading assignments, the preparation of required written work that involves the application of principles studied in each lesson, the correction of assigned work with such suggestions or recommendation as may be necessary to instruct the student, the keeping of student achievement records, and issuance of a diploma, certificate, or other evidence to the student upon satisfactorily completing the requirements of the course.

(b) *Special services or special courses* means those services or courses that VA requests that are supplementary to those the institution customarily provides for similarly circumstanced non-Veteran students and that the contracting officer considers to be necessary for the rehabilitation of the trainee.

871.205 Proration of charges.

A contract must include the exact formula agreed on for the proration of charges in the event that the Veteran's program is interrupted or discontinued before the end of the term, semester, quarter, or other period, or the program is completed in less time than stated in the contract.

871.206 Other fees and charges.

VA may pay fees and other charges that are not prescribed by law but are required by nongovernmental organizations, such as initiation fees required to become a member of a labor union and the dues necessary to maintain membership incidental to training on the job or to obtaining employment during a period in which the Veteran is a participant pursuant to 38 U.S.C.

chapter 31, provided there are no facilities feasibly available where the necessary training can be feasibly accomplished or employment obtained without paying such charges. Payment for such fees must be made in accordance with part 813.

871.207 Payment of tuition or fees.

(a) Contracts, agreements, or arrangements requiring the payment of tuition or fees must provide either of the following:

(1) Payment for tuition or fees must be made in arrears and must be prorated in installments over the school year or the length of the course.

(2) An institution may be paid in accordance with paragraph (b) of this section, if the institution operates on a regular term, quarter, or semester basis and normally accepts students only at the beginning of the term, quarter, or semester and if the institution is one of the following:

(i) An institution of higher learning that uses a standard unit of credit recognized by accrediting associations. Such institutions include those that are members of recognized national or regional educational accrediting associations, and those that, although not members of such accrediting associations, grant standard units of credit acceptable at full value without examination by collegiate institutions that are members of national or regional accrediting associations.

(ii) A public tax-supported institution.

(iii) An institution operated and controlled by a State, county, or local board of education.

(b) An institution that meets the exceptions of paragraph (a)(2) of this section and that has a refund policy providing for a graduated scale of charges for purposes of determining refunds may be paid part or all such tuitions or fees for a term, quarter, or other period of enrollment immediately following the date on which the refund expires.

(c) Proration of charges does not apply to a fee for noncontinuing service, such as a registration fee, etc.

(d) The period for which payment of charges may be made is the period of actual enrollment and is subject to the following:

(1) The effective date is the date of the trainee's entrance into training status, except that payment may be made for an entire semester, quarter, or term in institutions operating on that basis if the trainee enters no later than the final date set by the institution for enrolling for full credit.

(2) In those cases where the institution has not set a final date for enrolling for full credit or does not set a date acceptable to VA, payment may be prorated on the basis of attendance, regardless of the refund policy.

(3) If an institution customarily charges for the amount of credit or number of hours of attendance for which a trainee enrolls, payment may be made on that basis when a trainee enrolls after the final date permitted for carrying full credit for the semester or term.

871.208 Rehabilitation facilities.

Charges by rehabilitation facilities for the rehabilitation services provided under 38 U.S.C. chapter 31 are paid in the same manner as charges for educational and vocational services through contract, agreement, or other arrangement.

871.209 Prohibition on advertising—training of Veterans.

The training of persons under a VA contract or the fact that the United States is using the facilities of the institution for training Veterans must not be used in any way to advertise the institution. References in the advertising media or correspondence of the institution shall be limited to a list of courses under 38 U.S.C. chapter 31 and must not be directed or pointed specifically to Veterans.

871.210 Contract clauses.

(a) Contracting officers must use the following clauses, as appropriate, in solicitations and contracts for vocational rehabilitation and employment services as they pertain to training and rehabilitation services and contracts for counseling services:

(1) 852.271–72, Time Spent by Counselee in Counseling Process.

(2) 852.271–73, Use and Publication of Counseling Results.

(3) 852.271–74, Inspection of Instruction, Counseling or Testing Operations.

(b) See 837.110–70(a) for clause 852.237–74, Non-Discrimination in Service Delivery.

PART 872 [RESERVED]

PART 873—SIMPLIFIED PROCEDURES FOR HEALTH–CARE RESOURCES

Sec.

873.101 Policy.
873.102 Definitions.
873.103 Priority sources.
873.104 Competition requirements.
873.105 Acquisition planning.
873.106 Exchanges with industry before receipt of proposals.
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873.109 General requirements for acquisition of health-care resources.
873.110 Solicitation provisions.
873.111 Acquisition strategies for health-care resources.
873.112 Evaluation information.
873.113 Exchanges with offerors.
873.114 Best value pool.
873.115 Proposal revisions.
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873.117 Award to successful offeror.
873.118 Debriefings.

AUTHORITY: 38 U.S.C. 8127–8128; 38 U.S.C. 8151–8153; 40 U.S.C. 121(c); 41 U.S.C. 1121(c)(3); 41 U.S.C. 1303; 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 86 FR 54118, Sept. 30, 2021, unless otherwise noted.

873.101 Policy.

(a) *General.* In accordance with 38 U.S.C. 8153, to secure health-care resources which otherwise might not be feasibly available, or to effectively utilize certain other health-care resources, the Department of Veterans Affairs (VA) may make arrangements by contract for the mutual use, or exchange of use, of health-care resources between VA health-care facilities and any health-care provider, or other entity or individual. This part prescribes simplified procedures for contracts with entities not affiliated with VA under 38 U.S.C. 7302 to secure health-care resources that are a commercial service, or the use of medical equipment or space. VA may enter into such a contract if such resources are not, or would not be, used to their maximum effective capacity. (38 U.S.C. 8153)

(b) *Precedence.* The procedures in this part shall be used in conjunction with the Federal Acquisition Regulation (FAR) and other parts of the VA Acquisition Regulation (VAAR). However, when a policy or procedure in the FAR or another part of the VAAR is inconsistent with the procedures contained in this part, this part shall take precedence. (38 U.S.C. 8153)

873.102 Definitions.

Commercial service means a service that is offered and sold competitively in the commercial marketplace, is performed under standard commercial terms and conditions, and is procured using firm-fixed price contracts. (38 U.S.C. 8153)

Health-care providers include health-care plans and insurers and any organizations, institutions, or other entities or individuals who furnish health-care resources. (38 U.S.C. 8153)

Health-care resource includes hospital care and medical services (as those terms are defined in 38 U.S.C. 1701 and services under 38 U.S.C. 1782 and 1783) any other health-care service, and any health-care support or administrative resource. (38 U.S.C. 8153))

873.103 Priority sources.

Except for the acquisition of covered services available from the Committee for Purchase From People Who Are Blind or Severely Disabled and the AbilityOne Program (see FAR subpart 8.7), there are no priority sources for the acquisition of health-care resources consisting of commercial services or the use of medical equipment or space in accordance with 808.002(a)(2) and 873.107. (38 U.S.C. 8153)

873.104 Competition requirements.

(a) *Affiliated institutions.* (1) A health-care resource may be acquired on a sole source basis if a commercial service, the use of medical equipment or space, or research, and is to be acquired from an institution affiliated with the VA in accordance with 38 U.S.C. 7302, including medical practice groups and other entities associated with affiliated institutions, blood banks, organ banks,

or research centers. (38 U.S.C. 8153(a)(3)(A))

(2) Acquisitions of health-care resources identified in paragraph (a)(1) of this section are not required to be publicized as otherwise required by 873.108 or FAR 5.101.

(b) *Non-affiliated entities.* (1) If the health-care resource required is a commercial service or the use of medical equipment or space, and is to be acquired from an entity not described in paragraph (a)(1) of this section, contracting officers shall permit all responsible sources, as appropriate, to submit a bid, proposal, or quotation for the resource to be procured, and provide for the consideration by VA of bids, proposals, or quotations so submitted. (38 U.S.C. 8153(a)(3)(B))

(2) Acquisition of health-care resources identified in paragraph (b)(1) of this section shall be publicized as otherwise required by 873.108. Moreover, for any such acquisition described in paragraph (b)(1) of this section to be conducted on a sole source basis, the contracting officer must prepare a justification that includes the information and is approved at the levels prescribed in FAR 6.303. (38 U.S.C. 8153(a)(3)(D))

873.105 Acquisition planning.

(a) For the acquisition of health-care resources consisting of commercial services or the use of medical equipment or space where the acquisition is expected to exceed the simplified acquisition threshold (SAT), an acquisition team must be assembled. The team shall be tailored by the contracting officer for each particular acquisition expected to exceed the SAT. The team should consist of a mix of staff, appropriate to the complexity of the acquisition, and may include fiscal, legal, administrative, and technical personnel, and such other expertise as necessary to assure a comprehensive acquisition plan. The team should include the small business advocate representing the contracting activity or a higher-level designee. At a minimum, the team must include the contracting officer and a representative of the Office of General Counsel and the requesting service. (38 U.S.C. 8153)

(b) The contracting officer or the acquisition team, as appropriate, must conduct market research, including satisfying the requirements of 808.002(a)(2) and 873.107, Socioeconomic programs, and a VA Rule of Two determination (819.502–2). It is the responsibility of the contracting officer to ensure the requirement is appropriately publicized and information about the procurement opportunity is adequately disseminated as set forth in 873.107. (38 U.S.C. 8153)

(c) In lieu of the requirements of FAR part 7 addressing documentation of the acquisition plan, the contracting officer may conduct an acquisition strategy meeting with cognizant offices to seek approval for the proposed acquisition approach. If a meeting is conducted, briefing materials shall be presented to address the acquisition plan topics and structure in FAR 7.105. Formal written minutes—summarizing decisions, actions, and conclusions—shall be prepared and included in the contract file, along with a copy of the briefing materials. (38 U.S.C. 8153)

873.106 Exchanges with industry before receipt of proposals.

(a) Exchange of information among all interested parties involved in an acquisition described in 873.104(b), from the earliest identification of a requirement through release of the solicitation, is encouraged. Any exchange of information must be consistent with procurement integrity requirements in FAR 3.104. The nature and extent of exchanges between the Government and industry shall be a matter of the contracting officer's discretion (for acquisitions not exceeding the simplified acquisition threshold) or the acquisition team's discretion, as coordinated by the contracting officer. (38 U.S.C. 8153)

(b) Techniques to promote early exchange of information include—

(1) Industry or small business conferences;

(2) Public hearings;

(3) Market research in accordance with FAR 10.002(b), which shall be followed to the extent that the provisions therein would provide relevant information;

(4) One-on-one meetings with potential offerors;

(5) Presolicitation notices;
(6) Draft requests for proposals (RFPs);
(7) Requests for information (RFIs);
(8) Presolicitation or preproposal conferences;
(9) Site visits;
(10) Electronic notices (e.g., internet);
(11) Use of the System for Award Management (SAM) (*see http://www.sam.gov/*); and
(12) Researching VA's Vendor Information Pages (VIP) database at *https://www.vip.vetbiz.va.gov/*.

873.107 Socioeconomic programs.

(a) The Veterans First Contracting Program in VAAR subpart 819.70 takes precedence over other small business programs. (38 U.S.C. 8127–8128)

(b)(1) Except for contract actions subject to 808.002(a)(2), competitive contract actions not otherwise excluded under this part shall be set-aside for VIP-listed service-disabled veteran-owned small business (SDVOSB) concerns or veteran-owned small business (VOSB) concerns if the contracting officer has a reasonable expectation that two or more eligible small business concerns owned and controlled by Veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States. (38 U.S.C. 8127–8128)

(2) The contracting officer shall proceed with the acquisition under the simplified procedures of this part considering priority sources (see 808.008(a)(2) and 873.103) and preferences for other small businesses in accordance with 819.203–70 and 819.7004. (38 U.S.C. 8153)

(c) Without regard to FAR 13.003(b)(1), 19.203, 19.502, the head of the contracting activity (HCA) may approve a waiver from the requirement for any set-aside for small business participation when a waiver is determined to be in the best interest of the Government. (38 U.S.C. 8153)

(d) The contracting officer shall ensure priorities for veteran-owned small businesses are implemented within the VA hierarchy of small business program preferences, established by 38 U.S.C. 8127 and 8128, as implemented in VAAR subpart 819.70, the Veterans First Contracting Program. Specifically, the contracting officer shall consider preferences for verified service-disabled veteran-owned small businesses (SDVOSBs) first, then preferences for verified veteran-owned small businesses (VOSBs). These priorities will be followed by preferences for other small business concerns in accordance with FAR 19.203, 819.203–70, and 819.7004. (38 U.S.C. 8153)

873.108 Publicizing contract actions.

(a) All competitive acquisitions under this part, except as provided in paragraph (b) of this section, for dollar amounts in excess of the SAT, shall be publicly announced utilizing a medium designed to permit all responsible sources, as appropriate under the provisions of this part, to submit a bid, proposal, or quotation (as appropriate).

(1) The publication medium may include the internet, including the Governmentwide point of entry (GPE), and local, regional or national publications or journals, as appropriate, at the discretion of the contracting officer, depending on the complexity of the acquisition.

(2) Notice shall be published for a reasonable time prior to issuance of a solicitation, depending on the complexity or urgency of the acquisition, in order to afford potential offerors a reasonable opportunity to respond. If the notice includes a complete copy of the request for quotation (RFQ) or solicitation, a prior notice is not required, and the RFQ or solicitation shall be considered to be announced and issued at the same time.

(3) The notice may include contractor qualification parameters, such as time for delivery of service, credentialing or medical certification requirements, small business or other socio-economic preferences, the appropriate small business size standard, and such other qualifications as the contracting officer deems necessary to meet the needs of the Government. (38 U.S.C. 8153)

(b) The requirement for public announcement does not apply to sole source acquisitions described in 873.104(a). However, as required by 38 U.S.C. 8153(a)(3)(D), acquisitions from

an institution not affiliated with the VA in accordance with 38 U.S.C. 7302, if conducted on a sole source basis, must still be justified and publicized (see 873.104(b)(2)). (38 U.S.C. 8153)

(c) For acquisitions below the SAT, a public announcement is optional. (38 U.S.C. 8153)

(d) Each solicitation issued under the procedures in this part must prominently identify that the requirement is being solicited under the authority of 38 U.S.C. 8153 and this part. (38 U.S.C. 8153)

873.109 General requirements for acquisition of health-care resources.

(a) *Source selection authority.* Unless the head of the contracting activity (HCA) appoints another individual to serve as the Source Selection Authority (SSA), the contracting officer shall be the SSA for acquisitions of health-care resources, consisting of commercial services, or the use of medical equipment or space, utilizing the guidance contained in this part. (38 U.S.C. 8153)

(b) *Performance work statement/statement of work.* The performance work statement (PWS) or statement of work (SOW) must define the requirement and should, in most instances, include qualifications or limitations such as time limits for delivery of service, medical certification or credentialing restrictions, and small business or other socio-economic preferences. The contracting officer may include any other such terms as the contracting officer deems appropriate for each specific acquisition. (38 U.S.C. 8153)

(c) *Documentation.* Without regard to FAR 13.106–3(b), 13.501(b), or 15.406–3, the contract file must include—

(1) A brief written description of the procedures used in awarding the contract;

(2) A written determination that the health-care resources being procured are not otherwise feasibly available or that utilization of such health-care resources is necessary to meet mission requirements;

(3) Documentation of market research and the results of such research;

(4) The number of offers received; and

(5) An explanation, tailored to the size and complexity of the acquisition, of the basis for the contract award decision. (38 U.S.C. 8153)

(d) *Time for receipt of quotations or offers.* (1) Without regard to FAR 5.203, contracting officers shall set a reasonable time for receipt of quotations or proposals in the solicitations.

(2) Without regard to FAR 15.208 or 52.212–1(f), quotations or proposals received after the time set forth in an RFQ or request for proposals (RFP) may be considered at the discretion of the contracting officer if determined to be in the best interest of the Government. Contracting officers must document the rationale for accepting quotations or proposals received after the time specified in the RFQ or RFP. This paragraph (d)(2) shall not apply to RFQs or RFPs if alternative evaluation techniques described in 873.111(d)(1)(ii) are used. This paragraph (d)(2) does not apply to invitations for bid (IFBs). (38 U.S.C. 8153)

(e) *Cancellation of procurements.* Any acquisition may be canceled by the contracting officer at any time during the acquisition process if cancellation is determined to be in the best interest of the Government and a memorandum for the record in included in the solicitation file explaining the reasons for the cancellation. (38 U.S.C. 8153)

873.110 Solicitation provisions.

(a) As required in 873.109(d), contracting officers shall set a reasonable time for receipt of quotations or proposals and shall insert the provision at 852.273–70, Late Offers, in all RFQs and RFPs exceeding the micro-purchase threshold. However, this provision shall not be used if the provision 852.273–71, Alternative Negotiation Techniques, is to be used. (38 U.S.C. 8153)

(b) The contracting officer shall insert a provision in RFQs and solicitations, substantially the same as the provision at 852.273–71, Alternative Negotiation Techniques, when either of the alternative negotiation techniques described in 873.111(d)(1) will be used. (38 U.S.C. 8153)

(c) The contracting officer shall insert the provision at 852.273–72, Alternative Evaluation, in lieu of FAR provision 52.212–2, Evaluation—Commercial Items, when the alternative negotiation technique described in 873.111(d)(1)(ii) will be used. (38 U.S.C. 8153)

(d) When evaluation information, as described in 873.112, is to be used to select a contractor under a RFQ or RFP for health-care resources consisting of commercial services or the use of medical equipment or space, the contracting officer may insert the provision at 852.273–73, Evaluation—Health-Care Resources, in the RFQ or RFP in lieu of FAR provision 52.212–2. (38 U.S.C. 8153)

(e) As provided at 873.113(f), if award may be made without exchange with offerors, the contracting officer shall include the provision at 852.273–74, Award Without Exchanges, in the RFQ or RFP. (38 U.S.C. 8153)

(f) The contracting officer shall insert the FAR clause at 52.207–3, Right of First Refusal of Employment, in all RFQs, solicitations, and contracts issued under the authority of 38 U.S.C. 8151–8153 which may result in a conversion, from in-house performance to contract performance, of work currently being performed by Department of Veterans Affairs employees. (38 U.S.C. 8153)

873.111 Acquisition strategies for health-care resources.

The following acquisition processes and techniques may be used, singly or in combination with others, as appropriate, to design acquisition strategies suitable for the complexity of the requirement and the amount of resources available to conduct the acquisition. These strategies should be considered during acquisition planning. The contracting officer shall select the process most appropriate to the particular acquisition. There is no preference for sealed bid acquisitions. (38 U.S.C. 8153)

(a) *Request for quotations (RFQ).* (1) Without regard to FAR subparts 6.1 or 6.2, contracting officers must solicit a sufficient number of sources to promote competition to the maximum extent practicable and to ensure that the purchase is advantageous to the Government, based, as appropriate, on either price alone or price and other factors (e.g., past performance and quality). RFQs must notify vendors of the basis upon which the award is to be made. (*see* FAR 13.004)

(2) For acquisitions in excess of the SAT, the procedures set forth in FAR part 13 concerning RFQs may be utilized without regard to the dollar thresholds contained therein. (38 U.S.C. 8153)

(b) *Sealed bidding.* FAR part 14 provides procedures for sealed bidding.

(c) *Multiphase acquisition technique*—(1) *General.* Without regard to FAR 15.202, multiphase acquisitions may be appropriate when the submission of full proposals at the beginning of an acquisition would be burdensome for offerors to prepare and for Government personnel to evaluate. Using multiphase techniques, the Government may seek limited information initially, make one or more down-selects, and request a full proposal from an individual offeror or limited number of offerors. Provided that the notice notifies offerors, the contracting officer may limit the number of proposals during any phase to the number that will permit an efficient competition among proposals offering the greatest likelihood of award. The contracting officer may indicate in the notice an estimate of the greatest number of proposals that will be included in the down-select phase. The contracting officer may down-select to a single offeror. (38 U.S.C. 8153)

(2) *First phase notice.* In the first phase, the Government shall publish a notice (see 873.108) that solicits responses and that may provide, as appropriate, a general description of the scope or purpose of the acquisition and the criteria that will be used to make the initial down-select decision. The notice may also inform offerors of the evaluation criteria or process that will be used in subsequent down-select decisions. The notice must contain sufficient information to allow potential offerors to make an informed decision about whether to participate in the acquisition. The notice must advise offerors that failure to participate in the first phase will make them ineligible to participate in subsequent phases. The notice may be in the form

of a synopsis in the Governmentwide point of entry (GPE) or a narrative letter or other appropriate method that contains the information required by this paragraph. (38 U.S.C. 8153)

(3) *First phase responses.* Offerors shall submit the information requested in the notice described in paragraph (d)(2) of this section. Information sought in the first phase may be limited to a statement of qualifications and other appropriate information (e.g., proposed technical concept, past performance information, limited pricing information). (38 U.S.C. 8153)

(4) *First phase evaluation and down-select.* The Government shall evaluate all offerors' submissions in accordance with the notice and make a down-select decision. (38 U.S.C. 8153)

(5) *Subsequent phases.* Additional information shall be sought in the second phase so that a down-select can be performed or an award made without exchanges, if necessary. The contracting officer may conduct exchanges with remaining offeror(s), request proposal revisions, or request best and final offers, as determined necessary by the contracting officer, in order to make an award decision. (38 U.S.C. 8153)

(6) *Debriefing.* Without regard to FAR 15.505, contracting officers must debrief offerors whose proposals are not accepted under a competitive request for proposals (RFP) as required by 873.118. (38 U.S.C. 8153)

(d) *Alternative negotiation techniques.* (1) Contracting officers may utilize alternative negotiation techniques for the acquisition of health-care resources. Alternative negotiation techniques may be used when award will be based on either price or price and other factors. Alternative negotiation techniques include but are not limited to:

(i) Indicating to offerors a price, contract term or condition, commercially available feature, and/or requirement (beyond any requirement or target specified in the solicitation) that offerors will have to improve upon or meet, as appropriate, in order to remain competitive.

(ii) Posting offered prices electronically or otherwise (without disclosing the identity of the offerors) and permitting revisions of offers based on this information.

(2) Except as otherwise permitted by law, contracting officers shall not conduct acquisitions under this section in a manner that reveals the identities of offerors, releases proprietary information, or otherwise gives any offeror a competitive advantage (*see* FAR 3.104). (38 U.S.C. 8153)

873.112 Evaluation information.

(a) Without regard to FAR 15.304, Evaluation factors and significant subfactors (except for 15.304(c)(1) and (c)(3), which do apply to acquisitions under this authority), the criteria, factors, or other evaluation information that apply to an acquisition, and their relative importance, are within the broad discretion of agency acquisition officials as long as the evaluation information is determined to be in the best interest of the Government. (38 U.S.C. 8153)

(b) Price or cost to the Government must be evaluated in every source selection. Past performance shall be evaluated in source selections for competitive acquisitions exceeding the SAT unless the contracting officer documents that past performance is not an appropriate evaluation factor for the acquisition. (38 U.S.C. 8153)

(c) The quality of the product or service may be addressed in source selection through consideration of information such as past compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience. The information required from quoters, bidders, or offerors shall be included in notices or solicitations, as appropriate. (38 U.S.C. 8153)

(d) The relative importance of any evaluation information included in a solicitation must be set forth therein. (38 U.S.C. 8153)

873.113 Exchanges with offerors.

(a) Without regard to FAR 15.201 or 15.306, acquisitions generally involve exchanges between the Government and competing offerors. Open exchanges support the goal of efficiency in Government by providing the Government with relevant information (in addition to that submitted in the

offeror's initial proposal) needed to understand and evaluate the offeror's proposal. The nature and extent of exchanges between the Government and offerors is a matter of contracting officer judgment. Clarifications, communications, and discussions are not applicable to acquisitions under this part. (38 U.S.C. 8153)

(b) Exchanges with potential offerors may take place throughout the source selection process. Exchanges may start in the planning stages and continue through contract award. Exchanges should occur most often with offerors determined to be in the best value pool (see 873.114). The purpose of exchanges is to ensure there is mutual understanding between the Government and the offerors on all aspects of the acquisition, including offerors' submittals/proposals. Information disclosed as a result of oral or written exchanges with an offeror may be considered in the evaluation of an offeror's proposal. (38 U.S.C. 8153)

(c) Exchanges may be conducted, in part, to obtain information that explains or resolves ambiguities or other concerns (e.g., perceived errors, omissions, or deficiencies) in an Offeror's proposal. (38 U.S.C. 8153)

(d) Exchanges shall only be initiated if authorized by the contracting officer and need not be conducted with all offerors. (38 U.S.C. 8153)

(e) Except for acquisitions based on alternative negotiation techniques contained in 873.111(d)(1), the contracting officer and other Government personnel involved in the acquisition shall not disclose information regarding one offeror's proposal to other offerors without consent of the offeror in accordance with FAR parts 3 and 24. (38 U.S.C. 8153)

(f) Award may be made on initial proposals without exchanges if the solicitation states that the Government intends to evaluate proposals and make award without exchanges, unless the contracting officer determines that exchanges are considered necessary. (38 U.S.C. 8153)

873.114 Best value pool.

(a) Without regard to FAR 15.306(c), the contracting officer may determine the most highly rated proposals having the greatest likelihood of award based on the information or factors and subfactors in the solicitation. These vendors constitute the best value pool. This determination is within the sole discretion of the contracting officer. Competitive range determinations are not applicable to acquisitions under this part 873. (38 U.S.C. 8153)

(b) In planning an acquisition, the contracting officer may determine that the number of proposals that would otherwise be included in the best value pool is expected to exceed the number at which an efficient, timely, and economical competition can be conducted. In reaching such a conclusion, the contracting officer may consider such factors as the results of market research, historical data from previous acquisitions for similar services, and the resources available to conduct the source selection. Provided the solicitation notifies offerors that the best value pool can be limited for purposes of making an efficient, timely, and economical award, the contracting officer may limit the number of proposals in the best value pool to the greatest number that will permit an efficient competition among the proposals offering the greatest likelihood of award. The contracting officer may indicate in the solicitation the estimate of the greatest number of proposals that will be included in the best value pool. The contracting officer may limit the best value pool to a single offeror. (38 U.S.C. 8153)

(c) If the contracting officer determines that an offeror's proposal is no longer in the best value pool, the proposal shall no longer be considered for award. Written notice of this decision must be provided to unsuccessful offerors at the earliest practicable time. (38 U.S.C. 8153)

873.115 Proposal revisions.

(a) The contracting officer may request proposal revisions as often as needed during the proposal evaluation process at any time prior to award from vendors remaining in the best value pool. Proposal revisions shall be submitted in writing. The contracting officer may establish a common cutoff date for receipt of proposal revisions. Contracting officers may request best

and final offers n. In any case, contracting officers and acquisition team members must safeguard all proposals and revisions to avoid unfair dissemination of an offeror's proposal. (38 U.S.C. 8153)

(b) If an offeror initially included in the best value pool is no longer considered to be among those most likely to receive award after submission of proposal revisions and subsequent evaluation thereof, the offeror may be eliminated from the best value pool without being afforded an opportunity to submit further proposal revisions. (38 U.S.C. 8153)

(c) Requesting and/or receiving proposal revisions does not necessarily conclude exchanges. However, requests for proposal revisions should advise offerors that the Government may make award without obtaining further revisions. (38 U.S.C. 8153)

873.116 Source selection decision.

(a) An integrated comparative assessment of proposals should be performed before source selection is made. The SSA shall independently determine which proposal(s) represents the best value, consistent with the evaluation information or factors and subfactors in the solicitation, and that the prices are fair and reasonable. The SSA may determine that all proposals should be rejected if it is in the best interest of the Government. (38 U.S.C. 8153)

(b) The source selection team, or advisory boards or panels, may conduct comparative analysis(es) of proposals and make award recommendations, if the SSA requests such assistance. (38 U.S.C. 8153)

(c) The source selection decision must be documented in accordance with FAR 15.308. (38 U.S.C. 8153)

873.117 Award to successful offeror.

(a) The contracting officer shall award a contract to the successful offeror by furnishing the contract or other notice of the award to that offeror. (38 U.S.C. 8153)

(b) If a request for proposal (RFP) process was used for the solicitation and if award is to be made without exchanges, the contracting officer may award a contract without obtaining the offeror's signature a second time. The offeror's signature on the offer constitutes the offeror's agreement to be bound by the offer. If a request for quotation (RFQ) process was used for the solicitation, and if the contracting officer determines there is a need to establish a binding contract prior to commencement of work, the contracting officer should obtain the offeror's acceptance signature on the contract to ensure formation of a binding contract. (38 U.S.C. 8153)

(c) If the award document includes information that is different than the latest signed offer, both the offeror and the contracting officer must sign the contract award. (38 U.S.C. 8153)

(d) When an award is made to an offeror for less than all of the items that may be awarded and additional items are being withheld for subsequent award, each notice shall state that the Government may make subsequent awards on those additional items within the offer acceptance period. (38 U.S.C. 8153)

873.118 Debriefings.

Offerors whose proposals are not accepted under a competitive request for proposals (RFP) may submit a written request for a debriefing to the contracting officer. Without regard to FAR 15.505, preaward debriefings may be conducted by the contracting officer when determined to be in the best interest of the Government. Post-award debriefings shall be conducted in accordance with FAR 15.506. (38 U.S.C. 8153)

PARTS 874–899 [RESERVED]

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SUBCHAPTER A—GENERAL

PART 900 [RESERVED]

PART 901—FEDERAL ACQUISITION REGULATIONS SYSTEM

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AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 61 FR 41704, Aug. 9, 1996, unless otherwise noted.

Subpart 901.1—Purpose, Authority, Issuance

901.101 Purpose.

The Department of Energy Acquisition Regulation (DEAR) in this chapter establishes uniform acquisition policies which implement and supplement the Federal Acquisition Regulation (FAR) (Chapter 1 of title 48 of the Code of Federal Regulations (CFR)).

[61 FR 41704, Aug. 9, 1996, as amended at 76 FR 7689, Feb. 11, 2011]

901.103 Authority.

The DEAR and amendments thereto are issued by the Senior Procurement Executives of the Department of Energy (DOE) and the National Nuclear Security Administration (NNSA). The DOE Senior Procurement Executive delegation is pursuant to a delegation from the Secretary of Energy in accordance with the authority of section 644 of the Department of Energy Organization Act (42 U.S.C. 7254), section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended, (40 U.S.C. 121(c)(2)), and other applicable laws. The NNSA Senior Procurement Executive delegation is pursuant to a delegation from the Administrator of the NNSA, in accordance with section 3212 of the National Nuclear Security Administration Act (50 U.S.C. 2402), section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended, (40 U.S.C. 121(c)(2)), and other applicable laws.

[76 FR 7689, Feb. 11, 2011]

901.104 Applicability.

The FAR and DEAR apply to all DOE and NNSA acquisitions of supplies and services which obligate appropriated funds unless otherwise specified in this chapter.

[61 FR 41704, Aug. 9, 1996. Redesignated and amended at 76 FR 7689, Feb. 11, 2011]

901.105 Issuance.

901.105–1 Publication and code arrangement.

(a) The DEAR and its subsequent changes are published in the FEDERAL REGISTER, cumulative form in the Code of Federal Regulations (CFR), and Government Printing Office's Electronic CFR at *http://ecfr.gpoaccess.gov*.

(b) The DEAR is issued as chapter 9 of title 48 of the CFR.

[76 FR 7689, Feb. 11, 2011]

901.105–2 Arrangement of regulations.

(a) *General.* The DEAR is divided into the same parts, subparts, sections, subsections and paragraphs as is the FAR.

(b) *Numbering.* The numbering illustrations at 48 CFR 1.105–2(b) apply to the DEAR, but the DEAR numbering will be preceded with a 9 or a 90. Material which supplements the FAR will be assigned the numbers 70 and up.

[61 FR 41704, Aug. 9, 1996. Redesignated and amended at 76 FR 7689, Feb. 11, 2011]

901.105–3 Copies.

Copies of the DEAR published in the FEDERAL REGISTER or Code of Federal Regulations may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402 or viewed on line at *http://ecfr.gpoaccess.gov* or at *http://management.energy.gov/DEAR*.

[61 FR 41704, Aug. 9, 1996. Redesignated and amended at 76 FR 7689, Feb. 11, 2011]

901.106 OMB approval under the Paperwork Reduction Act.

The Office of Management and Budget (OMB) control number for the collection of information under 48 CFR chapter 9 is 1910–4100.

[76 FR 7689, Feb. 11, 2011]

Subpart 901.3—Agency Acquisition Regulations

901.301.70 Other issuances related to acquisition.

(a) In addition to the FAR and DEAR, there are other issuances which deal with acquisition. Among these are the Federal Property Management Regulation, the Federal Management Regulation, the DOE Property Management Regulation, and DOE Directives. The Department also maintains the DOE Acquisition Guide (''the Guide''), which has procedural guidance for the acquisition community. The DOE Acquisition Guide serves this purpose by identifying relevant internal standard operating procedures to be followed by both procurement and program personnel who are involved in various aspects of the acquisition process. The Guide also is intended to be a repository of best practices found throughout the agency that reflect specific illustrations of techniques which might be helpful to all readers. The Guide is at *http://management.energy.gov/policy_guidance/Acquisition_Guide.htm*.

[76 FR 7689, Feb. 11, 2011]

Subpart 901.6—Career Development, Contracting Authority, and Responsibilities

901.601 General.

(a) Contracting authority for DOE vests in the Secretary of Energy, and for NNSA in the Administrator.

(1) The Secretary has delegated this authority to the DOE Senior Procurement Executive. The DOE Senior Procurement Executive has redelegated this authority to the DOE Heads of Contracting Activities (HCA). These delegations are formal written delegations containing specific dollar limitations and conditions. Each DOE HCA, in turn, makes formal contracting officer appointments for its contracting activity.

(2) Contracting authority for NNSA vests in the Under Secretary for Nuclear Security, also known as the NNSA Administrator. The NNSA Administrator has delegated this authority, with specific dollar limitations and conditions to the NNSA Senior Procurement Executive. The NNSA Senior Procurement Executive has redelegated this authority to the NNSA Head of the Contracting Activities (HCA). Each NNSA HCA in turn makes formal contracting officer appointments for its contracting activity.

(b) The Senior Procurement Executives have been authorized, without power of redelegation, to perform the functions set forth at 48 CFR 1.601(b) regarding the assignment of contracting functions and responsibilities to another agency, and the creation of joint or combined offices with another agency to exercise acquisition functions and responsibilities.

[76 FR 7689, Feb. 11, 2011]

901.602–3 Ratification of unauthorized commitments.

(b)(2) The Senior Procurement Executives are authorized to ratify unauthorized commitments.

(3) The ratification authority of the DOE and NNSA Senior Procurement Executives in paragraph (b)(2) of this

section is delegated to the Head of the Contracting Activity (HCA) for individual unauthorized commitments of $25,000 or under. The ratification authority of the HCA is nondelegable.

[61 FR 41704, Aug. 9, 1996, as amended at 76 FR 7689, Feb. 11, 2011]

901.603 Selection, appointment, and termination of appointment.

901.603–1 General.

The DOE Order 361.1B, Acquisition Career Management Program, or its successor order, sets forth the requirements and responsibilities for the DOE and NNSA Acquisition Career Development Program.

[76 FR 7689, Feb. 11, 2011]

901.603–70 Appointment of contracting officers and contracting officer's representatives.

See the DOE Order 541.1B, Appointment of Contracting Officers and Contracting Officer Representatives, or its successor order, for procedures on the appointment of contracting officers and contracting officer's representatives.

[76 FR 7689, Feb. 11, 2011]

PART 902—DEFINITIONS OF WORDS AND TERMS

Subpart 902.1—Definitions

Sec.
902.101 Definitions.

Subpart 902.2—Definitions Clause

902.201 Contract clause.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 76 FR 7690, Feb. 11, 2011, unless otherwise noted.

Subpart 902.1—Definitions

902.101 Definitions.

Agency Head or *Head of the Agency* means—

(1) For the Department of Energy (DOE)—

(i) The Secretary;

(ii) The Deputy Secretary; or

(iii) Under Secretaries of the Department of Energy.

(2) For the National Nuclear Security Administration (NNSA) the Administrator, also known as the Under Secretary of Nuclear Security.

Department of Energy (DOE) means, as used in the DEAR, the Department of Energy and includes the National Nuclear Security Administration (NNSA), unless otherwise specified.

Senior Procurement Executive means for the Department of Energy, the Director, Office of Procurement and Assistance Management and for the National Nuclear Security Administration, the Deputy Associate Administrator for Acquisition and Project Management.

[76 FR 7690, Feb. 11, 2011, as amended at 81 FR 45977, July 15, 2016]

Subpart 902.2—Definitions Clause

902.201 Contract clause.

Insert the clause at 952.202–1, Definitions, in solicitation and contracts that exceed the simplified acquisition threshold.

PART 903—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 903.1—Safeguards

Sec.
903.101 Standards of conduct.
903.101–3 Agency regulations.
903.104–1 Definitions.
903.104–7 Violations or possible violations (DOE coverage—paragraph (a)).

Subpart 903.2—Contractor Gratuities to Government Personnel

903.203 Reporting suspected violations of the Gratuities clause.
903.204 Treatment of violations.

Subpart 903.3—Reports of Suspected Antitrust Violations

903.303 Reporting suspected antitrust violations.

Subpart 903.4—Contingent Fees

903.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

Subpart 903.5—Other Improper Business Practices

903.502 Subcontractor kickbacks.

Subpart 903.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

903.603 Responsibilities of the contracting officer.

Subpart 903.7—Voiding and Rescinding Contracts

903.700 Scope of subpart.

Subpart 903.9—Whistleblower Protections for Contractor Employees

903.900 Scope of subpart.
903.901 Definition.
903.902 Applicability.
903.970 Remedies.
903.971 Contract clause.

Subpart 903.10—Contractor Code of Business Ethics and Conduct

903.1004 Contract clauses.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11940, Mar. 28, 1984, unless otherwise noted.

Subpart 903.1—Safeguards

903.101 Standards of conduct.

903.101–3 Agency regulations.

Detailed rules applicable to the conduct of DOE employees are set forth in 10 CFR part 1010.

[49 FR 11940, Mar. 28, 1984, as amended at 60 FR 47307, Sept. 12, 1995]

903.104–1 Definitions.

As used in this section and for the purposes of the post-employment restrictions at 48 CFR 3.104–2(b)(3)—

Deputy program manager means the individual within DOE who normally acts as the program manager in the absence of the program manager, and does not mean an individual who occasionally acts for the program manager or the deputy program manager.

Program manager means the individual within DOE who:

(1) Exercises authority on a day-to-day basis to manage an acquisition program—

(i) For a system attained through the acquisition process; and

(ii) With one or more contracts, at least one of which has a value exceeding $10,000,000; and

(2) Is generally the person at the lowest organizational level who has authority to make technical and budgetary decisions on behalf of DOE.

System means a combination of elements that function together to produce the capabilities required to fulfill a mission need, including, but not limited to hardware, equipment, software, or any combination thereof.

[63 FR 56851, Oct. 23, 1998. Redesignated and amended at 74 FR 36361, July 22, 2009]

903.104–7 Violations or possible violations.

(a) Except for Headquarters activities, the individual within DOE responsible for fulfilling the requirements of 48 CFR 3.104–7(a) (1) and (2), relative to contracting officer conclusions on the impact of a violation or possible violation of subsections 27 (a), (b), (c) or (d) of the Office of Federal Procurement Policy Act, shall be the legal counsel assigned direct responsibility for providing legal advice to the contracting office making the award or selecting the source. The legal counsel is the Chief Counsel for the Operations Offices or the Federal Energy Technology Center; the Counsel, or the Chief Counsel, for the Support Offices or the Naval Reactors Offices; the General Counsel for National Nuclear Security Administration (NNSA), and the General Counsel for the Power Administrations. For Headquarters activities, the individual designated to perform the responsibilities in 48 CFR 3.104–7(a) (1) and (2) regarding questions of disclosure of proprietary or source selection information is the Assistant General Counsel for Procurement and Financial Assistance. The designated individual for other questions regarding 48 CFR 3.104–7(a) (1) and (2) for Headquarters activities is the Agency Ethics Official (Designated Agency Ethics Official).

[62 FR 53756, Oct. 16, 1997. Redesignated and amended at 74 FR 36361, July 22, 2009]

Subpart 903.2—Contractor Gratuities to Government Personnel

903.203 Reporting suspected violations of the Gratuities clause.

(a) Suspected violations of the Gratuities clause shall be reported to the Head of the Contracting Activity (HCA) in writing detailing the circumstances. The HCA will evaluate the report and, if the report appears to substantiate the allegations, the matter will be referred to the Senior Procurement Executive for disposition.

[49 FR 11940, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 74 FR 36378, July 22, 2009]

903.204 Treatment of violations.

Apparent violations will be processed in accordance with the debarment and suspension rules set forth at Title 10, part 1035, of the Code of Federal Regulations.

Subpart 903.3—Reports of Suspected Antitrust Violations

903.303 Reporting suspected antitrust violations.

(a) Potential anti-competitive practices, such as described in 48 CFR 3.301, and antitrust law violations as described in 48 CFR 3.303, evidenced in bids or proposals, shall be reported to the Office of General Counsel through the Head of the Contracting Activity with a copy to the Senior Procurement Executive. The Office of General Counsel will provide reports to the Attorney General, as appropriate.

[50 FR 12183, Mar. 27, 1985, as amended at 59 FR 9104, Feb. 25, 1994; 76 FR 7690, Feb. 11, 2011]

Subpart 903.4—Contingent Fees

903.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

(b) Before the Chief of the Contracting Office initiates appropriate action, the action shall be reviewed by Legal Counsel.

[76 FR 7690, Feb. 11, 2011]

Subpart 903.5—Other Improper Business Practices

903.502 Subcontractor kickbacks.

Contracting officers shall report suspected violations of the Anti-Kickback Act through the Head of the Contracting Activity, or designee, to the Office of General Counsel.

[49 FR 11940, Mar. 28, 1984, as amended at 74 FR 36361, July 22, 2009]

Subpart 903.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

903.603 Responsibilities of the contracting officer.

(a) When the needs of the Government cannot be reasonably supplied by sources other than employees of the Government or sources which are substantially owned or controlled by Government employees, the contracting officer, in accordance with 48 CFR 3.602, may submit, through the HCA, a request to the Senior Procurement Executive, with appropriate justification, for approval of an exception to the prohibitions contained in 48 CFR 3.601.

[49 FR 11940, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 74 FR 36378, July 22, 2009; 76 FR 7690, Feb. 11, 2011]

Subpart 903.7—Voiding and Rescinding Contracts

903.700 Scope of subpart.

The HCA is the designee for determining whether to void or rescind a contract. This authority is nondelegable.

[76 FR 7690, Feb. 11, 2011]

Subpart 903.9—Whistleblower Protections for Contractor Employees

SOURCE: 65 FR 81005, Dec. 22, 2000, unless otherwise noted.

903.900 Scope of subpart.

This subpart implements the DOE Contractor Employee Protection Program as set forth at 10 CFR part 708.

Part 708 establishes criteria and procedures for the investigation, hearing, and review of allegations from DOE contractor employees of employer reprisal resulting from employee disclosure of information to DOE, to Members of Congress, or to the contractor; employee participation in proceedings before Congress or pursuant to this subpart; or employee refusal to engage in illegal or dangerous activities, when such disclosure, participation, or refusal pertains to employer practices which the employee believes to be unsafe; to violate laws, rules, or regulations; or to involve fraud, mismanagement, waste, or abuse.

[65 FR 81005, Dec. 22, 2000. Redesignated at 74 FR 36361, July 22, 2009]

903.901 Definition.

Contractor, as used in this subpart, has the meaning contained in 10 CFR 708.2.

[65 FR 81005, Dec. 22, 2000. Redesignated at 74 FR 36361, July 22, 2009]

903.902 Applicability.

10 CFR part 708 is applicable to complaints of retaliation filed by employees of contractors, and subcontractors, performing work on behalf of DOE directly related to DOE-owned or leased facilities, if the complaint stems from a disclosure, participation, or refusal described in 10 CFR 708.5.

[65 FR 81005, Dec. 22, 2000. Redesignated at 74 FR 36361, July 22, 2009]

903.970 Remedies.

(a) Contractors found to have retaliated against an employee in reprisal for such disclosure, participation or refusal are required to provide relief in accordance with decisions issued under 10 CFR part 708.

(b) 10 CFR part 708 provides that for the purposes of the Contract Disputes Act (41 U.S.C. 605 and 606), a final decision issued pursuant to 10 CFR part 708 shall not be considered to be a claim by the Government against a contractor or a decision by the contracting officer subject to appeal. However, a contractor's disagreement and refusal to comply with a final decision could result in a contracting officer's decision to disallow certain costs or to terminate the contract for default. In such case, the contractor could file a claim under the Disputes clause of the contract regarding the disallowance of cost or the termination of the contract.

903.971 Contract clause.

The contracting officer shall insert the clause at 952.203–70, Whistleblower Protection for Contractor Employees, in contracts that involve work to be done on behalf of DOE directly related to activities at DOE-owned or leased sites.

Subpart 903.10—Contractor Code of Business Ethics and Conduct

903.1004 Contract clauses.

(b)(2)(ii) Insert the DOE Web site address *http://ig.energy.gov/hotline.htm* in paragraph (b)(3) of the 48 CFR 52.203–14 clause, Display of Hotline Poster(s).

[76 FR 7690, Feb. 11, 2011]

PART 904—ADMINISTRATIVE MATTERS

Subpart 904.4—Safeguarding Classified Information Within Industry

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Subpart 904.72—Public Affairs

904.7200 Purpose.
904.7201 Contract clause.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11941, Mar. 28, 1984, unless otherwise noted.

Subpart 904.4—Safeguarding Classified Information Within Industry

904.401 Definitions.

Access authorization means an administrative determination that an individual is eligible for access to classified information or is eligible for access to, or control over, special nuclear material.

Applicant means an individual who has submitted an expression of interest in employment; who is under consideration by the contractor for employment in a particular position; and who has not removed himself or herself from further consideration or otherwise indicated that he or she is no longer interested in the position.

Classified information means information that is classified as restricted data or formerly restricted data under the Atomic Energy Act of 1954, or information determined to require protection against unauthorized disclosure under Executive Order 12958, Classified National Security Information, as amended, or prior executive orders, which is identified as national security information.

Facility clearance means an administrative determination that a facility is eligible to access, produce, use or store classified information, or special nuclear material.

Restricted data means all data concerning design, manufacture, or utilization of atomic weapons; production of special nuclear material; or use of special nuclear material in the production of energy, but excluding data declassified or removed from the restricted data category pursuant to Section 142, as amended, of the Atomic Energy Act of 1954 (42 U.S.C. 2162).

Review or background review means a Contractor's assessment of the background of an uncleared applicant or uncleared employee for a position requiring a DOE access authorization prior to selecting that individual for such a position.

[67 FR 14875, Mar. 28, 2002, as amended at 74 FR 23124, May 18, 2009]

904.402 General.

(a) The basis of Department of Energy's (DOE) industrial security requirements is the Atomic Energy Act of 1954, as amended, and Executive Orders 12958 and 12829.

(b) DOE security regulations concerning restricted data are codified at 10 CFR part 1045.

(c)(1) Section 234B of the Atomic Energy Act (42 U.S.C. 2282b) requires that DOE contracts include a clause that provides for an appropriate reduction in the fees or amounts paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified information. The clause is required for all DOE prime contracts that involve any possibility of contractor access to Restricted Data or other classified information. The clause is required to specify various degrees of violations and the amount of the reduction attributable to each degree of violation. The clause prescribed at 904.404(d)(6) (952.204–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information) or the clause prescribed at 923.7003(f) (952.223–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health) shall be used for this purpose unless the clause prescribed at 970.1504–5(b)(1) (970.5215–3, Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts) is used.

(2) The 952.204–76 clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and

Other Classified Information'' and the 952.223–76 clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health'' provide for reductions of fee or profit that is earned by the contractor depending upon the severity of the contractor's failure to comply with contract terms or conditions relating to the safeguarding of Restricted Data or other classified information. When reviewing performance failures that would otherwise warrant a reduction of earned fee, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clause. Some of the mitigating factors that must be considered are specified in the clause.

(3) The contracting officer must obtain the concurrence of the Head of the Contracting Activity—

(i) Prior to effecting any reduction of fee or amounts otherwise payable to the contractor in accordance with the terms and conditions of the 952.204–76 clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information'' or of the 952.223–76 clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health;'' and

(ii) For determinations that no reduction of fee is warranted for a particular performance failure(s) that would otherwise warrant a reduction.

[67 FR 14876, Mar. 28, 2002, as amended at 68 FR 68776, Dec. 10, 2003; 74 FR 36361, July 22, 2009]

904.404 Solicitation provision and contract clause.

(d) The security clauses to be used in DOE contracts are found at 952.204. They are:

(1) *Security, 952.204–2.* This clause is required in contracts and subcontracts, the performance of which involves or is likely to involve classified information, access to special nuclear materials or the provision of protective services. DOE utilizes the National Industrial Security Program but DOE's security authority is derived from the Atomic Energy Act which contains specific language not found in other agencies' authorities. For this reason, DOE contracts must contain the clause at 952.204–2 rather than the clause at 48 CFR 52.204–2.

(2) *Classification/Declassification, 952.204–70.* This clause is to be used in all contracts which involve classified information.

(3) *Sensitive foreign nation controls, 952.204–71.* This clause is required in unclassified research contracts which may involve making unclassified information about nuclear technology available to certain sensitive foreign nations. The contractor shall be provided at the time of award the listing of nations referenced in DOE Order 142.3 or its successor. (The attachment referred to in the clause shall set forth the applicable requirements of the DOE regulations on dissemination of unclassified published and unpublished technical information to foreign nations.)

(4) *Disclosure of information, 952.204–72.* This clause may be used in place of the clauses entitled ''Security'' and ''Classification'' in contracts with educational institutions for research work performed in their own institute facilities that are not likely to produce classified information.

(5) *Facility Clearance, 952.204–73.* This solicitation provision should be used in solicitations expected to result in contracts and subcontracts that require employees to possess access authorizations.

(6) Except as prescribed in 970.1504–5(b), the contracting officer shall insert the clause at 952.204–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health, in all contracts that contain the clause at 952.204–2, Security, but that do not contain the clause at 952.250–70, Nuclear Hazards Indemnity Agreement.

(7) *Computer Security, 952.204–77.* This clause is required in contracts in which the contractor may have access to

computers owned, leased or operated on behalf of the Department of Energy.

[49 FR 11941, Mar. 28, 1984; 49 FR 38949, Oct. 2, 1984, as amended at 54 FR 27646, June 30, 1989; 59 FR 24358, May 11, 1994; 67 FR 14871, Mar. 28, 2002; 67 FR 14876, Mar. 28, 2002; 68 FR 68777, Dec. 10, 2003; 71 FR 40885, July 19, 2006; 74 FR 23124, May 18, 2009; 74 FR 36361, July 22, 2009; 76 FR 7690, Feb. 11, 2011]

Subpart 904.6 [Reserved]

Subpart 904.7—Contractor Records Retention

904.702 Applicability.

(b) Contracts containing the *Integration of Environment, Safety and Health into Work Planning and Execution* clause at 970.5223–1, as prescribed by 952.223–71, or the *Radiation Protection and Nuclear Criticality* clause at 952.223–72 must also include the *Preservation of Individual Occupational Radiation Exposure Records* clause at 952.223–75, and the *Access to and Ownership of Records* clause at 970.5204–3, which will necessitate retention of records in accordance with the National Archives and Records Administration (NARA)-approved DOE Records Disposition Schedules, rather than those found at FAR Subpart 4.7.

[79 FR 56285, Sept. 19, 2014]

Subpart 904.8—Government Contract Files

904.803 Contents of contract files.

(a) (29) The record copy of the Individual Acquisition Action Report shall be included in the file section containing procurement management reports.

[49 FR 11941, Mar. 28, 1984, as amended at 74 FR 36361, July 22, 2009]

904.804 Closeout of contract files.

904.804–1 Closeout by the office administering the contract.

(a) The Head of the Contracting Activity (HCA) shall ensure that necessary procedures and milestone schedules are established to meet the requirements of 48 CFR 4.804–1, and that resources are applied to effect the earliest practicable deobligation of excess funds and the timely closeout of all contract files which are physically completed or otherwise eligible for closeout action.

(b) Quick closeout procedures for cost reimbursable and other than firm fixed price type contracts are covered under 48 CFR 42.708.

[49 FR 11941, Mar. 28, 1984, as amended at 62 FR 53757, Oct. 16, 1997; 74 FR 36361, July 22, 2009; 76 FR 7690, Feb. 11, 2011]

904.805 Storage, handling, and disposal of contract files.

Contract files shall be disposed of in accordance with applicable DOE Order 243.1. (See current version.)

[74 FR 36361, July 22, 2009]

Subpart 904.70—Facility Clearance

904.7000 Scope of subpart.

This subpart sets forth the Department of Energy policies and procedures regarding Facility Clearances for contractors and subcontractors that require access to classified information or special nuclear material. A Facility Clearance is based upon a determination that satisfactory safeguards and security measures are carried out for classified activities being performed at the facility and upon a favorable foreign ownership, control, or influence (FOCI) determination.

[67 FR 14876, Mar. 28, 2002]

904.7001 Applicability.

The provisions of this subpart shall apply to all offeror(s), contractors, and subcontractors who will or do have access to classified information or a significant quantity of special nuclear material.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 76 FR 7690, Feb. 11, 2011]

904.7002 Definitions.

Contract means the prime contract and the subcontract at any tier.

Contracting officer means the DOE contracting officer.

Contractor means the contractor and the subcontractor at any tier.

Facility clearance means an administrative determination that a facility is

eligible to access, produce, use, or store classified information, or special nuclear material.

Foreign interest means any of the following—

(1) Foreign government or foreign government agency or instrumentality thereof;

(2) Any form of business enterprise organized under the laws of any country other than the United States or its possessions;

(3) Any form of business enterprise organized or incorporated under the laws of the U.S., or a State or other jurisdiction within the U.S. which is owned, controlled, or influenced by a foreign government, agency, firm, corporation, or person; or

(4) Any person who is not a U.S. citizen.

Foreign ownership, control, or influence means the situation where the degree of ownership, control, or influence over an offeror(s) or a contractor by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or special nuclear material may possibly result.

Special nuclear material means special nuclear material as defined in 10 CFR 710.5(a).

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 67 FR 14876, Mar. 28, 2002; 74 FR 36361, July 22, 2009; 76 FR 7690, Feb. 11, 2011]

904.7003 Disclosure of foreign ownership, control, or influence.

(a) If a contract requires a contractor to have a Facility Clearance, DOE must determine whether the contractor is or may be subject to foreign ownership, control or influence before a contract can be awarded.

(b) If, during the performance of a contract, the contractor comes under FOCI, then the DOE must determine whether a continuation of the Facility Clearance may pose an undue risk to the common defense and security through the possible compromise of that information or material. If the DOE determines that such a threat or potential threat exists, the contracting officer shall consider the alternatives of negotiating an acceptable method of isolating the foreign interest which owns, controls, or influences the contractor or terminating the contract.

(c) It is essential for the DOE to obtain information about FOCI which is sufficient to help the Department determine whether award of a contract to a person or firm, or the continued performance of a contract by a person or firm, may pose undue risk to the common defense and security. Therefore, the provision specified at 952.204–73 Facility Clearance, shall be included in solicitations that involve offeror(s) or contractors that are subject to 904.7001.

(d) The contracting officer shall not award or extend any contract subject to this subpart, exercise any options under a contract, modify any contracts subject to this subpart, or approve or consent to a subcontract subject to this subpart unless—

(1) The contractor provides the information required by the solicitation provision at 952.204–73 Facility Clearance, and

(2) The contracting officer has made a positive determination in accordance with 904.7004.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 62 FR 42073, Aug. 5, 1997; 67 FR 14876, Mar. 28, 2002; 74 FR 36362, July 22, 2009]

904.7004 Findings, determination, and contract award or termination.

(a) Based on the information disclosed by the offeror(s) or contractor, and after consulting with the DOE Office of Safeguards and Security, the contracting officer must determine that award of a contract to an offeror(s) or continued performance of a contract by a contractor will not pose an undue risk to the common defense and security. The contracting officer need not prepare a separate finding and determination addressing FOCI; however, the memorandum of negotiation shall include a discussion of the applicability of this subpart and the resulting determination.

(b) In those cases where FOCI does exist, and the DOE determines that an undue risk to the common defense and security may exist, the offeror(s) or contractor shall be requested to propose within a prescribed period of time a plan of action to avoid or mitigate

the foreign influences by isolation of the foreign interest.

(c) The types of plans that a contractor can propose are: measures which provide for physical or organizational separation of the facility or organizational component containing the classified information or special nuclear material; modification or termination of agreements with foreign interests; diversification or reduction of foreign source income; assignment of specific security duties and responsibilities to board members or special executive level committees; or any other actions to negate or reduce FOCI to acceptable levels. The plan of action may vary with the type of foreign interest involved, degree of ownership, and information involved so that each plan must be negotiated on a case by case basis. If the offeror(s) or contractor and the DOE cannot negotiate a plan of action that isolates the offeror(s) or contractor from FOCI satisfactory to the DOE, then the offeror(s) shall not be considered for contract award and affected existing contracts with a contractor shall be terminated.

[49 FR 11941, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994]

Subpart 904.71—Prohibition on Contracting (National Security Program Contracts)

SOURCE: 58 FR 59684, Nov. 10, 1993, unless otherwise noted.

904.7100 Scope of subpart.

This subpart implements section 836 of the Fiscal Year 1993 Defense Authorization Act (Pub. L. 102–484) which prohibits the award of a Department of Energy contract under the national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract.

[58 FR 59684, Nov. 10, 1993, as amended at 67 FR 14876, Mar. 28, 2002]

904.7101 Definitions.

Effectively owned or controlled means that a foreign government or an entity controlled by a foreign government has the power, either directly or indirectly, whether exercised or exercisable, to control or influence the election or appointment of the Offeror's officers, directors, partners, regents, trustees, or a majority of the Offeror's board of directors by any means, e.g., ownership, contract, or operation of law.

Entity controlled by a foreign government means any domestic or foreign organization or corporation that is effectively owned or controlled by a foreign government or any individual acting on behalf of a foreign government. See subpart 925.7 for a statement of the prohibition on certain foreign purchases.

Foreign government means any governing body organized and existing under the laws of any country other than the United States and its possessions and trust territories and any agent or instrumentality of that government.

Proscribed information means—

(1) Top Secret information;

(2) Communications Security (COMSEC) information, except classified keys used to operate secure telephone units (STU IIIs);

(3) Restricted Data, as defined in the Atomic Energy Act of 1954, as amended;

(4) Special Access Program (SAP) information; or

(5) Sensitive Compartmented Information (SCI).

[58 FR 59684, Nov. 10, 1993, as amended at 74 FR 36362, July 22, 2009]

904.7102 Waiver by the Secretary.

(a) 10 U.S.C. 2536(b)(1)(A) allows the Secretary of Energy to waive the prohibition on the award of contracts set forth in 10 U.S.C. 2536(a) if the Secretary determines that a waiver is essential to the national security interests of the United States. Any request for a waiver regarding award of a contract or execution of a novation agreement shall address—

(1) Identification of the proposed awardee and description of the control by a foreign government;

(2) Description of the procurement and performance requirements;

(3) Description of why a waiver is essential to the national security interests of the United States;

(4) The availability of other entities to perform the work; and

(5) A description of alternate means available to satisfy the requirement.

(b) 10 U.S.C. 2536(b)(1)(B) allows the Secretary of Energy to waive the prohibition on the award of contracts set forth in 10 U.S.C. 2536(a) for environmental restoration, remediation or waste management contracts at a DOE facility if the Secretary determines that a waiver will advance the environmental restoration, remediation or waste management objectives of DOE; will not harm the national security interests of the United States; and may be authorized because the entity to which the contract is to be awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under Section 144.c. of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)). Any request for such a waiver regarding award of a contract or execution of a novation agreement shall address—

(1) Identification of the proposed awardee and description of the control by a foreign government;

(2) Description of the procurement and performance requirements;

(3) A description of how the Department's environmental restoration, remediation, or waste management objectives will be advanced;

(4) A description of why a waiver will not harm the national security interests of the United States;

(5) The availability of other entities to perform the work;

(6) A description of alternate means available to satisfy the requirement; and

(7) Evidence that the entity to which a contract is to be awarded is controlled by a foreign government with which the Secretary is authorized to exchange Restricted Data under Section 144.c. of the Atomic Energy Act of 1954 (42 U.S.C. 2164(c)).

(c) Any request for a waiver under paragraph (a) or (b) of this section shall be forwarded by the Head of the Contracting Activity to the Office of Contract Management within the Headquarters procurement organization.

(d) If the Secretary decides to grant a waiver for an environmental restoration, remediation, or waste management contract, the Secretary shall notify Congress of this decision. The contract may be awarded or the novation agreement executed only after the end of the 45-day period beginning on the date notification is received by the Senate Committee on Armed Services and the House Committee on National Security.

(e) Any request for a waiver under this subpart shall be accompanied by the information required by 952.204–73, Facility Clearance that has been developed by the Safeguards and Security Lead Responsible Office at the contracting activity.

[67 FR 14876, Mar. 28, 2002, as amended at 74 FR 36362, July 22, 2009]

904.7103 Solicitation provision and contract clause.

(a) Any solicitation, including those under simplified acquisition procedures, for a contract under the national security program which will require acess to proscribed information shall include the provision at 952.204–73, Facility Clearance.

(b) Any contract, including those awarded under simplified acquisition procedures, under the national security program which require access to proscribed information to enable performance, shall include the clause at 952.204–2, Security.

[58 FR 59684, Nov. 10, 1993, as amended at 61 FR 21976, May 13, 1996; 62 FR 42074, Aug. 5, 1997; 67 FR 14877, Mar. 28, 2002; 74 FR 36362, July 22, 2009]

Subpart 904.72—Public Affairs

SOURCE: 65 FR 81006, Dec. 22, 2000, unless otherwise noted.

904.7200 Purpose.

It is the policy of the Department of Energy to provide to the public and the news media, accurate and timely unclassified information on Departmental policies, programs, and activities. The Department's contractors share the responsibility for releasing unclassified information related to efforts under their contracts and must coordinate the release of unclassified information with the cognizant contracting officer

and appropriate DOE Public Affairs personnel.

904.7201 Contract clause.

The contracting officer shall insert the clause at 952.204–75, Public Affairs, in solicitations and contracts that require the contractor to release unclassified information related to efforts under its contract regarding DOE policies, programs, and activities.

[49 FR 11941, Mar. 28, 1984, as amended at 74 FR 36362, July 22, 2009]

SUBCHAPTER B—COMPETITION ACQUISITION PLANNING

PART 905—PUBLICIZING CONTRACT ACTIONS

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

Subpart 905.5—Paid Advertisements

905.502 Authority.

(a) *Newspapers.* When it is deemed necessary to use paid advertisements in newspapers and trade journals, written authority for such publication shall be obtained from the Head of the Contracting Activity or designee.

[49 FR 11943, Mar. 28, 1984]

PART 906—COMPETITION REQUIREMENTS

Subpart 906.1—Full and Open Competition

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906.102 Use of competitive procedures.

Subpart 906.2—Full and Open Competition After Exclusion of Sources

906.202 Establishing or maintaining alternative sources.

Subpart 906.3—Other Than Full and Open Competition

906.304 Approval of the justification.

Subpart 906.5—Competition Advocates

906.501 Requirement.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 50 FR 12183, Mar. 27, 1985, unless otherwise noted.

Subpart 906.1—Full and Open Competition

906.102 Use of competitive procedures.

(d) *Other competitive procedures.* (1) Professional architect-engineer services shall be negotiated in accordance with subpart 936.6 and 48 CFR subpart 36.6.

(4) Program research and development announcements shall follow the competitive selection procedures for the award of research proposals in accordance with subpart 917.73 and 48 CFR part 35.

(5) Program opportunity notices for commercial demonstrations shall follow the competitive selection procedures for award of these proposals in accordance with subpart 917.72.

[50 FR 12183, Mar. 27, 1985, as amended at 76 FR 7690, Feb. 11, 2011]

Subpart 906.2—Full and Open Competition After Exclusion of Sources

906.202 Establishing or maintaining alternative sources.

(b)(1) Every proposed contract action under the authority of 48 CFR 6.202(a) shall be supported by a determination and finding (D&F) signed by the Senior Procurement Executive.

[50 FR 12183, Mar. 27, 1985, as amended at 74 FR 36378, July 22, 2009; 76 FR 7690, Feb. 11, 2011]

Subpart 906.3—Other Than Full and Open Competition

906.304 Approval of the justification.

(c) Class justifications within the delegated authority of a Head of the Contracting Activity may be approved for:

(1) Contracts for electric power or energy, gas (natural or manufactured), water, or other utility services when such services are available from only one source;

(2) Contracts under the authority cited in 48 CFR 6.302–4 or 6.302–5; or

(3) Contracts for educational services from nonprofit institutions. Class justifications for classes of actions that may exceed $10,000,000 require the approval of the Senior Procurement Executive.

[50 FR 12183, Mar. 27, 1985, as amended at 74 FR 36378, July 22, 2009; 76 FR 7690, Feb. 11, 2011]

Subpart 906.5—Competition Advocates

906.501 Requirement.

The Secretary of Energy and NNSA Administrator have delegated the authority for appointment of the agency and contracting activity competition advocates to the respective DOE and NNSA Senior Procurement Executives. The Senior Procurement Executives have redelegated authority to the Head of the Contracting Activity to appoint contracting activity competition advocates.

[76 FR 7690, Feb. 11, 2011]

PART 907 [RESERVED]

PART 908—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Subpart 908.8—Acquisition of Printing and Related Supplies

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908.802 Policy.

Subpart 908.11—Leasing of Motor Vehicles

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908.1102–70 Vehicle leasing.
908.1104 Contract clauses.
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Subpart 908.71—Acquisition of Special Items

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908.7101 Motor vehicles.
908.7101–1 Scope of section.
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908.7119–908.7120 [Reserved]
908.7121 Special materials.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11945, Mar. 28, 1984, unless otherwise noted.

Subpart 908.8—Acquisition of Printing and Related Supplies

908.802 Policy.

(b) Inclusion of printing requirements (limited exceptions are set forth in paragraphs 35–2 through 35–4 of the Government Printing and Binding Regulations) in contracts for supplies and services is prohibited unless specifically approved by the Director, Office of Administrative Services, Headquarters. Contracting officers shall insert the clause at 952.208–70, Printing, in all contracts.

[61 FR 41705, Aug. 9, 1996, as amended at 74 FR 36362, July 22, 2009]

Subpart 908.11—Leasing of Motor Vehicles

SOURCE: 61 FR 41705, Aug. 9, 1996, unless otherwise noted.

908.1102 Presolicitation requirements.

908.1102–70 Vehicle leasing.

(a)(4) Commercial vehicle lease sources may be used only when the General Services Administration (GSA) has advised that it cannot furnish the vehicle(s) through the Interagency Motor Pool System and it has been determined that the vehicle(s) are not available through the GSA Consolidated Leasing Program. All subsequent lease renewals or extensions may be exercised only when GSA has advised that it cannot furnish the vehicle(s) as prescribed herein.

[77 FR 74386, Dec. 14, 2012]

908.1104 Contract clauses.

(f) The clause at 952.208–7, Tagging of Leased Vehicles, shall be inserted whenever a vehicle(s) is to be leased over 60 days, except for those vehicles exempted by Federal Management Regulation (FMR) 41 CFR 102–34.160, 102–34.175, and 102–34.180.

[61 FR 41705, Aug. 9, 1996, as amended at 74 FR 36362, July 22, 2009; 77 FR 74386, Dec. 14, 2012]

908.1170 Leasing of fuel-efficient vehicles.

(a) All sedans and station wagons and certain types of light trucks, as specified by GSA, that are acquired by lease for 60 continuous days or more for official use by DOE or its authorized contractors, are subject to the requirements of the Energy Policy and Conservation Act of 1975 (EPCA), Public Law 94–163 and of Executive Order 12003 and subsequent implementing regulations.

(b) Leased vehicles will meet the miles-per-gallon criteria of, and be incorporated in, the approved plan of the fiscal year in which leases are initiated, reviewed, extended, or increased in scope. Vehicle leases will specify the vehicle model type to be provided.

Subpart 908.71—Acquisition of Special Items

908.7100 Scope of subpart.

This subpart sets forth requirements and procedures for the acquisition of special items by DOE and contractors authorized to use special sources of supply to the extent indicated herein.

908.7101 Motor vehicles.

908.7101–1 Scope of section.

Acquisitions by purchase of motor vehicles shall be in accordance with this section.

908.7101–2 Consolidated acquisition of new vehicles by General Services Administration.

(a) New vehicles shall be procured in accordance with Federal Property Management Regulations (FPMR) 41 CFR 101–26.501, and 41 CFR 102–1 through 102–220, and Department of Energy Property Management Regulations (DOE–PMR) 41 CFR 109–26.501. Orders for all motor vehicles must be placed utilizing GSA's online vehicle purchasing system (AutoChoice).

(b) Orders for all motor vehicles shall be submitted utilizing GSA's on-line system (Auto Choice), in accordance with FPMR 41 CFR 101–26.501. Requisitions for sedans, station wagons, and certain light trucks as specified by GSA, should contain a certification that the acquisition is in conformance with Pub. L. 94–163, and Executive Order 12003 and 12375 and subsequent implementations.

(c) The schedule of dates for submission of orders is contained in FPMR 41 CFR 101–26.501–4. The Heads of Contracting Activities shall consolidate and submit their requirements for passenger automobiles early in the fiscal year. Requisitions for sedans, station wagons and certain types of light trucks shall be submitted through Headquarters as outlined in 908.7101–6. Requisitions for all other types of vehicles shall be submitted directly to GSA.

[49 FR 11945, Mar. 28, 1984; 49 FR 38949, Oct. 2, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 77 FR 74386, Dec. 14, 2012]

908.7101–3 Direct acquisition.

Vehicles may be acquired by DOE activities directly rather than through GSA when a waiver has been granted by GSA. A copy of the activity's request to GSA for a waiver shall be forwarded to the Director, Personal Property Policy Division, within the Headquarters procurement organization. In cases involving general purpose vehicles where GSA refuses to grant a waiver and where it is believed that acquisition through GSA would adversely affect or otherwise impair the program, authority for direct acquisition shall be obtained from the above-mentioned Headquarters official, prior to acquisition. In the acquisition of special purpose vehicles for use by DOE and its authorized contractors, the Head of the Contracting Activity may authorize direct purchases. The purchase price for sedans and station wagons, shall not

exceed any statutory limitation in effect at the time the acquisition is made. (See 41 CFR 109–26.501–1).

[49 FR 11945, Mar. 28, 1984; 49 FR 38950, Oct. 2, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 77 FR 74386, Dec. 14, 2012]

908.7101–4 Replacement of motor vehicles.

(a) The replacement of motor vehicles shall be in accordance with the replacement standards prescribed in 41 CFR 102–34.270 and 109–38.402.

(b) The Heads of Contracting Activities may arrange to sell, as exchange sales, used motor vehicles being replaced and to apply the proceeds to the purchase of similar new vehicles. However, in the event personnel are not available to make such sales, or it is in the best interest of the DOE office, GSA may be requested to sell the used vehicles.

[49 FR 11945, Mar. 28, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 77 FR 74386, Dec. 14, 2012]

908.7101–5 Used vehicles.

Normally, DOE does not purchase or authorize contractors to purchase used vehicles. However, the Heads of Contracting Activities may authorize the purchase of used vehicles where justified by special circumstances; e.g., when new vehicles are in short supply, the vehicles are to be used for experimental or test purposes, or the vehicles are acquired from exchange sale. In accordance with 41 CFR 109–26.501–50 and 109–26.501–51, the statutory passenger vehicle allocation requirements for DOE shall apply to any purchase of used vehicles except in the case of vehicles to be used exclusively for experimental or test purposes.

[49 FR 11945, Mar. 28, 1984; 49 FR 38950, Oct. 2, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 77 FR 74386, Dec. 14, 2012]

908.7101–6 Acquisition of fuel-efficient vehicles.

(a) All purchases of sedans and station wagons, and certain types of light trucks as specified by GSA, are subject to the requirements of the Energy Policy and Conservation Act of 1975 (EPCA), Pub. L. 94–163, and of Executive Orders 12003 and 12375 and subsequent implementing regulations. Accordingly, the Director of Administration and the Heads of Contracting Activities will submit annually to the Director, Personal Property Policy Division, within the Headquarters procurement organization, for approval, a forecast of plans for the purchase of such vehicles during the fiscal year. Such forecast shall be submitted to the Property Executive, or designee.

(b) Approved sedans, station wagons, and light trucks requisitioned, but not contracted for by GSA until the subsequent fiscal year, shall be included in the acquisition plan for the miles-per-gallon criteria of the year in which GSA signs the purchase contract along with the new vehicles planned for acquisition that year.

[49 FR 11945, Mar. 28, 1984; 49 FR 38950, Oct. 2, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 77 FR 74386, Dec. 14, 2012]

908.7101–7 Government license tags.

(a) Government license tags shall be procured and assignments recorded by DOE offices in accordance with 41 CFR 102–34.140.

(b) The letter ''E'' has been designated as the prefix symbol for all DOE official license tags. Assignment of new tag numbers will be made by UNICOR via the UNICOR online vehicle license tag ordering data base. Contractors must obtain approval from their Federal fleet manager or OPMO for authorization to utilize the UNICOR data base. Director, Personal Property Policy Division, within the Headquarters procurement organization will maintain tag assignment records issued by UNICOR.

(c) Special license tags for security purposes shall be purchased in accordance with state and local laws, regulations, and procedures.

(d) In the District of Columbia, official Government tags shall be obtained from the Department of Transportation, Motor Vehicles Services Branch, District of Columbia, for all motor vehicles (except vehicles exempt for security purposes) based or housed in the District.

(e) See 41 CFR 109–38.202–2 and 109–38.202–3 for additional guidance.

[49 FR 11945, Mar. 28, 1984; 49 FR 38950, Oct. 2, 1984, as amended at 59 FR 9104, Feb. 25, 1994; 77 FR 74387, Dec. 14, 2012]

908.7102 Aircraft.

Acquisition of aircraft shall be in accordance with 41 CFR 102–33, subpart B and DOE Order 440.2B latest revision.

[77 FR 74387, Dec. 14, 2012]

908.7103 Office machines.

Acquisitions of office machines by DOE offices and its authorized contractors shall be in accordance with FPMR 41 CFR 101–25.104, 101–25.302, and DOE-PMR 41 CFR 109–25.302, and 109–25.4.

[49 FR 11945, Mar. 28, 1984, as amended at 77 FR 74387, Dec. 14, 2012]

908.7104 Office furniture and furnishings.

Acquisitions of office furniture and furnishings by DOE offices shall be in accordance with FPMR 41 CFR 101–25.104, 101–25.302, 101–25.302–5, 101–25.302–7, 101–25.404 and 101–26.505, and DOE-PMR 41 CFR 109–25.302, and 109–25.350.

[49 FR 11945, Mar. 28, 1984, as amended at 77 FR 74387, Dec. 14, 2012]

908.7105 Filing cabinets.

Acquisitions of filing cabinets shall be in accordance with FPMR 41 CFR 101–26.308 and 101–25.302–2 and DOE–PMR 41 CFR 109–25.302.

[49 FR 11945, Mar. 28, 1984; 49 FR 38950, Oct. 2, 1984, as amended at 74 FR 36362, July 22, 2009]

908.7106 Security cabinets.

(a) Acquisitions of security cabinets shall be in accordance with FPMR 41 CFR 101–26.507 and the ''prerequisites to ordering'' criteria contained in FPMR 41 CFR 101–25.302–2 and DOE–PMR 41 CFR 109–25.302.

(b) Fixed-price prime contractors and lower tier subcontractors may use GSA acquisition sources for security cabinets in accordance with 48 CFR part 51.

[49 FR 11945, Mar. 28, 1984; 49 FR 38950, Oct. 2, 1984, as amended at 74 FR 36362, July 22, 2009; 76 FR 7691, Feb. 11, 2011]

908.7107 Procurement and use of industrial alcohol.

(a) This section covers the procurement of industrial alcohol by DOE or authorized contractors and the applicable policies and delegations of authority to submit industrial alcohol user application to procure and use tax-free alcohol or specially denatured spirits. To the fullest extent practicable, industrial alcohol for use by DOE or its contractors shall be procured on a tax-free basis.

(b) The procurement of tax-free alcohol or specially denatured spirits shall be conducted in accordance with the regulations, policy, and procedures of the Alcohol and Tobacco Tax and Trade Bureau (TTB), of the Department of Treasury. The applicable TTB regulations and forms may be accessed at the following Web site: *http://www.ttb.gov/foia/err.shtml#regulations*. For further information, contact the Alcohol and Tobacco Tax and Trade Bureau, Director, National Revenue Center, 550 Main St., Suite 8002, Cincinnati, OH 45202–5215 or toll free at 1–877–882–3277.

(c) The applying office should coordinate, as necessary, with the local State Alcohol Control Board, or its equivalent, to obtain the appropriate State license.

(1) *Tax-free alcohol.* TTB regulations relating to the procurement and use of alcohol free of tax, by Government agencies, are set forth in 27 CFR part 22, subpart N, §§ 22.171 to 22.176.

(2) *Specially denatured spirits.* TTB regulations relating to the acquisition and use of alcohol free of tax, by Government agencies, are set forth in 27 CFR part 20, subpart N, §§ 20.241 to 20.245.

(d) For the user permits to procure and use tax-free alcohol and specially denatured spirits submit the application on the TTB Form 5150.22, ''Application for Industrial Alcohol User Permit,'' (or the current TTB form). When permits are no longer required, they should be forwarded to the Alcohol and Tobacco Tax and Trade Bureau for cancellation. Industrial alcohol procured by use of the TTB form referred to in this subsection shall be used exclusively on DOE work.

(e) The Senior Procurement Executive (SPE) has the authority to sign the TTB application, Form 5150.22. The SPE may delegate this authority to sign the application to specifically named DOE personnel. Requests for new authorizations or changes to existing authorizations shall be submitted by letter to the SPE. A copy of the TTB approved permit shall be sent to the SPE.

(f) Abandoned and forfeited alcohol which has come into the custody or control of a Federal agency may be obtained by following the procedure set forth in the FMR at 41 CFR part 102–41.

[76 FR 7691, Feb. 11, 2011]

908.7108 [Reserved]

908.7109 Fuels and packaged petroleum products.

Acquisitions of fuel and packaged petroleum products by DOE offices shall be in accordance with FPMR 41 CFR 101–26.602. When contractors are authorized, consistent with 951, to acquire such products from Defense sources, they shall do so in accordance with FPMR 41 CFR 101–26.602.

908.7110 Coal.

DOE offices and authorized contractors may participate in the Defense Fuel Supply Center (DFSC) coal contracting program for carload or larger lots. If participation is desired, estimates shall be submitted to DFSC in accordance with FPMR 41 CFR 101–26.602.

908.7111 Arms and ammunition.

Pursuant to 10 U.S.C. 4655, the Secretary of the Army is authorized to furnish arms, suitable accouterments for use therewith, and ammunition for the protection of public money and property.

(a) The Department of the Army has granted clearance for Federal agencies to procure, without further reference to or clearance from that Department, all arms and ammunition of types which are not peculiar to the military services, and which are readily procurable in the civilian market.

(b) Acquisition of arms and ammunition readily procurable in the civilian market shall be made in accordance with regular acquisition procedures.

(c) Acquisition of arms and ammunition which are peculiar to the military services shall be made by submission of order form to the Commanding General, Headquarters, U.S. Army Materiel Command, 9301 Chapek Road, Fort Belvoir, VA 22060–5527.

[49 FR 11945, Mar. 28, 1984, as amended at 49 FR 38950, Oct. 2, 1984; 74 FR 36362, July 22, 2009]

908.7112 Materials handling equipment replacement standards.

Materials handling equipment shall be purchased for replacement purposes in accordance with the standards in FPMR 41 CFR 101–25.405 and DOE-PMR 41 CFR 109–25.4. The Heads of Contracting Activities are authorized to replace an item earlier than the date specified in such standards under unusual circumstances. A written justification shall be placed in the purchase file.

[49 FR 11945, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

908.7113 Calibration services.

Orders for calibration services may be placed with the National Institute of Standards and Technology, 100 Bureau Drive, Stop 2300, Gaithersburg, MD 20899–2300, by either DOE acquisition offices or its authorized contractors. Copies of the letters authorizing contractors to order calibration services on behalf of DOE shall be sent to the National Institute of Standards and Technology, Attention: ''Calibration Services.''

[74 FR 36362, July 22, 2009]

908.7114 Wiretapping and eavesdropping equipment.

Acquisition by DOE offices and contractors of devices primarily designed to be used surreptitiously to overhear or record conversations is prohibited.

908.7115 Forms.

(a) DOE forms shall be obtained by DOE offices in accordance with the DOE Guide 242.1–1, DOE Forms Management, for use with DOE Order 200.1, Information Management Program.

(b) Standard, optional, and certain other agency forms as listed in the GSA Supply Catalog will be obtained by DOE offices in accordance with FPMR 41 CFR 101–26.302.

(c) Marginally punched continuous forms shall be obtained in accordance with FPMR 41 CFR 101–26.703.

[49 FR 11945, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994; 74 FR 36362, July 22, 2009]

908.7116 Electronic data processing tape.

(a) Acquisitions of electronic data processing tape by DOE offices shall be in accordance with FPMR 41 CFR 101–26.508.

(b) Acquisitions of electronic data processing tape by authorized contractors shall be in accordance with FPMR 41 CFR 101–26.508–1. However, if adequate justification exists, the Heads of Contracting Activities may authorize contractors to obtain their tape from other sources. When such an authorization is granted, a copy of the authorization and justification shall be retained in the contract file.

[49 FR 11945, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

908.7117 Tabulating machine cards.

DOE offices shall acquire tabulating machine cards in accordance with FPMR 41 CFR 101–26.509.

908.7118 Rental of post office boxes.

DOE offices and authorized contractors may rent post office boxes on an annual basis, or for shorter periods by quarters, where necessary. Payments for annual rentals are to be made in advance at the beginning of the fiscal year, and for periods of less than a year, either in advance for the whole period or at the beginning of each quarter in which the box is to be used.

908.7119–908.7120 [Reserved]

908.7121 Special materials.

This section covers the purchase of materials peculiar to the DOE program. While purchases of these materials may be unclassified, the specific quantities, destination or use may be classified (see appropriate sections of the Classification Guide). Contracting officers shall require authorized contractors to obtain the special materials identified in the following subsections in accordance with the following procedures:

(a) *Heavy water.* The Senior Program Official or designee controls the acquisition and production of heavy water for a given program. Request for orders shall be placed directly with the cognizant Senior Program Official or designee.

(b) *Precious metals.* (1) NNSA, Y–12 National Security Complex in Oak Ridge, TN is responsible for maintaining the DOE supply of precious metals. These metals are platinum, palladium, iridium, osmium, rhodium, ruthenium, gold and silver. The NNSA Y–12 National Security Complex has assigned management of these precious metals to its Management and Operating (M&O) contractor. DOE and NNSA offices and authorized contractors shall coordinate with the Y–12 M&O contractor regarding the availability of these metals prior to purchasing in the open market.

(2) For contractor inventory containing precious metals or possessing precious metals excess, see 945.604–1 for contractor identification and reporting.

(c) *Lithium.* Lithium is available from Y–12 at no cost other than normal packing, handling, and shipping charges from Oak Ridge. The excess quantities at Y–12 are the first source of supply prior to procurement of lithium compounds from any other source.

[77 FR 74387, Dec. 14, 2012]

PART 909—CONTRACTOR QUALIFICATIONS

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AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11949, Mar. 28, 1984, unless otherwise noted.

Subpart 909.1—Responsible Prospective Contractors

909.104 Standards.

909.104–1 General standards.

(h) For solicitations for contract work subject to the provisions of 10 CFR part 707, Workplace Substance Abuse Programs at DOE sites, the prospective contractor must agree, in accordancewith 970.5223–3., Agreement Regarding Workplace Substance Abuse Programs at DOE Sites, to provide the contracting officer with its written workplace substance abuse program in order to be determined responsible and, thus, eligible to receive the contract award.

[57 FR 32675, July 22, 1992, as amended at 62 FR 42074, Aug. 5, 1997; 65 FR 81006, Dec. 22, 2000; 74 FR 36362, July 22, 2009]

909.104–3 Application of standards.

(e) *Guaranteeing corporate entities.* The Department of Energy (DOE) may select an entity which was newly created to perform the prospective contract, including, but not limited to, a joint venture or other similarly binding corporate partnership. In such instances when making the determination of responsibility pursuant to 48 CFR 9.103, the contracting officer may evaluate the financial resources of other entities only to the extent that those entities are legally bound, jointly and severally if more than one, by means of a performance guarantee or other equivalent enforceable commitment to supply the necessary resources to the prospective contractor and to assume all contractual obligations of the prospective contractor. The guaranteeing corporate entity(ies) must be found to have sufficient resources in order to satisfy its guarantee.

[64 FR 16651, Apr. 6, 1999, as amended at 74 FR 36362, July 22, 2009]

Subpart 909.4—Debarment, Suspension, and Ineligibility

SOURCE: 61 FR 39857, July 31, 1996, unless otherwise noted.

909.400 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures governing the debarment and suspension of organizations and individuals from participating in Department of Energy (DOE) and National Nuclear Security Administration (NNSA) contracts, procurement sales contracts, and real property purchase agreements, and from participating in DOE and, NNSA approved subcontracts and subagreements;

(b) Sets forth the causes, procedures, and requirements for determining the scope, duration, and effect of DOE and NNSA debarment and suspension actions; and

(c) Implements and supplements 48 CFR subpart 9.4 with respect to the exclusion of organizations and individuals from procurement contracting and Government approved subcontracting.

[61 FR 39857, July 31, 1996, as amended at 74 FR 36362, July 22, 2009; 76 FR 7691, 7692, Feb. 11, 2011]

909.401 Applicability.

The provisions of this subpart apply to all procurement debarment and suspension actions initiated by DOE and NNSA on or after the effective date of this subpart. Nonprocurement debarment and suspension rules are codified in 2 CFR part 901.

[61 FR 39857, July 31, 1996, as amended at 76 FR 7691, Feb. 11, 2011]

909.403 Definitions.

In addition to the definitions set forth at 48 CFR 9.403, the following definitions apply to this subpart:

Debarring and suspending official, for the DOE, the designees are:

(1) *Debarring Official* means the Debarring Official for DOE contracts is the Director, Office of Procurement and Assistance Management, DOE, or designee. The Debarring Official for NNSA contracts is the Deputy Associate Administrator for Acquisition and Project Management, NNSA, or designee.

(2) *Suspending Official* means the Suspending Official for DOE contracts is the Director, Office of Procurement and Assistance Management, DOE, or designee. The Suspending Official for NNSA contracts is the Deputy Associate Administrator for Acquisition and Project Management, NNSA, or designee.

[69 FR 75003, Dec. 15, 2004, as amended at 74 FR 36362, July 22, 2009; 76 FR 7692, Feb. 11, 2011; 81 FR 45977, July 15, 2016]

909.405 Effect of listing.

(e) The Department of Energy may not solicit offers from, award contracts to or consent to subcontracts with contractors debarred, suspended, or proposed for debarment unless the Senior Procurement Executive makes a written determination justifying that there is a compelling reason for such action in accordance with 48 CFR 9.405(a). For NNSA, the Head of the Contracting Activity (HCA) makes the written determination justifying the compelling reason.

(f) DOE or NNSA may disapprove or not consent to the selection (by a contractor) of an individual to serve as a principal investigator, as a project manager, in a position of responsibility for the administration of Federal funds, or in another key personnel position, if the individual is listed in the Excluded Parties List System (EPLS).

(g) DOE or NNSA shall not conduct business with an agent or representative of a contractor if the agent's or representative's name is listed in the EPLS.

(h) DOE or NNSA shall review the EPLS before conducting a pre-award survey or soliciting proposals, awarding contracts, renewing or otherwise extending the duration of existing contracts, or approving or consenting to the award, extension, or renewal of subcontracts.

[76 FR 7691, Feb. 11, 2011]

909.406 Debarment.

909.406–2 Causes for debarment.

(c) The DOE and NNSA Debarring Official may debar a contractor for any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor. Such cause may include but is not limited to:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a private contract or subcontract.

(2) Inexcusable, prolonged, or repeated failure to pay a debt (including disallowed costs and overpayments) owed to DOE, provided the contractor has been notified of the determination of indebtedness, and further provided that the time for initiating any administrative or legal action to oppose or appeal the determination of indebtedness has expired or that such action, if initiated, has been concluded.

(d) The Debarring Official may debar a contractor:

(1) On the basis that an individual or organization is an affiliate of a debarred contractor, subject to the requirements of 48 CFR 9.406–1(b) and 9.406–3(c).

(2) For failure to observe the material provisions of a voluntary exclusion (see 10 CFR 1036.315 for discussion of voluntary exclusion).

[61 FR 39857, July 31, 1996, as amended at 74 FR 36362, July 22, 2009; 76 FR 7691, Feb. 11, 2011]

909.406–3 Procedures.

(a) *Investigation and referral.* (1) Offices responsible for the award and administration of contracts are responsible for reporting to the appropriate Senior Procurement Executive and the DOE Inspector General information about possible fraud, waste, abuse, or other wrongdoing which may constitute or contribute to a cause(s) for

debarment under this subpart. Circumstances that involve possible criminal or fraudulent activities must be reported to the Office of the Inspector General in accordance with 10 CFR part 1010, Conduct of Employees, §1010.103, Reporting Wrongdoing.

(2) At a minimum, referrals for consideration of debarment action should be in writing and should include the following information—

(i) The recommendation and rationale for the referral;

(ii) A statement of facts;

(iii) Copies of documentary evidence and a list of all witnesses, including addresses and telephone numbers, together with a statement concerning their availability to appear at a fact-finding proceeding and the subject matter of their testimony;

(iv) A list of parties including the contractor, principals, and affiliates (including last known home and business addresses, zip codes and DUNS Number or other identifying number for an individual);

(v) DOE's and NNSA's acquisition history with the contractor, including recent experience under contracts and copies of pertinent contracts;

(vi) A list of any known active or potential criminal investigations, criminal or civil proceedings, or administrative claims before the Civilian Board of Contract Appeals or other fact-finding body; and

(vii) A statement regarding the impact of the debarment action on DOE and NNSA programs. This statement is not required for referrals by the Inspector General.

(3) Referrals may be returned to the originator for further information or development.

(b) *Decisionmaking process.* Contractors proposed for debarment shall be afforded an opportunity to submit information and argument in opposition to the proposed debarment.

(1) In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the Debarring Official shall make a decision on the basis of all the information in the administrative record, including any submissions made by the contractor. If the respondent fails to submit a timely written response to a notice of proposed debarment, the Debarring Official shall notify the respondent in accordance with FAR 9.406–3(e) that the contractor is debarred.

(2) In actions not based upon a conviction or civil judgment, the contractor may request a fact-finding hearing to resolve a genuine dispute of material fact. In its request, the contractor must identify the material facts in dispute and the basis for disputing the facts. If the Debarring Official determines that there is a genuine dispute of material fact, the Debarring Official shall appoint, and refer the matter to, a Fact-Finding Official for a fact-finding conference.

(3) *Meeting.* Upon receipt of a timely request from a contractor proposed for debarment, the Debarring Official shall schedule a meeting between the Debarring Official and the respondent, to be held no later than 30 days from the date the request is received. The Debarring Official may postpone the date of the meeting if the respondent requests a postponement in writing. At the meeting, the respondent, appearing personally or through an attorney or other authorized representative, may present and explain evidence that causes for debarment do not exist, evidence of any mitigating factors, and arguments concerning the imposition, scope, or duration of a proposed debarment or debarment.

(4) *Fact-finding conference.* The purpose of a fact-finding conference under this section is to provide the respondent an opportunity to dispute material facts through the submission of oral and written evidence; resolve facts in dispute; and provide the Debarring Official with findings of fact based, as applicable, on adequate evidence or on a preponderance of the evidence. The fact-finding conference shall be conducted in accordance with rules consistent with 48 CFR 9.406–3(b). The Fact-Finding Official will notify the affected parties of the schedule for the hearing. The Fact-Finding Official shall deliver written findings of fact to the Debarring Official (together with a transcription of the proceeding, if made) within a certain time period after the hearing record closes as specified by the Fact-Finding Official. The findings shall resolve any disputes over

material facts based upon a preponderance of the evidence, if the case involves a proposal to debar, or on adequate evidence, if the case involves a suspension. Since convictions or civil judgments generally establish the cause for debarment by a preponderance of the evidence, there usually is no genuine dispute over a material fact that would warrant a fact-finding conference for those proposed debarments based on convictions or civil judgments.

(d) *Debarring Official's decision.* (4) The Debarring Official's final decision shall be based on the administrative record. In those actions where additional proceedings are necessary as to disputed material facts, written findings of fact shall be prepared and included in the final decision. In those cases where the contractor has requested and received a fact-finding conference, the written findings of fact shall be those findings prepared by the Fact-Finding Official. Findings of fact shall be final and conclusive unless, within 15 days of receipt of the findings, the Department or the respondent requests reconsideration, or unless set aside by a court of competent jurisdiction. The Fact-Finding Official shall be provided a copy of the Debarring Official's final decision.

[61 FR 39857, July 31, 1996, as amended at 76 FR 7691, Feb. 11, 2011]

909.406–70 Requests for reconsideration of debarment.

(a) At any time during a period of debarment, a respondent may submit to the Debarring or Suspending Official a written request for reconsideration of the scope, duration, or effects of the suspension/debarment action because of new information or changed circumstances, as discussed at 48 CFR 9.406–4(c).

(b) In reviewing a request for reconsideration, the Debarring or Suspending Official may, in his or her discretion, utilize any of the procedures (meeting and fact-finding) set forth in 909.406–3 and 909.407–3. The Debarring or Suspending Official's final disposition of the reconsideration request shall be in writing and shall set forth the reasons why the request has been granted or denied. A notice transmitting a copy of the disposition of the request for reconsideration shall be sent to the respondent.

[61 FR 39857, July 31, 1996, as amended at 74 FR 36362, July 22, 2009; 76 FR 7692, Feb. 11, 2011]

909.407 Suspension.

909.407–2 Causes for suspension.

(d) The Suspending Official may suspend an organization or individual—

(1) Indicted for or suspected, upon adequate evidence, of the causes described in 909.406–2(c)(1);

(2) On the basis of the causes set forth in 909.406–2(d)(2); or

(3) On the basis that an organization or individual is an affiliate of a suspended or debarred contractor.

[61 FR 39857, July 31, 1996, as amended at 74 FR 36363, July 22, 2009]

909.407–3 Procedures.

(b) *Decisionmaking process.* (1) In actions based on an indictment, the Suspending Official shall make a decision based upon the administrative record, which shall include submissions made by the contractor in accordance with 909.406–3(b)(1) and 909.406–3(b)(3).

(2) For actions not based on an indictment, the procedures in 909.406–3(b)(2) and 48 CFR 9.407–3(b)(2) apply.

(3) Coordination with Department of Justice. Whenever a meeting or fact-finding conference is requested, the Suspending Official's legal representative shall obtain the advice of appropriate Department of Justice officials concerning the impact disclosure of evidence at the meeting or fact-finding conference could have on any pending civil or criminal investigation or legal proceeding. If such Department of Justice official requests in writing that evidence needed to establish the existence of a cause for suspension not be disclosed to the respondent, the Suspending Official shall—

(i) Decline to rely on such evidence and withdraw (without prejudice) the suspension or proposed debarment until such time as disclosure of the evidence is authorized; or

(ii) Deny the request for a meeting or fact-finding and base the suspension decision solely upon the information in the administrative record, including

any submission made by the respondent.

(e) *Notice of suspending official's decision.* In actions in which additional proceedings have been held, following such proceedings, the Suspending Official shall notify respondent, as applicable, in accordance with paragraphs (e)(1) or (e)(2) of this section.

(1) Upon deciding to sustain a suspension, the Suspending Official shall promptly send each affected respondent a notice containing the following information:

(i) A reference to the notice of suspension, the meeting and the fact-finding conference;

(ii) The Suspending Official's findings of fact and conclusions of law;

(iii) The reasons for sustaining a suspension;

(iv) A reference to the Suspending Official's waiver authority under 909.405;

(v) A statement that the suspension is effective throughout the Executive Branch as provided in 48 CFR 9.407–1(d);

(vi) Modifications, if any, of the initial terms of the suspension;

(vii) A statement that the respondent's name and address will be added to the EPLS; and

(viii) If less than an entire organization is suspended, specification of the organizational element(s) or individual(s) included within the scope of the suspension.

(2) If the Suspending Official decides to terminate a suspension, the Suspending Official shall promptly send, by certified mail, return receipt requested, each affected respondent a copy of the final decision required under this section.

[61 FR 39857, July 31, 1996; 61 FR 41684, Aug. 9, 1996, as amended at 74 FR 36363, July 22, 2009; 76 FR 7692, Feb. 11, 2011]

Subpart 909.5—Organizational and Consultant Conflicts of Interest

SOURCE: 62 FR 40751, July 30, 1997, unless otherwise noted.

909.503 Waiver.

Heads of Contracting Activities are delegated the authorities in 48 CFR 9.503 regarding the waiver of organizational and consultant conflicts of interest requirements.

[74 FR 36363, July 22, 2009]

909.504 Contracting officer's responsibility.

(d) The contracting officer shall evaluate the statement by the apparent successful offeror or, where individual contracts are negotiated with all firms in the competitive range, all such firms for interests relating to a potential organizational conflict of interest in the performance of the proposed contract. Using that information and any other credible information, the contracting officer shall make written determination of whether those interests create an actual or significant potential organizational conflict of interest and identify any actions that may be taken to avoid, neutralize, or mitigate such conflict. In fulfilling their responsibilities for identifying and resolving potential conflicts, contracting officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation.

(e) The contracting officer shall award the contract to the apparent successful offeror unless a conflict of interest is determined to exist that cannot be avoided, neutralized, or mitigated. Before determining to withold award based on organizational conflict of interest considerations, the contracting officer shall notify the offeror, provide the reasons therefor, and allow the offeror a reasonable opportunity to respond. If the conflict of interest cannot be avoided, neutralized, or mitigated to the contracting officer's satisfaction, the contracting officer may disqualify the offeror from award and undertake the disclosure, evaluation, and determination process with the firm next in line for award. 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 shall be submitted in accordance with 909.503. The waiver request and decisions shall be included in the contract file.

[62 FR 40751, July 30, 1997, as amended at 74 FR 36363, July 22, 2009]

909.507 Solicitation provisions and contract clause.

909.507–1 Solicitation provisions.

(e) The contracting officer shall insert the provision at 952.209–8, Organizational Conflicts of Interest Disclosure-Advisory and Assistance Services, in solicitations for advisory and assistance services expected to exceed the simplified acquisition threshold. In individual procurements, the Head of the Contracting Activity may increase the period subject to disclosure in 952.209–8 (c)(1) up to 36 months.

[62 FR 40751, July 30, 1997, as amended at 74 FR 36363, July 22, 2009]

909.507–2 Contract clause.

(a)(1) The contracting officer shall insert the clause at 952.209–72, Organizational Conflicts of Interest, in each solicitation and contract for advisory and assistance services expected to exceed the simplified acquisition threshold.

(2) Contracting officers may make appropriate modifications where necessary to address the potential for organizational conflicts of interest in individual contracts. Contracting officers shall determine the appropriate term of the bar of paragraph (b)(1)(i) of the clause at 952.209–72 and enter that term in the blank provided. In the usual case of a contract for advisory and assistance services a period of three, four, or five years is appropriate; however, in individual cases the contracting officer may insert a term of greater or lesser duration.

(3) The contracting officer shall include Alternate I with the clause in instances in which a meaningful amount of subcontracting for advisory and assistance services is expected.

(b) Contracts, which are not subject to part 970 but provide for the operation of a DOE site or facility or environmental remediation of a specific DOE site or sites, shall contain the organizational conflict of interest clause at 952.209–72. The organizational conflicts of interest clause in such contracts shall include Alternate I to that clause.

[62 FR 40751, July 30, 1997, as amended at 74 FR 36363, July 22, 2009]

PART 911—DESCRIBING AGENCY NEEDS

Subpart 911.6—Priorities and Allocations

Sec.
911.600 Scope of subpart.
911.602 General.
911.604 Solicitation provision and contract clause.

AUTHORITY: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.*

Subpart 911.6—Priorities and Allocations

911.600 Scope of subpart.

This subpart implements and supplements 48 CFR part subpart 11.6, Priorities and Allocations, and implements the regulations and procedures of the Defense Priorities and Allocations System (DPAS) in solicitations and contracts in support of authorized national defense programs. (See 15 CFR part 700).

[52 FR 38422, Oct. 16, 1987, as amended at 59 FR 9105, Feb. 25, 1994. Redesignated and amended at 61 FR 21976, May 13, 1996; 61 FR 30823, June 18, 1996; 73 FR 10985, Feb. 29, 2008; 76 FR 7692, Feb. 11, 2011]

911.602 General.

(e) The Heads of Contracting Activities shall ensure that members of their staffs and contractors under their jurisdiction are advised of the provisions of the DPAS regulation and that the related procedures are followed to ensure adherence to the regulation throughout the industrial supply chain. Under DPAS, it is mandatory that the priority rating be extended through the industrial chain from supplier to supplier.

[52 FR 38422, Oct. 16, 1987, as amended at 59 FR 9105, Feb. 25, 1994. Redesignated at 61 FR 21976, May 13, 1996, as amended at 73 FR 10985, Feb. 29, 2008]

911.604 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 952.211–70, Priorities and Allocations (Atomic Energy), in solicitations that will result in the placement of rated orders for authorized DOE atomic energy programs.

(b) The contracting officer shall insert the clause at 952.211–71, Priorities and Allocations (Atomic Energy), in contracts that are placed in support of authorized DOE atomic energy programs.

(c) The use of the provisions at 952.211–70 and the clause at 952.211–71 is optional for industrial delivery orders of $5,000 or less.

[52 FR 38422, Oct. 16, 1987, as amended at 59 FR 9105, Feb. 25, 1994. Redesignated and amended at 61 FR 21976, May 13, 1996; 65 FR 81006, Dec. 22, 2000; 73 FR 10985, Feb. 29, 2008; 74 FR 36363, July 22, 2009]

PART 912—ACQUISITION OF COMMERCIAL ITEMS

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

Subpart 912.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

912.302 Tailoring of provisions and clauses for the acquisition of commercial items.

(c) The waiver required by 48 CFR 12.302(c) shall be in writing and approved by the local procurement manager or individual appointed for that purpose by the local procurement manager.

[74 FR 36363, July 22, 2009]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 913—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 913.3—Simplified Acquisition Methods

Sec.
913.307 Forms.

Subpart 913.4 [Reserved]

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 67 FR 14871, Mar. 28, 2002, unless otherwise noted.

Subpart 913.3—Simplified Acquisition Methods

913.307 Forms.

(b) Optional Forms 347 and 348, or DOE F 4250.3, may be used for purchase orders using simplified acquisition procedures. These forms shall not be used as the contractor's invoice. See 48 CFR 12.204 regarding the use of SF–1449 for the acquisition of commercial items using simplified acquisition procedures.

Subpart 913.4 [Reserved]

PART 914—SEALED BIDDING

Subpart 914.4—Opening of Bids and Award of Contract

Sec.
914.404 Rejection of bids.
914.404–1 Cancellation of invitations after opening.
914.407 Mistakes in bids.
914.407–3 Other mistakes disclosed before award.
914.407–4 Mistakes after award.
914.409–2 Award of classified contracts.

Subpart 914.5—Two-Step Sealed Bidding

914.502 Conditions for use.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11954, Mar. 28, 1984, unless otherwise noted.

Subpart 914.4—Opening of Bids and Award of Contract

914.404 Rejection of bids.

914.404–1 Cancellation of invitations after opening.

(c) The Senior Procurement Executives have been delegated authority to make the determination under 48 CFR 14.404–1(c) and (e) and has redelegated this authority to the Heads of Contracting Activities without power of redelegation.

[50 FR 12184, Mar. 27, 1985, as amended at 74 FR 36363, July 22, 2009; 76 FR 7692, Feb. 11, 2011]

914.407 Mistakes in bids.

914.407–3 Other mistakes disclosed before award.

(e) Pursuant to 48 CFR 14.407–3(e), the Senior Procurement Executives have been delegated authority by the Secretary to make the determinations under 48 CFR 14.407–3. In the case of mistakes in bids alleged after opening of bids and before award, the Senior Procurement Executives have redelegated this authority to the Heads of Contracting Activities without power of redelegation and to make administrative determinations regarding withdrawal of bids as provided for in 48 CFR 14.407–3, providing that each such determination shall be approved by Legal Counsel.

[49 FR 11954, Mar. 28, 1984, as amended at 56 FR 41964, Aug. 26, 1991; 59 FR 9105, Feb. 25, 1994. Redesignated and amended at 67 FR 14871, Mar. 28, 2002; 74 FR 36363, July 22, 2009; 76 FR 7692, Feb. 11, 2011]

914.407–4 Mistakes after award.

The Senior Procurement Executives have been delegated authority to make the determinations under 48 CFR 14.407–4. Mistakes in bids after award, together with the data set forth in 48 CFR 14.407–4(e), shall be submitted to

the appropriate Senior Procurement Executive for decision.

[49 FR 11954, Mar. 28, 1984. Redesignated and amended at 67 FR 14871, Mar. 28, 2002; 74 FR 36363, July 22, 2009; 76 FR 7692, Feb. 11, 2011]

914.409–2 Award of classified contracts.

DOE regulations regarding the safeguarding of restricted data and procedures for its destruction are contained at 10 CFR part 1016.

[49 FR 11954, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994. Redesignated at 74 FR 36363, July 22, 2009]

Subpart 914.5—Two-Step Sealed Bidding

914.502 Conditions for use.

(c) Use of the two-step sealed bidding method shall be approved by the Head of the Contracting Activity. The contracting officer shall submit a written request for approval justifying its use in accordance with 48 CFR 14.502.

[50 FR 12184, Mar. 27, 1985, as amended at 76 FR 7692, Feb. 11, 2011]

PART 915—CONTRACTING BY NEGOTIATION

Subpart 915.2—Solicitation and Receipt of Proposals and Information

Sec.

915.200 Scope of subpart.
915.201 Exchanges with industry before receipt of proposals.
915.207 Handling proposals and information.
915.207–70 Handling of proposals during evaluation.

Subpart 915.3—Source Selection

915.305 Proposal evaluation.

Subpart 915.4—Contract Pricing

915.404 Proposal analysis.
915.404–2 Information to support proposal analysis.
915.404–2–70 Audit as an aid in proposal analysis.
915.404–4 Profit.
915.404–4–70 DOE structured profit and fee system.
915.404–4–70–1 General.
915.404–4–70–2 Weighted guidelines system.
915.404–4–70–3 Documentation.
915.404–4–70–4 Exceptions.
915.404–4–70–5 Special considerations—contracts with nonprofit organizations (other than educational institutions).
915.404–4–70–6 Contracts with educational institutions.
915.404–4–70–7 Alternative techniques.
915.404–4–70–8 Weighted guidelines application considerations.
915.404–4–71 Profit and fee-system for construction and construction management contracts.
915.404–4–71–1 General.
915.404–4–71–2 Limitations.
915.404–4–71–3 Factors for determining fees.
915.404–4–71–4 Considerations affecting fee amounts.
915.404–4–71–5 Fee schedules.
915.404–4–71–6 Fee base.
915.404–4–72 Special considerations for cost-plus-award-fee contracts.
915.408 Solicitation provisions and contract clauses.
915.408–70 Solicitation provision and contract clause.

Subpart 915.6—Unsolicited Proposals

915.602 Policy.
915.603 General.
915.605 Content of unsolicited proposals.
915.606 Agency procedures.
915.607 Criteria for acceptance and negotiation of an unsolicited proposal.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 63 FR 56851, Oct. 23, 1998, unless otherwise noted.

Subpart 915.2—Solicitation and Receipt of Proposals and Information

915.200 Scope of subpart.

The 48 CFR subpart 15.2 is not applicable to Program Opportunity Notices for Commercial Demonstrations (See subpart 917.72) or Program Research and Development Announcements (See subpart 917.73).

[74 FR 36363, July 22, 2009]

915.201 Exchanges with industry before receipt of proposals.

(e) Approval for the use of solicitations for information or planning purposes shall be obtained from the Head of the Contracting Activity.

915.207 Handling proposals and information.

915.207–70 Handling proposals and information during evaluation.

(a) Proposals furnished to the Government are to be used for evaluation purposes only. Disclosure outside the Government for evaluation is permitted only to the extent authorized by, and in accordance with, the procedures in this subsection.

(b) While the Government's limited use of proposals does not require that the proposal bear a restrictive notice, proposers should, if they desire to maximize protection of their trade secrets or confidential or privileged commercial and financial information contained in them, apply the restrictive notice prescribed in paragraph (e) of the provision at 48 CFR 52.215–1 to such information. In any event, information contained in proposals will be protected to the extent permitted by law, but the Government assumes no liability for the use or disclosure of information (data) not made subject to such notice in accordance with paragraph (e) of the provision at 48 CFR 52.215–1.

(c) If proposals are received with more restrictive conditions than those in paragraph (e) of the provision at 48 CFR 52.215–1, the contracting officer or coordinating officer shall inquire whether the submitter is willing to accept the conditions of paragraph (e). If the submitter does not, the contracting officer or coordinating officer shall, after consultation with counsel, either return the proposal or accept it as marked. Contracting officers shall not exclude from consideration any proposals merely because they contain an authorized or agreed to notice, nor shall they be prejudiced by such notice.

(d) Release of proposal information (data) before decision as to the award of a contract, or the transfer of valuable and sensitive information between competing offerors during the competitive phase of the acquisition process, would seriously disrupt the Government's decision-making process and undermine the integrity of the competitive acquisition process, thus adversely affecting the Government's ability to solicit competitive proposals and award a contract which would best meet the Government's needs and serve the public interest. Therefore, to the extent permitted by law, none of the information (data) contained in proposals, except as authorized in this subsection, is to be disclosed outside the Government before the Government's decision as to the award of a contract. In the event an outside evaluation is to be obtained, it shall be only to the extent authorized by, and in accordance with the procedures of, this subsection.

(e)(1) In order to maintain the integrity of the procurement process and to assure that the propriety of proposals will be respected, contracting officers shall assure that the following notice is affixed to each solicited proposal prior to distribution for evaluation:

GOVERNMENT NOTICE FOR HANDLING PROPOSALS

This proposal shall be used and disclosed for evaluation purposes only, and a copy of this Government notice shall be applied to any reproduction or abstract thereof. Any authorized restrictive notices which the submitter places on this proposal shall also be strictly complied with. Disclosure of this proposal outside the Government for evaluation purposes shall be made only to the extent authorized by, and in accordance with, the procedures in DEAR subsection 915.207–70.

(End of notice)

(2) The notice at 48 CFR 15.609(d) for unsolicited proposals shall be affixed to a cover sheet attached to each such proposal upon receipt by DOE. Use of the notice neither alters any obligation of the Government, nor diminishes any rights in the Government to use or disclose data or information.

(f)(1) Normally, evaluations of proposals shall be performed only by employees of the Department of Energy. As used in this section, ''proposals'' includes the offers in response to requests for proposals, sealed bids, program opportunity announcements, program research and development announcements, or any other method of solicitation where the review of proposals or bids is to be performed by other than peer review. In certain cases, in order to gain necessary expertise, employees of other agencies may be used in instances in which they will

be available and committed during the period of evaluation. Evaluators or advisors who are not Federal employees, including employees of DOE management and operating contractors, may be used where necessary. Where such non-Federal employees are used as evaluators, they may only participate as members of technical evaluation committees. They may not serve as members of the Source Evaluation Board or equivalent board or committee.

(2)(i) Pursuant to section 6002 of Pub. L. 103–355, a determination is required for every competitive procurement as to whether sufficient DOE personnel with the necessary training and capabilities are available to evaluate the proposals that will be received. This determination, discussed at 48 CFR 37.204, shall be made in the memorandum appointing the technical evaluation committee by the Source Selection Official, in the case of Source Evaluation Board procurements, or by the Contracting Officer in all other procurements.

(ii) Where it is determined such qualified personnel are not available within DOE but are available from other Federal agencies, a determination to that effect shall be made by the same officials in the same memorandum. Should such qualified personnel not be available, a determination to use non-Federal evaluators or advisors must be made in accordance with paragraph (f)(3) of this subsection.

(3) The decision to employ non-Federal evaluators or advisors, including employees of DOE management and operating contractors, in Source Evaluation Board procurements must be made by the Source Selection Official with the concurrence of the Head of the Contracting Activity. In all other procurements, the decision shall be made by the senior program official or designee with the concurrence of the Head of the Contracting Activity. In a case where multiple solicitations are part of a single program and would call for the same resources for evaluation, a class determination to use non-Federal evaluators may be made by the Senior Procurement Executive.

(4) Where such non-Federal evaluators or advisors are to be used, the solicitation shall contain a provision informing prospective offerors that non-Federal personnel may be used in the evaluation of proposals.

(5) The nondisclosure agreement as it appears in paragraph (f)(6) of this subsection shall be signed before DOE furnishes a copy of the proposal to non-Federal evaluators or advisors, and care should be taken that the required handling notice described in paragraph (e) of this subsection is affixed to a cover sheet attached to the proposal before it is disclosed to the evaluator or advisor. In all instances, such persons will be required to comply with nondisclosure of information requirements and requirements involving Procurement Integrity, see 48 CFR 3.104; with requirements to prevent the potential for personal conflicts of interest; or, where a non-Federal evaluator or advisor is acquired under a contract with an entity other than the individual, with requirements to prevent the potential for organizational conflicts of interest.

(6) Non-Federal evaluators or advisors shall be required to sign the following agreement prior to having access to any proposal:

NONDISCLOSURE AGREEMENT

Whenever DOE furnishes a proposal for evaluation, I, the recipient, agree to use the information contained in the proposal only for DOE evaluation purposes and to treat the information obtained in confidence. This requirement for confidential treatment does not apply to information obtained from any source, including the proposer, without restriction. Any notice or restriction placed on the proposal by either DOE or the originator of the proposal shall be conspicuously affixed to any reproduction or abstract thereof and its provisions strictly complied with. Upon completion of the evaluation, it is agreed all copies of the proposal and abstracts, if any, shall be returned to the DOE office which initially furnished the proposal for evaluation. Unless authorized by the Contracting Officer, I agree that I shall not contact the originator of the proposal concerning any aspect of its elements.

Recipient: _____

Date: _____

(End of agreement)

(g) The submitter of any proposal shall be provided notice adequate to afford an opportunity to take appropriate action before release of any information (data) contained therein pursuant to a request under the Freedom of Information Act (5 U.S.C. 552); and, time permitting, the submitter should be consulted to obtain assistance in determining the eligibility of the information (data) in question as an exemption under the Act. (See also 48 CFR 24.2, Freedom of Information Act.)

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36363, July 22, 2009; 76 FR 7693, Feb. 11, 2011]

Subpart 915.3—Source Selection

915.305 Proposal evaluation.

(d) Personnel from DOE, other Government agencies, consultants, and contractors, including those who manage or operate Government-owned facilities, may be used in the evaluation process as evaluators or advisors when their services are necessary and available. When personnel outside the Government, including those of contractors who operate or manage Government-owned facilities, are to be used as evaluators or advisors, approval and nondisclosure procedures as required by 915.207–70 shall be followed and a notice of the use of non-Federal evaluators shall be included in the solicitation. In all instances, such personnel will be required to comply with DOE conflict of interest and nondisclosure requirements.

[63 FR 56851, Oct. 23, 1998, as amended at 76 FR 7692, Feb. 11, 2011]

Subpart 915.4—Contract Pricing

915.404 Proposal analysis.

915.404–2 Information to support proposal analysis.

(a)(1) Field pricing assistance as discussed in 48 CFR 15.404–2(a) is not required for the negotiation of DOE contract prices or modifications thereof. The term ''field pricing assistance'' refers to the Department of Defense (DOD) system for obtaining a price and/or cost analysis report from a cognizant DOD field level contract management office wherein requests for the review of a proposal submitted by an offeror are initiated and the recommendations made by the various specialists of the management office are consolidated into a single report that is forwarded to the office making the contract award for use in conducting negotiations. In the DOE, such review activities, except for reviews performed by professional auditors, are expected to be accomplished by pricing support personnel located in DOE Contracting Activities. The DOE contracting officer shall formally request the assistance of appropriate pricing support personnel, other than auditors, for the review of any proposal that exceeds the threshold stated at 48 CFR 15.403–4(a)(1), unless the contracting officer has sufficient data to determine the reasonableness of the proposed cost or price. Such pricing support may be requested for proposals below the threshold stated at 48 CFR 15.403–4(a)(1), if considered necessary for the establishment of a reasonable pricing arrangement. Contracting officers, however, are not precluded by this section from requesting pricing assistance from a cognizant DOD contract management office, provided an appropriate cross-servicing arrangement for pricing support services exists between the DOE and the servicing agency.

(c)(1) When an audit is required pursuant to 915.404–2–70, ''Audit as an aid in proposal analysis,'' the request for audit shall be sent directly to the Federal audit office assigned cognizance of the offeror or prospective contractor. When the cognizant agency is other than the Defense Contract Audit Agency or the Department of Health and Human Services, and an appropriate interagency agreement has not been established, the need for audit assistance shall be coordinated with the Office of Policy, within the Headquarters procurement organization.

(2)(i) The request for audit shall establish the due date for receipt of the auditor's report and in so doing shall allow as much time as possible for the auditor's review.

(ii) Copies of technical analysis reports prepared by DOE technical or other pricing support personnel shall

not normally be provided to the auditor. The contracting officer or the supporting price, cost, or financial analyst at the contracting activity shall determine the monetary impact of the technical findings.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36363, July 22, 2009; 76 FR 7692, 7693, Feb. 11, 2011]

915.404–2–70 Audit as an aid in proposal analysis.

(a) When a contract price will be based on cost or pricing data submitted by the offerors, the DOE contracting officer or authorized representative shall request a review by the cognizant Federal audit activity prior to the negotiation of any contract or modification including modifications under advertised contracts in excess of—

(1) The threshold stated at 48 CFR 15.403–4(a)(1) for a firm fixed-price contract or a fixed-price contract with economic price adjustment provisions; or adjustment provisions; or

(2) Twice the threshold at 48 CFR 15.403–4(a)(1) for requiring cost or pricing data for all other contract types, including initial prices, estimated costs of cost-reimbursement contracts, interim and final price redeterminations, and target and settlement of incentive contracts.

(b) The requirement for auditor reviews of proposals which exceed the thresholds specified in paragraph (a) of this section may be waived at a level above the contracting officer when the reasonableness of the negotiated contract price can be determined from information already available. The contract file shall be documented to reflect the reason for any such waiver, provided, however, that independent Government estimates of cost or price shall not be used as the sole justification for any such waiver.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36363, July 22, 2009; 76 FR 7692, Feb. 11, 2011]

915.404–4 Profit.

(c)(4)(i) *Contracting officer responsibilities*. The statutory limitations on price and fee as set forth in 48 CFR 15.404–4(c)(4)(i) shall be followed, except as exempted for DOE architect-engineer contracts covering Atomic Energy Commission (AEC) and Bonneville Power Administration (BPA) functions. Pursuant to section 602(d) (13) and (20) of the Federal Property and Administration Services Act of 1949, as amended, those former AEC functions, as well as those of the BPA, now being performed by DOE are exempt from the 6 percent of cost restriction on contracts for architect-engineer services. The estimated costs on which the maximum fee is computed shall include facilities capital cost of money when this cost is included in cost estimates.

(c)(6) In cases where a change or modification calls for substantially different work than the basic contract, the contractor's effort may be radically changed and a detailed analysis of the profit factors would be a necessity. Also, if the dollar amount of the change or contract modification is very significant in comparison to the contract dollar amount, a detailed analysis should be made.

(d) *Profit-analysis factors*. A profit/fee analysis technique designed for a systematic application of the profit factors in 48 CFR 15.404–4(d) provides contracting officers with an approach that will ensure consistent consideration of the relative value of the various factors in the establishment of a profit objective and the conduct of negotiations for a contract award. It also provides a basis for documentation of this objective, including an explanation of any significant departure from it in reaching a final agreement. The contracting officer's analysis of these prescribed factors is based on information available prior to negotiations. Such information is furnished in proposals, audit data, performance reports, preaward surveys and the like.

[63 FR 56851, Oct. 23, 1998, as amended at 76 FR 7692, 7693 Feb. 11, 2011]

915.404–4–70 DOE structured profit and fee system.

This section implements 48 CFR 15.404–4(b) and (d).

[63 FR 56851, Oct. 23, 1998, as amended at 76 FR 7693, Feb. 11, 2011]

915.404–4–70–1 General.

(a) *Objective*. It is the intent of DOE to remunerate contractors for financial

and other risks which they may assume, resources they use, and organization, performance and management capabilities they employ. Profit or fee shall be negotiated for this purpose; however, when profit or fee is determined as a separate element of the contract price, the aim of negotiation should be to fit it to the acquisition, giving due weight to effort, risk, facilities investment, and special factors as set forth in this subpart.

(b) *Commercial (profit) organization.* Profit or fee prenegotiation objectives for contracts with commercial (profit) organizations shall be determined as provided in this subpart.

(c) *Nonprofit organizations.* It is DOE's general policy to pay fees in contracts with nonprofit organizations other than educational institutions and governmental bodies; however, it is a matter of negotiation whether a fee will be paid in a given case. In making this decision, the DOE negotiating official should consider whether the contractor is ordinarily paid fees for the type of work involved. The profit objective should be reasonable in relation to the task to be performed and the requirements placed on the contractor.

(d) *Educational institutions.* It is DOE policy not to pay fees under contracts with educational institutions.

(e) *State, local and Indian tribal governments.* Profit or fee shall not be paid under contracts with State, local, and Indian tribal Governments.

915.404–4–70–2 Weighted guidelines system.

(a) To properly reflect differences among contracts and the circumstances relating thereto and to select an appropriate relative profit/fee in consideration of these differences and circumstances, weightings have been developed for application by the contracting officer to standard measurement bases representative of the prescribed profit factors cited in 48 CFR 15.404–4(d) and paragraph (d) of this section. This is a structured system, referred to as weighted guidelines. Each profit factor or subfactor, or component thereof, has been assigned weights relative to their value to the contract's overall effort. The range of weights to be applied to each profit factor is also set forth in paragraph (d) of this section. Guidance on how to apply the weighted guidelines is set forth in 915.404–4–70–8.

(b) Except as set forth in 915.404–4–70–4, the weighted guidelines shall be used in establishing the profit objective for negotiation of contracts where cost analysis is performed.

(c) The negotiation process does not contemplate or require agreement on either estimated cost elements or profit elements. Accordingly, although the details of analysis and evaluation may be discussed in the fact-finding phase of the negotiation process in order to develop a mutual understanding of the logic of the respective positions, specific agreement on the exact weights of values of the individual profit factors is not required and need not be attempted.

(d) The factors set forth in the following table are to be used in determining DOE profit objectives. The factors and weight ranges for each factor shall be used in all instances where the weighted guidelines are applied.

Profit factors	Weight ranges (percent)
I. Contractor Effort (Weights applied to cost):	
a. Material acquisitions:	
(1) Purchased parts	1 to 3.
(2) Subcontracted items	1 to 4.
(3) Other materials	1 to 3.
b. Labor skills:	
(1) Technical and managerial:	
(a) Scientific	10 to 20.
(b) Project management/administration.	8 to 20.
(c) Engineering	8 to 14.
(2) Manufacturing	4 to 8.
(3) Support services	4 to 14.
c. Overhead:	
(1) Technical and managerial	5 to 8.
(2) Manufacturing	3 to 6.
(3) Support services	3 to 7.
d. Other direct costs	3 to 8.
e. G&A (General Management) expenses	5 to 7.
II. Contract Risk (type of contract-weights applied to total cost of items 4.a. thru 4.e.).	0 to 8.
III. Capital Investment (Weights applied to the net book value of allocable facilities).	5 to 20.
IV. Independent Research and Development:	
a. Investment in IR&D program (Weights applied to allocable IR&D costs).	5 to 7.
b. Developed items employed (Weights applied to total of profit $ for items 4.a. thru 4.e.).	0 to 20.
V. Special Program Participation (Weights applied to total of Profit $ for items 4.a. thru 4.e.).	−5 to +5.
VI. Other Considerations (Weights applied to total of Profits $ for items 4.a. thru 4.e.).	−5 to +5.

Profit factors	Weight ranges (percent)
VII. Productivity/Performance (special computation).	(N/A).

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36363, July 22, 2009; 76 FR 7692, 7693, Feb. 11, 2011]

915.404–4–70–3 Documentation.

Determination of the profit or fee objective, in accordance with this subpart shall be fully documented. Since the profit objective is the contracting officer's pre-negotiation evaluation of a total profit allowance for the proposed contract, the amounts developed for each category of cost will probably change in the course of negotiation. Furthermore, the negotiated amounts will probably vary from the objective and from the pre-negotiation detailed application of the weighted guidelines technique to each element of the contractor's input to total performance. Since the profit objective is viewed as a whole rather than as its component parts, insignificant variations from the pre-negotiation profit objective, as a result of changes to the contractor's input to total performance, need not be documented in detail. Conversely, significant deviations from the profit objective necessary to reach a final agreement on profit or fee shall be explained in the price negotiation memorandum prepared in accordance with 48 CFR 15.406–3.

[63 FR 56851, Oct. 23, 1998, as amended at 76 FR 7693, Feb. 11, 2011]

915.404–4–70–4 Exceptions.

(a) For contracts not expected to exceed the threshold stated at 48 CFR 15.403–4(a)(1), the weighted guidelines need not be used; however, the contracting officer may use the weighted guidelines for contracts below this amount if he or she elects to do so.

(b) For the following classes of contracts, the weighted guidelines shall not be used—

(1) Commercialization and demonstration type contracts;

(2) Management and operating contracts;

(3) Construction contracts;

(4) Construction management contracts;

(5) Contracts primarily requiring delivery of material supplied by subcontractors;

(6) Termination settlements; and

(7) Contracts with educational institutions.

(c) In addition to paragraphs (a) and (b) of this section, the contracting officer need not use the weighted guidelines in unusual pricing situations where the weighted guidelines method has been determined by the DOE negotiating official to be unsuitable. Such exceptions shall be justified in writing and shall be authorized by the Head of the Contracting Activity. The contract file shall include this documentation and any other information that may support the exception.

(d) If the contracting officer makes a written determination that the pricing situation meets any of the circumstances set forth in this section, other methods for establishing the profit objective may be used. For contracts other than those subject to subpart 917.6, the selected method shall be supported in a manner similar to that used in the weighted guidelines (profit factor breakdown and documentation of profit objectives); however, investment or other factors that would not be applicable to the contract shall be excluded from the profit objective determination. It is intended that the methods will result in profit objectives for noncapital intensive contracts that are below those generally developed for capital intensive contracts.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36363, July 22, 2009; 76 FR 7693, Feb. 11, 2011]

915.404–4–70–5 Special considerations—contracts with nonprofit organizations (other than educational institutions).

(a) For purposes of identification, nonprofit organizations are defined as those business entities 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 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.

(b) In computing the amount of profit or fee to be paid, the DOE negotiating official shall take into account the tax benefits received by a nonprofit organization. While it is difficult to establish the degree to which a remuneration under any given contract contributes to an organization's overall net profit, the DOE negotiating official should assume that there is an element of profit in any amount to be paid.

(c) In order to assure consideration of the tax posture of nonprofit organizations during a profit or fee negotiation, the DOE negotiating official shall calculate the fee as for a contract with a commercial concern and then reduce it at least 25 percent. However, depending on the circumstances, the contracting officer may pay profit or fees somewhere between this amount and the appropriate profit or fee as if it were a commercial concern. When this is the case, the contract file shall be documented to specifically state the reason or reasons.

(d) Where a contract with a nonprofit organization is for the operation of Government-owned facilities, the fee should be calculated using the procedures and schedules applicable to operating contracts as set forth in part 970.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36363, July 22, 2009]

915.404–4–70–6 Contracts with educational institutions.

In certain situations the DOE may contract with a university to manage or operate Government-owned laboratories. These efforts are generally apart from, and not in conjunction with, their other activities, and the complexity and magnitude of the work are not normally found in standard university research or study contracts. Such operating contracts are subject to the applicable provisions set forth in part 970.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36363, July 22, 2009]

915.404–4–70–7 Alternative techniques.

(a) Profit or fees to be paid on construction contracts and construction management contracts shall be determined in accordance with the applicable profit/fee technique for such contracts set forth in 915.404–4–71.

(b) Profit and fee to be paid on contracts under the threshold stated at 48 CFR 15.403–4(a)(1), not using the weighted guidelines, shall be judgmentally developed by the contracting officer by assigning individual dollar amounts to the factors appropriate to DOE profit considerations discussed in 915.404–4–70–2(d).

(c) Contracts which require only delivery or furnishing of goods or services supplied by subcontractors shall include a fee or profit which, in the best judgment of the contracting officer, is appropriate. It would be expected that there would be a declining relationship of profit/fee dollars in relation to total costs. The higher the cost of subcontracts, for example, the lower the profit/fee ratio to these costs.

(d) Profit/Fee considerations in termination settlements are often a question of equity. They are a matter of negotiation. They should not, however, exceed what would have otherwise been payable under weighted guidelines had the termination not occurred.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36364, July 22, 2009; 76 FR 7693, Feb. 11, 2011]

915.404–4–70–8 Weighted guidelines application considerations.

The Department has developed internal procedures to aid the contracting officer in the application of weighted guidelines and to assure a reasonable degree of uniformity across the Department.

915.404–4–71 Profit and fee-system for construction and construction management contracts.

915.404–4–71–1 General.

(a) Business concerns awarded a DOE construction or construction management contract shall be paid a profit or fee if requested or solicited. The profit or fee objective for a construction or construction management contract shall be an amount appropriate for the

type of effort contained therein. It is the intent of DOE to—

(1) Reward contractors based on the complexity of work;

(2) Reward contractors who demonstrate and establish excellent records of performance; and

(3) Reward contractors who contribute their own resources, including facilities and investment of capital.

(b) Standard fees or across-the-board agreements will not be used or made. Profit or fee objectives are to be determined for each contract according to the effort or task contracted thereunder.

(c) Profit or fee payable on fixed-price and cost-reimbursable construction or construction management contracts shall be established in accordance with the appropriate procedures and schedules set forth in this subpart.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36364, July 22, 2009; 76 FR 7693, Feb. 11, 2011; 76 FR 10476, Feb. 25, 2011]

915.404–4–71–2 Limitations.

Amounts payable under construction and construction management contracts shall not exceed amounts derived from the schedules established for this purpose. Requests to pay fees in excess of these levels shall be forwarded to the Senior Procurement Executive for review and approval.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36378, July 22, 2009]

915.404–4–71–3 Factors for determining fees.

(a) The profit policy stated in 915.404–4–71–1(a) reflects, in a broad sense, recognition that profit is compensation to contractors for the entrepreneurial function of organizing and managing resources (including capital resources), and the assumption of risk that all costs of performance (operating and capital) may not be reimbursable.

(b) The best approach calls for a structure that allows judgmental evaluation and determination of fee dollars for prescribed factors which impact the need for, and the rewards associated with, fee or profit, as follows—

(1) Management risk relating to performance, including the—

(i) Quality and diversity of principal work tasks required to do the job;

(ii) Labor intensity of the job;

(iii) Special control problems; and

(iv) Advance planning, forecasting and other such requirements;

(2) The presence or absence of financial risk, including the type and terms of the contract;

(3) The relative difficulty of work, including consideration of technical and administrative knowledge, skill, experience and clarity of technical specifications;

(4) Degree and amount of contract work required to be performed by and with the contractor's own resources, including the extent to which the contractor contributes plant, equipment, computers, or working capital (labor, etc.);

(5) Duration of project;

(6) Size of operation;

(7) Benefits which may accrue to the contractor from gaining experience and know-how, from establishing or enhancing a reputation, or from being enabled to hold or expand a staff whose loyalties are primarily to the contractor; and

(8) Other special considerations, including support of Government programs such as those relating to small, small disadvantaged, and women-owned small business in subcontracting, energy conservation, etc.

(c) The total fee objective and amount for a particular negotiation is established by judgmental considerations of the factors in paragraph (b) of this section, assigning fee values as deemed appropriate for each factor and totaling the resulting amounts.

(d) In recognition of the complexities of this process, and to assist in promoting a reasonable degree of consistency and uniformity in its application, fee schedules have been developed which set forth maximum fee amounts that contracting activities are allowed to negotiate for a particular transaction without obtaining prior approval of the Senior Procurement Executive. In addition, the fee negotiation objective established in accordance with 915.404–4–71–3(a), (b), and (c) shall not exceed the applicable fee schedule amounts without prior approval of the Senior Procurement Executive. To facilitate application to a contract, the fee amounts are related

to the total cost base which is defined as total operating and capital costs.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36364, 36378, July 22, 2009]

915.404–4–71–4 Considerations affecting fee amounts.

(a) In selecting final fee amounts for the various factors in 915.404–4–71–3 of this section, the DOE negotiating official will have to make several judgments as discussed in this subsection.

(b) Complexity of a construction project shall be considered by analysis of its major parts. For a project which includes items of work of different degrees of complexity, a single average classification should be considered, or the work should be divided into separate classifications. The following class identifications are appropriate for proper fee determinations.

(1) *Class A*—Manufacturing plants involving operations requiring a high degree of design layout or process control; nuclear reactors; atomic particle accelerators; complex laboratories or industrial units especially designed for handling radioactive materials.

(2) *Class B*—Normal manufacturing processes and assembly operations such as ore dressing, metal working plant and simple processing plants; power plants and accessory switching and transformer stations; water treatment plants; sewage disposal plants; hospitals; and ordinary laboratories.

(3) *Class C*—Permanent administrative and general service buildings, permanent housing, roads, railroads, grading, sewers, storm drains, and water and power distribution systems.

(4) *Class D*—Construction camps and facilities and other construction of a temporary nature.

(c) Normal management elements of principal tasks relating to a construction contract cover several categories of tasks with differing rates of application throughout the construction period. The principal elements of management effort are outlined in this paragraph. Although each project has a total management value equal to 100% for all elements, the distribution of effort among the various elements will be different for each project due to differences in project character or size. The basic management elements and the normal range of efforts expected to apply for a normal sized project are as follows. When the normally expected effort will not be performed by a contractor, this fact should be considered in arriving at appropriate fee amounts.

Management elements	Effort range	
	Minimum	Maximum
I. *Broad project planning.* Overall project planning and scheduling, establishment of key project organization and consultation with the A-E and DOE. Performed by highest level of contractor's officers, technical personnel and project manager	15	25
II. *Field planning.* Mobilization and demobilization of top field organization from the contractor's existing organization and from other sources as necessary. Detailed project planning and scheduling for construction of facilities. Performed by the project manager and top field professional staff	18	28
III. *Labor supervision.* Direct supervision of manual employees. Performed by contractor's subprofessional staff, such as superintendents and foremen (some salaried and some hourly rate). This includes the contractor's personnel to coordinate and expedite the work of Subcontractors	12	16
IV. *Acquisition and subcontracting.* Acquisition of other than special equipment. Selection of subcontractors and execution and administration of subcontracts. Performed by contractor's staff under supervision and direction of elements I and II	12	16
V. *Labor relations and recruit-ment (manual).* Performed by the contractor's staff under supervision and direction of elements I, II and III. This includes demobilization of work forces	7	11
VI. *Recruitment of supervisory staff.* Staffing required to supplement the organization under elements I and II, and demobilization during completion of the project. Performed by contractor's permanent staff and recruitment personnel under supervision and direction of management elements I and II	4	6
VII. *Expediting.* Expediting contracting performed by contractor's staff and by subcontractors. Performed by contractor's staff under supervision and direction of elements I and II	4	6
VIII. *Construction equipment operations.* This includes mobilization and demobilization. Performed by contractor's staff under supervision, direction and coordination of elements I, II, and IV	4	6

Management elements	Effort range	
	Minimum	Maximum
IX. *Other services.* Timekeeping, cost accounting, estimating, reporting, security, etc., by the contractor's staff under supervision and direction of elements I and II	4	6

(d) Fee considerations dealing with the duration of a project are usually provided by the consideration given to the degree of complexity and magnitude of the work. In only very unusual circumstances should it be necessary to separately weight, positively or negatively, for the period of services or length of time involved in the project when determining fee levels.

(e) The size of the operation is to a considerable degree a continuation of the complexity factor, and the degree and amount of work required to be performed by and with the contractor's own resources. Generally, no separate weighting, positively or negatively, is required for consideration of those factors.

(f) The degree and amount of work required to be performed by and with the contractor's own resources affect the level of fees. Reasonable fees should be based on expectations of complete construction services normally associated with a construction or construction management contract. In the case of a construction contract, reduced services can be in the form of excessive subcontracting or supporting acquisition actions and labor relations interfaces being made by the government. If an unusual amount of such work is performed by other than the contractor, it will be necessary to make downward adjustments in the fee levels to provide for the reduction in services required.

(g) The type of contract to be negotiated and the anticipated contractor cost risk shall be considered in establishing the appropriate fee objective for the contract.

(h) When a contract calls for the contractor to use its own resources, including facilities and equipment, and to make its own cost investment (i.e., when there is no letter-of-credit financing), a positive impact on the fee amount shall be reflected.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36364, July 22, 2009]

915.404–4–71–5 Fee schedules.

(a) The schedules included in this paragraph, adjusted in accordance with provisions of this section and 915.404–4–71–6, provide maximum fee levels for construction and construction management contracts. The fees are related to the estimated cost (fee base) for the construction work and services to be performed. The schedule in paragraph (d) of this section sets forth the basic fee schedule for construction contracts. The schedule in paragraph (f) of this section sets forth the basic fee schedule for construction management contracts. A separate schedule in paragraph (h) of this section has been developed for determining the fee applicable to special equipment purchases and to reflect a differing level of fee consideration associated with the subcontractor effort under construction management contracts. (See 915.404–4–71–6(c) and 915.404–4–71–6(d)).

(b) The schedules cited in paragraph (a) of this section provide the maximum fee amount for a CPFF contract arrangement. If a fixed-price type contract is to be awarded, the fee amount set forth in the fee schedules shall be increased by an amount not to exceed 4 percent of the fee base.

(c) The fee schedule shown in paragraphs (d) and (f) of this section assumes a letter of credit financing arrangement. If a contract provides for or requires the contractor to make their own cost investment for contract performance (i.e., when there is no letter-of-credit financing), the fee amounts set forth in the fee schedules shall be increased by an amount equal to 5 percent of the fee amount as determined from the schedules.

(d) The following schedule sets forth the base for construction contracts:

CONSTRUCTION CONTRACTS SCHEDULE

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
Up to $1 Million	.....	.....	5.47
1,000,000	54,700	5.47	3.88
3,000,000	132,374	4.41	3.28

CONSTRUCTION CONTRACTS SCHEDULE—Continued

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
5,000,000	198,014	3.96	2.87
10,000,000	341,328	3.41	2.60
15,000,000	471,514	3.14	2.20
25,000,000	691,408	2.77	1.95
40,000,000	984,600	2.46	1.73
60,000,000	1,330,304	2.22	1.56
80,000,000	1,643,188	2.05	1.41
100,000,000	1,924,346	1.92	1.26
150,000,000	2,552,302	1.70	1.09
200,000,000	3,094,926	1.55	0.80
300,000,000	3,897,922	1.30	0.68
400,000,000	4,581,672	1.15	0.57
500,000,000	5,148,364	1.03	
Over $500 Million	5,148,364	.....	0.57

(e) When using the Construction Contracts Schedule for establishing maximum payable basic fees, the following adjustments shall be made to the Schedule fee amounts for complexity levels, excessive subcontracting, normal contractor services performed by the government or another contractor:

(1) The target fee amounts, set forth in the fee schedule, shall not be adjusted for a Class A project, which is maximum complexity. A Class B project requires a 10 percent reduction in amounts. Class C and D projects require a 20 percent and 30 percent reduction, respectively. The various classes are defined in 915.404–4–71–4(b).

(2) The target fee schedule provides for 45 percent of the contract work to be subcontracted for such things as electrical and other specialties. Excessive subcontracting results when such efforts exceed 45 percent of the total contract work. To establish appropriate fee reductions for excessive subcontracting, the negotiating official should first determine the amount of subcontracting as a percentage of the total contract work. Next, the negotiating official should determine a percentage by which the prime contractor's normal requirement (based on a requirement for doing work with its own forces) is reduced due to the excessive subcontracting and, finally, multiply the two percentages to determine a fee reduction factor.

(3) If acquisition or other services normally expected of the contractor (see 915.404–4–71–4(c)) are performed by the government, or another DOE prime or operating contractor, a fee reduction may also be required. The negotiating official should first determine what percentage of the total procurement or other required services is performed by others. Then the negotiating official should apply this percentage reduction to the normally assigned weightings for the management services or effort as discussed in 915.404–4–71–4(c) to arrive at the appropriate reduction factor.

(f) The following schedule sets forth the base for construction management contracts:

CONSTRUCTION MANAGEMENT CONTRACTS SCHEDULE

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
Up to $1 Million	.....	.....	5.47
1,000,000	54,700	5.47	3.88
3,000,000	132,374	4.41	3.28
5,000,000	198,014	3.96	2.87
10,000,000	341,328	3.41	2.60
15,000,000	471,514	3.14	2.20
25,000,000	691,408	2.77	1.95
40,000,000	984,600	2.46	1.73
60,000,000	1,330,304	2.22	1.56
80,000,000	1,643,188	2.05	1.41
100,000,000	1,924,346	1.92	1.26
150,000,000	2,552,302	1.70	1.09
200,000,000	3,094,926	1.55	0.80
300,000,000	3,897,922	1.30	0.68
400,000,000	4,581,672	1.15	0.57
500,000,000	5,148,364	1.03	
Over $500 Million	5,148,364	.....	0.57

(g) When applying the basic Construction Management Contracts Schedule for determining maximum payable fees, no adjustments are necessary to such payable fees for contractor Force account labor used for work which should otherwise be subcontracted until such Force account work exceeds, in the aggregate, 20 percent of the base. Excessive use of Force account work results when such effort exceeds 20 percent of the fee base; and, when this occurs, appropriate fee reductions for such excessive Force account labor shall be computed as follows:

(1) Determine the percentage amount of Force account work to total contractor effort.

(2) Determine the percentage amount of subcontract work reduced due to the use of Force account work.

(3) Multiply the two percentages to determine the fee reduction factor. It is not expected that reductions in the

Construction Management Contracts Schedule fee amounts will be made for complexity, reduced requirements and similar adjustments as made for construction contracts.

(h) The schedule of fees for consideration of special equipment purchases and for consideration of the subcontract program under a construction management contract is as follows:

SPECIAL EQUIPMENT PURCHASES/SUBCONTRACT WORK SCHEDULE

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
Up to $1 Million	.....	.....	1.64
1,000,000	16,410	1.64	1.09
2,000,000	27,350	1.37	0.93
4,000,000	45,948	1.15	0.77
6,000,000	61,264	1.02	0.71
8,000,000	75,486	0.94	0.66
10,000,000	88,614	0.89	0.61
15,000,000	119,246	0.79	0.53
25,000,000	171,758	0.69	0.47
40,000,000	242,868	0.61	0.43
60,000,000	329,294	0.55	0.39
80,000,000	406,968	0.51	0.37
100,000,000	480,266	0.48	0.28
150,000,000	619,204	0.41	0.23
200,000,000	732,980	0.37	0.13
300,000,000	867,542	0.29	.....
Over $300 Million	867,542	.....	013

[63 FR 56851, Oct. 23, 1998, as amended at 64 FR 12227, Mar. 11, 1999; 74 FR 36364, July 22, 2009]

915.404–4–71–6 Fee base.

(a) The fee base shown in the Construction Contracts Schedule and Construction Management Contracts Schedule represents that estimate of cost to which a percentage factor is applied to determine maximum fee allowances. The fee base is the estimated necessary allowable cost of the construction work or other services which are to be performed. It shall include the estimated cost for, but is not limited to, the following as they may apply in the case of a construction or construction management contract:

(1) Site preparation and utilities.

(2) Construction (labor-materials-supplies) of buildings and auxiliary facilities.

(3) Construction (labor-materials-supplies) to complete/construct temporary buildings.

(4) Design services to support the foregoing.

(5) General management and job planning cost.

(6) Labor supervision.

(7) Procurement and acquisition administration.

(8) Construction performed by subcontractors.

(9) Installation of government furnished or contractor acquired special equipment and other equipment.

(10) Equipment (other than special equipment) which is to become Government property (including a component of Government property).

(b) The fee base for the basic fee determination for a construction contract and construction management contract shall include all necessary and allowable costs cited in paragraph (a) of this section as appropriate to the type of contract; except, any home office G&A expense paid as a contract cost per cost principle guidance and procedures shall be excluded from the fee base. The fee base shall exclude:

(1) Cost of land.

(2) Cost of engineering (A&E work).

(3) Contingency estimate.

(4) Equipment rentals or use charges.

(5) Cost of government furnished equipment or materials.

(6) Special equipment.

(c) A separate fee base shall be established for special equipment for use in applying the Special Equipment Purchases or Subcontract Work Schedule (see 915.404–4–71–5(h)). The fee base for determination of applicable fees on special equipment shall be based on the estimated purchase price of the equipment.

(d) The fee base under the Construction Management Contracts Schedule for a maximum basic fee determination for a construction management contract shall be comprised of only the costs of the construction manager's own efforts. However, it is recognized that in the case of construction management contracts, the actual construction work will be performed by subcontractors. In most cases the subcontract awards for the construction work will be made by the construction management contractor. Occasionally the contract may involve management of construction performed under a contract awarded by the Department or by

one of the Department's operating contractors. In these cases, the actual cost of the subcontracted construction work shall be excluded from the fee base used to determine the maximum basic fee (under the Construction Management Contracts Schedule) applicable to a construction management contract. A separate fee base for additional allowances (using the Special Equipment Purchases or Subcontract Work Schedule) shall be established, which shall be comprised of those subcontract construction costs, special equipment purchases, and other items' costs that are contracted for or purchased by the construction manager.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36364, July 22, 2009]

915.404–4–72 Special considerations for cost-plus-award-fee contracts.

(a) When a contract is to be awarded on a cost-plus-award-fee basis several special considerations are appropriate. Fee objectives for management and operating contracts or other contracts as determined by the Senior Procurement Executive, including those using the Construction, Construction Management, or Special Equipment Purchases/Subcontract Work schedules from 915.404–4–71–5, shall be developed pursuant to the procedures set forth in 970.15404–4–8. Fee objectives for other cost-plus-award-fee contracts shall be in accordance with 916.405–2 and be developed as follows:

(1) The base fee portion of the fee objective of an award fee contract may range from 0% up to the 50% level of the fee amount for a Cost-Plus-Fixed-Fee (CPFF) contract, arrived at by using the weighted guidelines or other techniques (such as those provided in 915.404–4–71 for construction and construction management contracts). However, the base amount should not normally exceed 50% of the otherwise applicable fixed fee. In the event this 50% limit is exceeded, appropriate documentation shall be entered into the contract file. In no event shall the base fee exceed 60% of the fixed fee amount.

(2) The base fee plus the amount included in the award fee pool should normally not exceed the fixed fee (as subjectively determined or as developed from the fee schedule) by more than 50%. However, in the event the base fee is to be less than 50% of the fixed fee, the maximum potential award fee may be increased proportionately with the decreases in base fee amounts.

(3) The following maximum potential award fees shall apply in award fee contracts: (percent is stated as percent of fee schedule amounts).

Base fee percent	Award fee percent	Maximum total percentage
50	100	150
40	120	160
30	140	170
20	160	180
10	180	190
0	200	200

(b) Prior approval of the Senior Procurement Executive, is required for total fee (base plus award fee pool) exceeding the guidelines in 915.404–4–72(a)(3).

[63 FR 56851, Oct. 23, 1998, as amended at 64 FR 12229, Mar. 11, 1999; 74 FR 36364, 36378, July 22, 2009; 76 FR 7693, Feb. 11, 2011]

915.408 Solicitation provisions and contract clauses.

915.408–70 Key personnel clause.

The contracting officer (after deleting ''under the clause at 970.5203–3, Contractor's Organization'' from paragraph (a) if not a management and operating contract) shall insert the clause at 952.215–70, Key Personnel, in contracts under which performance is largely dependent on the expertise of specific key personnel.

[65 FR 81006, Dec. 22, 2000, as amended at 74 FR 36364, July 22, 2009]

Subpart 915.6—Unsolicited Proposals

915.602 Policy.

(a) Present and future needs demand the involvement of all resources in exploring alternative energy sources and technologies. To achieve this objective, it is DOE policy to encourage external sources of unique and innovative methods, approaches, and ideas by stressing submission of unsolicited proposals for government support. In furtherance of this policy and to ensure the integrity

of the acquisition process through application of reasonable controls, the DOE:

(1) Disseminates information on areas of broad technical concern whose solutions are considered relevant to the accomplishment of DOE's assigned mission areas;

(2) Encourages potential proposers to consult with program personnel before expending resources in the development of written unsolicited proposals;

(3) Endeavors to distribute unsolicited proposals to all interested organizations within DOE;

(4) Processes unsolicited proposals in an expeditious manner and, where practicable, keeps proposers advised as discrete decisions are made;

(5) Assures that each proposal is evaluated in a fair and objective manner; and, (6) Assures that each proposal will be used only for its intended purpose and the information, subject to applicable laws and regulations, contained therein will not be divulged without prior permission of the proposer.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36364, July 22, 2009]

915.603 General.

(f) Unsolicited proposals for the performance of support services are, except as discussed in this paragraph, unacceptable as the performance of such services is unlikely to necessitate innovative and unique concepts. There may be rare instances in which an unsolicited proposal offers an innovative and unique approach to the accomplishment of a support service. If such a proposal offers a previously unknown or an alternative approach to generally recognized techniques for the accomplishment of a specific service(s) and such approach will provide significantly greater economy or enhanced quality, it may be considered for acceptance. Such acceptance shall, however, require approval of the acquisition of support services in accordance with applicable DOE Directives and be processed as a deviation to the prohibition in this paragraph.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36364, July 22, 2009]

915.605 Content of unsolicited proposals.

(b)(5) Unsolicited proposals for nonnuclear energy demonstration activities not covered by existing formal competitive solicitations or program opportunity notices may include a request for federal assistance or participation, and shall be subject to the cost sharing provisions of subpart 917.70.

[63 FR 56851, Oct. 23, 1998, as amended at 74 FR 36364, July 22, 2009]

915.606 Agency procedures.

(b) Unless otherwise specified in a notice of program interest, all unsolicited proposals should be submitted to the Unsolicited Proposal Manager, U.S. Department of Energy, National Energy Technology Laboratory P.O. Box 10940, MS 921–107, Pittsburgh, PA 15236–0940. If the proposer has ascertained the cognizant program office through preliminary contacts with program staff, the proposal may be submitted directly to that office. In such instances, the proposer should separately send a copy of the proposal cover letter to the unsolicited proposal coordinator to assure that the proposal is logged in the Department's automated tracking system for unsolicited proposals.

[63 FR 56851, Oct. 23, 1998, as amended at 67 FR 14871, Mar. 28, 2002; 74 FR 36364, July 22, 2009]

915.607 Criteria for acceptance and negotiation of an unsolicited proposal.

(c) DOE's cost participation policy, at subpart 917.70, shall be followed in determining the extent to which the DOE will participate in the cost for the proposed effort.

[74 FR 36364, July 22, 2009]

PART 916—TYPES OF CONTRACTS

Subpart 916.2—Fixed-Price Contracts

Sec.

916.203 Fixed-price contracts with economic price adjustments.
916.203–4 Contract clauses.

Subpart 916.3—Cost-Reimbursement Contracts

916.306 Cost-plus-fixed-fee contracts.

916.307 Contract clauses.

Subpart 916.4—Incentive Contracts

916.405 Cost-reimbursement incentive contracts.
916.405–2 Cost-plus-award-fee contracts.

Subpart 916.5—Indefinite-Delivery Contracts

916.504 Indefinite-quantity contracts.
916.505 Ordering.

Subpart 916.6—Time and Materials, Labor Hour, and Letter Contracts

916.601 [Reserved]

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11972, Mar. 28, 1984, unless otherwise noted.

Subpart 916.2—Fixed-Price Contracts

916.203 Fixed-price contracts with economic price adjustments.

916.203–4 Contract clauses.

(d)(2) The Head of the Contracting Activity, or designee, for contracts estimated to be within the limits of their delegated authority, may approve the use of an economic price adjustment clause when appropriate in accordance with 48 CFR 16.203–4.

[49 FR 11955, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994; 76 FR 7693, Feb. 11, 2011]

Subpart 916.3—Cost-Reimbursement Contracts

916.306 Cost-plus-fixed-fee contracts.

(c)(2) The Head of the Contracting Activity, or designee, for contracts estimated to be within their delegated authority, may approve (sign) the determination and findings establishing the basis for application of the statutory price or fee limitations.

[49 FR 11955, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

916.307 Contract clauses.

(a) When contracting with a commercial organization, modify paragraph (a) of the clause at 48 CFR 52.216–7 by adding the phrase ''as supplemented by subpart 931.2 of the DEAR'' after ''FAR subpart 31.2.''

(g) Insert the clause at 48 CFR 52.216–15, Predetermined Indirect Cost Rates, modified as specified in 952.216–15 in solicitations and contracts when a cost-reimbursement research and development contract with a State or local government is contemplated and predetermined indirect cost rates are to be used.

[49 FR 11972, Mar. 28, 1984, as amended at 74 FR 36364, July 22, 2009; 76 FR 7693, Feb. 11, 2011]

Subpart 916.4—Incentive Contracts

916.405 Cost-reimbursement incentive contracts.

916.405–2 Cost-plus-award-fee contracts.

(d) *Fee determination plans.* Award fee arrangements limited to technical performance considerations are prohibited because they may increase cost disproportionately to any benefits gained. Instead, the award fee arrangement shall include both technical performance (including scheduling as appropriate) and business management considerations tailored to the needs of the particular situation. In addition, in a situation where cost estimating reliability and other factors are such that the negotiation of a separate predetermined incentive sharing arrangement applicable to cost performance is determined both feasible and advantageous, cost incentives may be added. The resulting contract would then be identified as a cost-plus-incentive-fee/award-fee combination type. The goals and evaluation criteria should be results-oriented. The award fee should be concentrated on the end product of the contract, that is, output, be it hardware, research and development, demonstration or services, together with business management considerations. However, input criteria such as equal employment opportunity, small business programs, functional management areas, such as safety, security, etc., should not be disregarded and may be appropriate criteria upon which to base some part of the award fee. Specific goals or objectives shall be established

in relation to each performance evaluation criterion against which contractor performance is measured.

[49 FR 11955, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994. Redesignated at 74 FR 36364, July 22, 2009]

Subpart 916.5—Indefinite-Delivery Contracts

916.504 Indefinite-quantity contracts.

(c) The contracting officer shall establish minimum ordering guarantees with each awardee for all indefinite-quantity, multiple award contracts to ensure that adequate consideration exists to contractually bind each awardee to participate in the ordering process throughout the term of the multiple award contract. Minimum ordering guarantees should be equal among all awardees, and shall be determined on a case-by-case basis for each acquisition commensurate with the size, scope and complexity of the contract requirements.

[62 FR 53757, Oct. 16, 1997]

916.505 Ordering.

(b)(6)(i) The Director, Office of Contract Management, Office of Procurement and Assistance Management, is designated as the DOE Ombudsman for task and delivery order contracts in accordance with 48 CFR 16.505(b)(6).

(ii) The Heads of Contracting Activities shall designate a senior manager to serve as the Contracting Activity Ombudsman for task and delivery order contracts. If, for any reason, the Contracting Activity Ombudsman is unable to execute the duties of the position, the Head of the Contracting Activity shall designate an Acting Contracting Activity Ombudsman.

(iii) The Contracting Activity Ombudsman shall—

(A) Be independent of the contracting officer who awarded and/or is administering the contract under which a complaint is submitted;

(B) Not assume any duties and responsibilities pertaining to the evaluation or selection of an awardee for the issuance of an order under a multiple award, task or delivery order contract;

(C) Review complaints from contractors awarded a task or delivery order contract;

(D) Collect all facts from the cognizant organizations or individuals that are relevant to a complaint submitted to ensure that the complainant and all contractors were afforded a fair opportunity to be considered for the order issued in accordance with the procedures set forth in each awardees' contract;

(E) Maintain a written log to track each complaint submitted from receipt through disposition;

(F) Ensure that no information is released which is determined to be proprietary or is designated as source selection information; and

(G) Resolve complaints at the contracting activity for which they have cognizance.

(iv) If, upon review of all relevant information, the Contracting Activity Ombudsman determines that corrective action should be taken, the Contracting Activity Ombudsman shall report the determination to the cognizant contracting officer. Issues which cannot be so resolved should be forwarded to the DOE Ombudsman.

[74 FR 36364, July 22, 2009, as amended at 81 FR 45977, July 15, 2016]

Subpart 916.6—Time and Materials, Labor Hour, and Letter Contracts

916.601 [Reserved]

PART 917—SPECIAL CONTRACTING METHODS

Subpart 917.6—Management and Operating Contracts

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917.601 Definitions.
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Subpart 917.70—Cost Participation

917.7000 Scope of subpart.
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Subpart 917.72—Program Opportunity Notices for Commercial Demonstrations

917.7200 Scope of subpart.
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Subpart 917.74—Acquisition, Use, and Disposal of Real Estate

917.7401 General.
917.7402 Policy.
917.7403 Contract clause.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11974, Mar. 28, 1984, unless otherwise noted.

Subpart 917.6—Management and Operating Contracts

917.600 Scope of subpart.

(a) This subpart implements 48 CFR subpart 17.6, Management and Operating Contracts. Departmental policies, procedures, provisions and clauses to be used in the award and administration of management and operating contracts that either implement or supplement the Federal Acquisition Regulation and parts 901 through 952 of this chapter are contained in part 970.

(b) The requirements of this subpart apply to any Department of Energy management and operating contract, including performance-based management contracts as defined in 917.601. References in this subpart to ''management and operating contracts'' include performance-based management contracts.

[65 FR 81006, Dec. 22, 2000, as amended at 74 FR 36364, July 22, 2009]

917.601 Definitions.

Performance-based contracting has the meaning contained in 48 CFR 37.101.

Performance-based management contract means a management and operating contract that employs, to the maximum extent practicable, performance-based contracting concepts and methodologies through the application of results-oriented statements of work; clear objective performance standards and measurement tools; and incentives to encourage superior contractor performance.

[62 FR 34861, June 27, 1997, as amended at 65 FR 81006, Dec. 22, 2000]

917.602 Policy.

(a) The use of a management and operating contract must be authorized by the Secretary.

(b) It is the policy of the Department of Energy to provide for full and open competition in the award of management and operating contracts, including performance-based management contracts.

(c) A management and operating contract may be awarded or extended at the completion of its term without providing for full and open competition only when such award or extension is justified under one of the statutory authorities identified in 48 CFR 6.302 and only when authorized by the Secretary. Documentation and processing requirements for justifications for the use of other than full and open competition shall be accomplished in accordance with internal agency procedures

[65 FR 81006, Dec. 22, 2000, as amended at 67 FR 14871, Mar. 28, 2002; 76 FR 7693, Feb. 11, 2011; 81 FR 45977, July 15, 2016]

Subpart 917.70—Cost Participation

SOURCE: 61 FR 41706, Aug. 9, 1996, unless otherwise noted.

917.7000 Scope of subpart.

(a) This subpart sets forth the DOE policy on cost participation by organizations performing research, development, and/or demonstration projects under DOE prime contracts. This subpart does not cover efforts and projects performed for DOE by other Federal agencies.

(b) Cost participation is a generic term denoting any situation where the Government does not fully reimburse the performer for all allowable costs necessary to accomplish the project or effort under the contract. The term encompasses cost sharing, cost matching, cost limitation (direct or indirect), participation in kind, and similar concepts.

917.7001 Policy.

(a) When DOE supports performer research, development, and/or demonstration efforts, where the principal purpose is ultimate commercialization and utilization of the technologies by the private sector, and when there are reasonable expectations that the performer will receive present or future economic benefits beyond the instant contract as a result of performance of the effort, it is DOE policy to obtain cost participation. Full funding may be provided for early phases of development programs when the technological problems are still great.

(b) In making the determination to obtain cost participation, and evaluating present and future economic benefits to the performer, DOE will consider the technical feasibility, projected economic viability, societal and political acceptability of commercial application, as well as possible effects of other DOE-supported projects in competing technologies.

(c) The propriety, manner, and amount of cost participation must be decided on a case-by-case basis.

(d) Cost participation is required for demonstration projects unless exempted by the Under Secretary. Demonstration projects, pursuant to this subpart, include demonstrations of technological advances and field demonstrations of new methods and procedures, and demonstrations of prototype commercial applications for the exploration, development, production, transportation, conversion, and utilization of energy resources.

Subpart 917.72—Program Opportunity Notices for Commercial Demonstrations

SOURCE: 61 FR 41706, Aug. 9, 1996, unless otherwise noted.

917.7200 Scope of subpart.

(a) This subpart discusses the policy for the use of a program opportunity notice solicitation approach to accelerate the demonstration of the technical feasibility and commercial application of all potentially beneficial nonnuclear energy sources and utilization technologies.

(b) This subpart applies to demonstrations performed by individuals, educational institutions, commercial or industrial organizations, or other private entities, public entities, including State and local governments, but not other Federal agencies. For purposes of this subpart, commercial demonstration projects include demonstrations of technological advances, field demonstrations of new methods and procedures, and demonstration of prototype commercial applications for the exploration, development, production, transportation, conversion, and utilization of non-nuclear energy resources.

[61 FR 41706, Aug. 9, 1996, as amended at 74 FR 36365, July 22, 2009; 76 FR 7693, Feb. 11, 2011]

917.7201 Policy.

917.7201–1 General.

(a) It is DOE's intent to encourage the submission of proposals to accelerate the demonstration of the technical, operational, economic, and commercial feasibility and environmental acceptability of particular energy technologies, systems, subsystems, and components. Program opportunity notices will be used to provide information concerning scientific and technological areas encompassed by DOE's programs. DOE shall, from time to time, issue program opportunity notices for proposals for demonstrations of various forms of non-nuclear energy and technology utilization.

(b) Each program opportunity notice shall as a minimum describe: the goal of the intended demonstration effort; the time schedule for award; evaluation criteria; program policy factors; the amount of cost detail required; and proposal submission information. Program policy factors are those factors which, while not appropriate indicators of a proposal's individual merit (i.e., technical excellence, proposer's ability, cost, etc.), are relevant and essential to the process of choosing which of the proposals received will, taken together, best achieve the program objectives. All such factors shall be predetermined and specified in the notice so as to notify proposers that factors which are essentially beyond their control will affect the selection process.

Subpart 917.73—Program Research and Development Announcements

SOURCE: 61 FR 41707, Aug. 9, 1996, unless otherwise noted.

917.7300 Scope of subpart.

(a) This subpart discusses the policy for the use of a program research and development announcement (PRDA) solicitation approach to obtain and select proposals from the private sector for the conduct of research, development, and related activities in the energy field.

917.7301 Policy.

917.7301–1 General.

(a) PRDAs shall be used to provide potential proposers with information concerning DOE's interest in entering into arrangements for research, development, and related projects in specified areas of interest. It is DOE's intent to solicit the submission of ideas which will serve as a basis for research, development, and related activities in the energy field. It is DOE's desire to encourage the involvement of small business concerns, small disadvantage business concerns, and women-owned small business concerns in research and development undertaken pursuant to PRDAs.

(b) The PRDA should not replace existing acquisition procedures where a requirement can be sufficiently defined for solicitation under standard advertised or negotiated acquisition procedures. Similarly, it should not inhibit or curtail the submission of unsolicited proposals. However, a proposal which is submitted as though it were unsolicited but is in fact germane to an existing PRDA shall be treated as though submitted in response to the announcement or returned without action to the proposer, at the proposer's option. Further, the PRDA is not to be used in a competitive situation where it is appropriate to negotiate a study contract to obtain analysis and recommendations to be incorporated in the subsequent request for proposals.

[61 FR 41707, Aug. 9, 1996, as amended at 76 FR 7693, Feb. 11, 2011]

Subpart 917.74—Acquisition, Use, and Disposal of Real Estate

SOURCE: 61 FR 41707, Aug. 9, 1996, unless otherwise noted.

917.7401 General.

The acquisition of real estate requires the involvement of a DOE Certified Realty Specialist, as specified at 917.7402. Special circumstances and situations may arise under cost-type contracts when, in the performance of the contract or subcontract, the performer shall be required, or otherwise find it necessary, to acquire real estate or interests therein by:

(a) Purchase, on DOE's behalf or in its own name, with title eventually vesting in the Government.

(b) Lease for which DOE will reimburse the contractor for the pre-approved costs incurred under the lease.

(c) Acquisition of temporary interest through easement, license or permit, and DOE funds the cost of the temporary interest.

[61 FR 41707, Aug. 9, 1996, as amended at 76 FR 7693, Feb. 11, 2011]

917.7402 Policy.

It is the policy of the Department of Energy that, when real estate acquisitions are made, the following policies and procedures shall be applied to such acquisitions—

(a) Real estate acquisitions shall be mission essential; effectively, economically, and efficiently managed and utilized; and disposed of promptly, when not needed;

(b) Acquisitions shall be justified, with documentation which describes the need for the acquisitions, general requirements, cost, acquisition option considerations with the best acquisition method to be used, site investigation reports, site recommended for selection, property appraisal reports, and include the review and approval by the applicable DOE Certified Realty Specialist in accordance with DOE Order 430.1B, or its successor version; and

(c) Acquisition by lease, in addition to the requirements in paragraphs (a) and (b) of this section:

(1) Shall not exceed a one-year term if funded by one-year appropriations.

(2) May exceed a one-year term, when the lease is for special purpose space funded by no-year appropriations and approved by a DOE Certified Realty Specialist.

(3) Shall contain an appropriate cancellation clause which limits the Government's obligation to no more than the amount of rent to the earliest cancellation date plus a reasonable cancellation payment.

(4) Shall be consistent with Government laws, regulations, and the DOE Order 430.1B, or its successor version, applicable to real estate acquisition.

(d) Any real property actions require the involvement of the applicable DOE Certified Realty Specialist.

[61 FR 41707, Aug. 9, 1996, as amended at 76 FR 7693, Feb. 11, 2011]

917.7403 Contract clause.

The clause at 952.217–70, Acquisition of Real Property, shall be included in contracts including modifications where contractor acquisitions of real property are expected to be made.

[76 FR 7693, Feb. 11, 2011]

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 919—SMALL BUSINESS PROGRAMS

Subpart 919.2—Policies

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919.201 General policy.

Subpart 919.5—Set-Asides for Small Business

919.501 General.
919.502 Setting aside acquisitions.
919.502–2 Total small business set-asides.
919.503 Setting aside a class of acquisitions for small business.

Subpart 919.6—Certificates of Competency and Determinations of Eligibility

919.602–1 Referral.

Subpart 919.7—The Small Business Subcontracting Program

919.705–6 Postaward responsibilities of the contracting officer.

Subpart 919.8—Contracting With the Small Business Administration (The 8(a) Program)

919.805–2 Procedures.

Subpart 919.70—The Department of Energy Mentor-Protege Program

919.7001 Scope of subpart.
919.7002 Definitions.
919.7003 General policy.
919.7004 General prohibitions.
919.7005 Eligibility to be a Mentor.
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919.7007 Eligibility to be a Protege.
919.7008 Selection of Proteges.
919.7009 Process for participation in the program.
919.7010 Contents of Mentor-Protege Agreement.
919.7011 Developmental assistance.
919.7012 Review and approval process of agreement by OSDBU.
919.7013 Reports.
919.7014 Solicitation provision.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11997, Mar. 28, 1984, unless otherwise noted.

Subpart 919.2—Policies

919.201 General policy.

(c) The Director, Office of Small and Disadvantaged Business Utilization, Headquarters, is responsible for the administration of the Department of Energy (DOE) small, small disadvantaged, and women-owned small business programs. The Executive Director, Federal Energy Regulatory Commission, is responsible for the administration of the Commission's small, small disadvantaged, and women-owned small business programs. This includes responsibility for developing, implementing, executing, and managing these programs, providing advice on these programs, and representing DOE before other Government agencies on matters primarily affecting small, small disadvantaged, and women-owned small businesses. The Heads of Contracting Activities (HCAs) shall appoint a small business specialist.

[50 FR 12185, Mar. 27, 1985, as amended at 59 FR 9106, Feb. 25, 1994; 61 FR 21976, May 13, 1996; 75 FR 69012, Nov. 10, 2010]

Subpart 919.5—Set-Asides for Small Business

919.501 General.

(c) The Department has established an internal comprehensive review and screening process for acquisitions exceeding the simplified acquisition threshold. The review is intended to enhance the prospect of participation by small business, small disadvantaged business, and women-owned small business concerns.

(g) The policy prescribed by 48 CFR 19.501, which requires that a product or service acquired by a successful small business set-aside shall continue to be acquired on a set-aside basis, is applicable to DOE on a contracting activity-wide basis. The small and disadvantaged business specialist at a contracting activity shall maintain a list

of such small business set-aside awards.

[52 FR 38425, Oct. 16, 1987, as amended at 59 FR 9106, Feb. 25, 1994; 61 FR 21977, May 13, 1996; 75 FR 69012, Nov. 10, 2010]

919.502 Setting aside acquisitions.

919.502–2 Total small business set-asides.

In considering set-asides in the area of architect engineer contracts, contracting personnel must first consider the special procedures required by the Brooks Act, Pub. L. 92–582 pertaining to this type acquisition.

919.503 Setting aside a class of acquisitions for small business.

By agreement with Small Business Administration (SBA), the DOE has established a class set-aside for construction acquisitions not exceeding $3 million, including new construction and repair and alteration of structures. Lists of other class set-asides shall be maintained by all DOE contracting offices. These lists shall be updated at least annually.

[49 FR 11997, Mar. 28, 1984, as amended at 75 FR 69012, Nov. 10, 2010]

Subpart 919.6—Certificates of Competency and Determinations of Eligibility

919.602–1 Referral.

(a)(2) The contracting officer shall coordinate with the small business specialist and the SBA procurement center representative prior to referring a determination of nonresponsibility of a small business to the SBA Area Office.

[52 FR 38425, Oct. 16, 1987, as amended at 61 FR 21977, May 13, 1996; 63 FR 56860, Oct. 23, 1998]

Subpart 919.7—The Small Business Subcontracting Program

919.705–6 Postaward responsibilities of the contracting officer.

A copy of the notification to the SBA of awards of contracts, amendments or modifications that contain subcontracting plans, as required by 48 CFR 19.705–6(a), shall be provided to the Office of Small and Disadvantaged Business Utilization.

[49 FR 11997, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994; 75 FR 69012, Nov. 10, 2010]

Subpart 919.8—Contracting With the Small Business Administration (The 8(a) Program)

919.805–2 Procedures.

Acquisitions involving section 8(a) competition must comply with source selection procedures set forth in 48 CFR chapter 1 in accordance with 13 CFR part 124.

[63 FR 56860, Oct. 23, 1998, as amended at 75 FR 69012, Nov. 10, 2010]

Subpart 919.70—The Department of Energy Mentor-Protege Program

SOURCE: 65 FR 21369, Apr. 21, 2000, unless otherwise noted.

919.7001 Scope of subpart.

The Department of Energy (DOE) Mentor-Protege Program is designed to encourage DOE prime contractors to assist small disadvantaged firms certified by the Small Business Administration (SBA) under Section 8(a) of the Small Business Act (8(a)), other small disadvantaged businesses, women-owned small businesses, Historically Black Colleges and Universities, and other minority institutions of higher learning, and small business concerns owned and controlled by service disabled veterans in enhancing their capabilities to perform contracts and subcontracts for DOE and other Federal agencies. The program seeks to foster long-term business relationships between these small business entities and DOE prime contractors, and to increase the overall number of these small business entities that receive DOE contract and subcontract awards.

919.7002 Definitions.

Historically Black Colleges and Universities (HBCUs) means an institution determined by the Secretary of Education to meet the requirements of 34 CFR 608.2.

Other minority institutions of higher learning means an institution determined by the Secretary of Education to meet the requirements of 20 U.S.C. 1067k.

Small business concern owned and controlled by service-disabled veterans means a small business concern as defined in Public Law 106–50, Veterans Entrepreneurship and Small Business Development Act of 1999.

Small disadvantaged business means a small business concern owned and controlled by socially and economically disadvantaged individuals that meets the requirements of 13 CFR part 124, subpart B.

Women-owned small business means a small business concern that meets the requirements of 15 U.S.C. 637(d)(3)(D).

919.7003 General policy.

(a) DOE contractors eligible under 48 CFR 919.7005 may enter into agreements with businesses certified by the SBA in the 8(a) Program, other small disadvantaged businesses, women-owned small businesses, HBCUs, other minority institutions of higher learning, and small business concerns owned and controlled by service disabled veterans to provide those firms appropriate developmental assistance to enhance the capabilities of Proteges.

(b) Costs incurred by a Mentor to provide developmental assistance, as described in 919.7011, are allowable only to the extent that they are incurred in performance of a contract identified in the Mentor-Protege Agreement and are otherwise allowable in accordance with the cost principles applicable to that contract.

(c) Headquarters Office of Small and Disadvantaged Business Utilization (OSDBU) is the DOE Program Manager for the Mentor-Protege Program.

919.7004 General prohibitions.

DOE will not reimburse the costs of a Mentor in providing any form of developmental assistance to a Protege except as provided in 919.7003(b).

919.7005 Eligibility to be a Mentor.

To be eligible for recognition by DOE as a Mentor, an entity must be performing at least one contract for DOE.

919.7006 Incentives for DOE contractor participation.

(a) Under cost-plus-award fee contracts, approved Mentor firms may earn award fees associated with their performance as a Mentor. The award fee plan may include provision for the evaluation of the contractor's utilization of 8(a) firms, other small disadvantaged businesses, women-owned small businesses, HBCUs, other minority institutions of higher learning and small business concerns owned and controlled by service disabled veterans. DOE may evaluate the Mentor's performance in the DOE Mentor-Protege Program under any Mentor-Protege Agreement(s) as a separate element of the award fee plan.

(b) Mentors shall receive credit for subcontracts awarded pursuant to their Mentor-Protege Agreements toward subcontracting goals contained in their subcontracting plan.

919.7007 Eligibility to be a Protege.

(a) To be eligible for selection as a Protege, a firm must—

(1) Be a small business certified under Section 8(a) of the Small Business Act by SBA, other small disadvantaged business, a women-owned small business, HBCU, or any other minority institution of higher learning, or a small business concern owned and controlled by service disabled veterans;

(2) Be eligible for receipt of government contracts;

(3) Have been in business for at least two (2) years prior to application for enrollment into the Mentor-Protege Program; and

(4) Be able to certify as a small business according to the Standard Industrial Code for the services or supplies to be provided by the Protege under its subcontract with the Mentor.

(b) A prospective Mentor may rely in good faith on written representations by a prospective Protege that the Protege meets the requirements in paragraph (a) of this section.

[49 FR 11997, Mar. 28, 1984, as amended at 75 FR 69012, Nov. 10, 2010]

919.7008 Selection of Proteges.

(a) A Mentor firm is solely responsible for selecting one or more Protege

entities from firms eligible under 919.7007.

(b) A Mentor may have more than one Protege; however, a Protege may have only one Mentor.

(c) The selection of Protege firms by Mentor firms may not be protested, except as provided in paragraph (d) of this section.

(d) Only protests regarding the small business size status of a firm to be a Protege will be considered and shall be submitted to the DOE Office of Small and Disadvantaged Business Utilization for resolution. If that office is unable to resolve a protest, it will refer the matter to the Small Business Administration for resolution in accordance with 13 CFR part 121.

[49 FR 11997, Mar. 28, 1984, as amended at 75 FR 69012, Nov. 10, 2010]

919.7009 Process for participation in the program.

A prospective Mentor must submit the following to the DOE Mentor-Protege Program Manager—

(a) A statement that it is eligible, as of the date of application, for the award of Federal contracts;

(b) A statement that it is currently performing at least one contract for DOE;

(c) The DOE contract number, type of contract, period of performance (including options), title of technical program effort, name of DOE technical program manager (including contact information) and the DOE contracting activity; and

(d) An original and two copies of the Mentor-Protege Agreement signed by the chief executive officer or designee of the Mentor firm and the chief executive officer of the Protege firm.

[49 FR 11997, Mar. 28, 1984, as amended at 75 FR 69012, Nov. 10, 2010]

919.7010 Contents of Mentor-Protege Agreement.

The proposed Mentor-Protege Agreement must contain—

(a) Names, addresses and telephone numbers of Mentor and Protege firms and a point of contact within each firm who will oversee the Agreement;

(b) Requirements for the Mentor firm or the Protege firm to notify the other entity, DOE Headquarters OSDBU, and the contracting officer in writing at least 30 days in advance of the Mentor firm's or the Protege firm's intent to voluntarily terminate or withdraw from the Mentor-Protege Agreement (such termination would not terminate any existing subcontract between the Mentor and the Protege);

(c) A description of the form of developmental assistance program that will be provided by the Mentor to the Protege firm, including a description of any subcontract work, and a schedule for providing the assistance and the criteria for evaluation of the Protege's developmental success (919.7011);

(d) A listing of the number and types and estimated amount of subcontracts to be awarded to the Protege firm;

(e) Term of the Agreement;

(f) Procedures to be invoked should DOE terminate its recognition of the Agreement for good cause (such termination of DOE recognition would not constitute a termination of the subcontract between the Mentor and the Protege);

(g) Provision for the Mentor firm to submit to the DOE Mentor-Protege Program Manager a ''lessons learned'' evaluation developed by the Mentor at the conclusion of the Mentor-Protege Agreement;

(h) Provision for the submission by the Protege firm of a ''lessons learned'' evaluation to the DOE Mentor-Protege Program Manager at the conclusion of the Mentor-Protege Agreement;

(i) Description of how the development assistance will potentially increase subcontracting opportunities for the Protege firm;

(j) Provision for the Mentor firm to brief the DOE Mentor-Protege Program Manager, the technical program manager(s), and the contracting officer at the conclusion of each year in the Mentor-Protege Program regarding program accomplishments as pertains to the approved Agreement (where possible, this review may be incorporated into the normal program review for the Mentor's contract);

(k) Recognition that costs incurred by a Mentor to provide developmental assistance, as described in 919.7011, are allowable only to the extent that they are incurred in performance of a contract identified in the Mentor-Protege

Agreement and are otherwise allowable in accordance with the cost principles applicable to that contract (the DOE Mentor-Protege Program has no appropriation for paying for developmental assistance); and

(l) Other terms and conditions, as appropriate.

[49 FR 11997, Mar. 28, 1984, as amended at 75 FR 69012, Nov. 10, 2010]

919.7011 Developmental assistance.

(a) The forms of developmental assistance a Mentor may provide to a Protege include, but are not limited to—

(1) Management guidance relating to—

(i) Financial management,

(ii) Organizational management,

(iii) Overall business management planning,

(iv) Business development, and

(v) Marketing assistance;

(2) Engineering and other technical assistance;

(3) Noncompetitive award of subcontracts under DOE or other Federal contracts where otherwise authorized;

(4) Award of subcontracts in the Mentor's commercial activities;

(5) Progress payments based on costs;

(6) Rent-free use of facilities and/or equipment owned or leased by Mentor; and

(7) Temporary assignment of Mentor personnel to the Protege for purposes of training.

(b) Costs incurred by a Mentor to provide developmental assistance, as described in paragraph (a) of this section, are allowable only to the extent provided at 919.7003(b).

[49 FR 11997, Mar. 28, 1984, as amended at 75 FR 69012, Nov. 10, 2010]

919.7012 Review and approval process of agreement by OSDBU.

(a) OSDBU will review the proposed Mentor-Protege Agreement under 919.7010 and will complete its review and assessment no later than 30 days after receipt. OSDBU will provide a copy of its assessment to the cognizant DOE technical program manager and contracting officer for review and concurrence.

(b) If OSDBU approves the Agreement, the Mentor may implement the developmental assistance program.

(c) Upon finding deficiencies that DOE considers correctable, the OSDBU will notify the Mentor and request information to be provided within 30 days that may correct the deficiencies. The Mentor may then provide additional information for reconsideration. The review of any supplemental material will be completed within 30 days after receipt by the OSDBU and the Agreement either approved or disapproved.

[49 FR 11997, Mar. 28, 1984, as amended at 75 FR 69012, Nov. 10, 2010]

919.7013 Reports.

(a) Prior to performing an evaluation of a Mentor's performance under its Mentor-Protege Agreement for use in award fee evaluations, the Mentor-Protege Program Manager must consult with the cognizant DOE technical program manager and must provide a copy of the performance evaluation comments regarding the technical effort and Mentor-Protege development to the contracting officer.

(b) The DOE Mentor-Protege Program Manager must submit semi-annual reports to the cognizant contracting officer regarding the participating Mentor's performance in the Program for use in the award fee determination process.

(c) The Mentor firm must submit progress reports to the DOE Mentor-Protege Program Manager semi-annually.

919.7014 Solicitation provision.

The cognizant contracting officer must insert the provision at 952.219–70, DOE Mentor-Protege Program, in all solicitations with an estimated value in excess of the simplified acquisition threshold.

PART 922—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION

Subpart 922.1—Basic Labor Policies

Sec.

922.103 Overtime.
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Subpart 922.6 [Reserved]

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AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11998, Mar. 28, 1984, unless otherwise noted.

Subpart 922.1—Basic Labor Policies

922.103 Overtime.

922.103–4 Approvals.

(d)(1) Where the cost to the Government may be affected, approval of hours of work in excess of the normal workweek is justified only in those instances and for those employees where it can be shown that overtime would provide needed and demonstrable impetus to the accomplishment of Department of Energy (DOE) objectives and that all other means of meeting these objectives have been considered and found inadequate or not feasible. Accordingly, the Heads of Contracting Activities shall—

(i) Establish controls to prevent excess casual overtime and to assure that such overtime work is in the best interest of the Government. Casual overtime means—

(A) Work in excess of the normal workweek (or in excess of an authorized extended workweek) which cannot be regularly scheduled in advance; or

(B) Regularly scheduled work in excess of the normal workweek for a period of four consecutive weeks or less; and

(ii) Establish controls to assure that any use of any extended workweek schedule is in the best interest of the Government. Extended workweek means a workweek regularly scheduled and established in excess of the normal workweek for a period in excess of four consecutive weeks.

[49 FR 11998, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994; 74 FR 36365, July 22, 2009]

922.103–5 Contract clauses.

In accordance with 48 CFR 22.101–1(e) and 48 CFR 22.103–5, the contracting officer shall insert the clause at 48 CFR 52.222–1, Notice to the Government of Labor Disputes, in all solicitations and contracts for protective services at DOE owned facilities requiring continuity of services for public safety and national security reasons. The contracting officer may insert this clause in other solicitations and contracts where a significant need for continuity in contract performance exists. See subpart 937.70, Protective Services Contracting, for additional policy guidance regarding protective services.

[58 FR 36151, July 6, 1993, as amended at 74 FR 36365, July 22, 2009; 75 FR 69012, Nov. 10, 2010]

Subpart 922.6 [Reserved]

Subpart 922.8—Equal Employment Opportunity

922.800 Scope of subpart.

This subpart implements 48 CFR part 22, subpart 22.8. It applies to all DOE contracts and subcontracts.

[49 FR 11998, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994; 75 FR 69012, Nov. 10, 2010]

922.802 [Reserved]

922.803 Responsibilities.

(a) The Director, Office of Federal Contract Compliance Programs of the Department of Labor has been delegated authority and responsibility for carrying out the requirements of Executive Order 11246, as amended. In conjunction with the delegation, contracting officers shall be familiar with existing and any updated provisions of 41 CFR Ch. 60, and assist the Department of Labor in its compliance responsibilities. DOE contracting officers

will include the applicable Equal Employment Opportunity (EEO)) and Affirmative Action Program (AAP) requirements in their solicitations and obtain the applicable reports of compliance from the Office of Federal Contract Compliance Programs (OFCCP) (when required) prior to awarding of contracts. The provisions of 41 CFR Ch. 60, are applicable to all DOE contracts.

(d) The OFCCP requires that requests for pre-award clearances be directed to the OFCCP Regional Office in which the contractor's facility is (to be) located. If OFCCP finds the contractor in compliance, the contracting officer will be notified. Findings of non-compliance can be communicated to the contracting officer by the OFCCP or Headquarters Director or his designee. The appropriate Regional Office will provide the appropriate contact point in cases of non-compliance. The Director, Office of Civil Rights (DOE HQ), when requested, will provide assistance to contracting officers resolving noncompliance issues by providing assistance in obtaining a final decision from the OFCCP.

[49 FR 11998, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 58 FR 36365, July 7, 1993]

922.804 [Reserved]

922.804–1 Nonconstruction.

In the event a prospective contractor or subcontractor is entering into its first contract containing the Equal Opportunity clause, the contracting officer shall determine that the prospective contractor understands and appears able to conform to the requirements of the EEO clause.

922.804–2 Construction.

(a) Construction contracts, including cost-sharing contracts, are subject to OFCCP orders applicable in particular areas.

(1) When a proposed nonexempt construction contract is within a geographic area where construction is subject to the provisions of Federal EEO Bid Conditions, Part I or Part II, the solicitation shall contain those bid conditions. The contracting officer shall include in such solicitation a provision that ''the offeror shall adhere to the affirmative action plan (bid conditions) set forth in this solicitation.''

(2) Lists of areas for which OFCCP has designated specific affirmative action requirements are available through the Procurement Executive. Contracting officers should assure that this list and copies of pertinent orders are made available to all concerned DOE offices and to DOE contractors and construction subcontractors for work to be performed in the specified geographical areas.

(b) *Other nonexempt construction contracts.* (1) When a proposed nonexempt construction contract is not in a ''plan area'' and is in the amount of $10,000 or more, offerors must agree to comply with the Equal Employment Opportunity clause.

(2) When proposed nonexempt contracts of $1,000,000 or over are not in plan areas and have not been designated as high impact, offerors also must submit to the contracting officer details regarding specific affirmative action steps to be taken by the offeror in connection with all work under the contract. Such details shall include estimates of the percentage of minority group persons expected to be employed in each craft involved in the performance of the contract work. All solicitations for construction contracts shall reference the affirmative action requirements and the offeror's obligation to make good faith efforts to employ women in craft positions.

(3) Pursuant to the OFCCP order dated August 30, 1976, agencies shall develop ''Special Bid Conditions'' for use on high impact projects in non-plan areas. These special bid conditions will include mandatory goals and timetables for the utilization of minorities. The Procurement Executive using the criteria issued by OFCCP will determine those projects that are ''high impact.'' The contracting officer is responsible for compliance with policies and procedures contained in the OFCCP ''Construction Compliance Program Operations Manual.'' Language for inclusion in solicitations or contracts contained in the manual may be

modified, provided all of the requirements are retained. The contracting officer shall develop the goals and timetables and shall confer with the appropriate OFCCP regional office. The Office of Civil Rights will provide assistance as necessary, when requested. Special bid conditions will be submitted by the contracting officer to the appropriate OFCCP regional office for approval unless otherwise directed by the Procurement Executive. When special bid conditions are applicable, adequate presolicitation lead time should be allowed for submission of the special bid conditions to OFCCP national and regional offices.

(c) An attempt to limit in any major respect the equal opportunity requirements included in an invitation for bids or request for proposals for a construction contract shall constitute grounds for a determination that the offeror does not qualify as a responsible offeror and for rejection of the bid or proposal. In the case of construction acquisition by DOE prime contractors, this determination shall be made only with the approval of the DOE contracting officer.

[49 FR 11998, Mar. 28, 1984, as amended at 56 FR 41965, Aug. 26, 1991, 58 FR 36365, July 7, 1993; 59 FR 9106, Feb. 25, 1994]

922.807 Exemptions.

(c) Contracting officer requests for exemption from E.O. 11246 should be directed to the Procurement Executive for submission to the Director, OFCCP.

PART 923—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Sec.
923.002 Policy.

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Subpart 923.70—Environmental, Energy and Water Efficiency, Renewable Energy Technologies, and Occupational Safety Programs

923.7001 Nuclear safety.
923.7002 Worker Safety and Health.
923.7003 Contract clauses.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

923.002 Policy.

(a) *Requirement.* FAR 23.002 and Section 3(e) of Executive Order 13423, Strengthening Federal Environmental, Energy and Transportation Management, require contracts for the operation of Government-owned facilities or Government-owned motor vehicle fleets to include provisions that obligate the contractor to comply with the requirements of Executive Order 13423 to the same extent as the Federal agency would be required to comply if the agency operated the facility or fleet.

(b) *Contract clause.* Insert the clause at 970.5223–6, Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management, in contracts for Contractor operation of a DOE facility or motor vehicle fleet.

[75 FR 57692, Sept. 22, 2010]

Subpart 923.1—Sustainable Acquisition

SOURCE: 75 FR 57693, Sept. 22, 2010, unless otherwise noted.

923.101 Policy.

The Department has promoted energy efficient products as well as products with recycled or biobased content as these products have become more common and the market has become more energy and resource aware. All of these products and services and others

with environmentally preferable attributes are captured in the DOE Sustainable Acquisition Program. Guidance on all these products may be found at: *http://www.hss.energy.gov/pp/epp/*.

923.102 Applicability to contractors.

Many of the Department's major facilities are operated by contractors. Provisions regarding those contracts may be found at part 970 of this chapter. At other locations, the Department makes significant use of contractors to operate and maintain its facilities. As such, the Department encourages the greatest possible use of energy efficient and environmentally sustainable products and services by its facility support contractors. The DOE Sustainable Acquisition Program is to be followed by all contractors operating DOE facilities or motor vehicle fleets.

923.103 Contract clauses.

Insert the clause at 952.223–78, Sustainable Acquisition Program, or its Alternate I, in all contracts under which the contractor operates Government-owned facilities or Government-owned fleets or performs construction at a Government-owned facility. All such contracts should also include the following clauses: FAR 52.223–2, Affirmative Procurement of Biobased Products under Service and Construction Contracts; FAR 52.223–10, Waste Reduction Program; FAR 52.223–XX, Compliance with Environmental Management Systems (see 923.903 regarding the applicability of this clause to specific DOE contracts); FAR 52.223–15, Energy Efficiency in Energy Consuming Products; and FAR 52.223–17, Affirmative Procurement of EPA-designated Items in Service and Construction Contracts.

Subpart 923.5—Drug-Free Workplace

SOURCE: 57 FR 32676, July 22, 1992, unless otherwise noted.

923.500 Scope of subpart.

For contracts performed at DOE sites, in lieu of 48 CFR subpart 23.5, contracting activities shall use 923.570, Workplace Substance Abuse Programs at DOE Sites.

[75 FR 69012, Nov. 10, 2010]

923.570 Workplace substance abuse programs at DOE sites.

(a) The Department of Energy (DOE), as part of its overall responsibilities to protect the environment, maintain public health and safety, and safeguard the national security, has established policies, criteria, and procedures for contractors to develop and implement programs that help maintain a workplace free from the use of illegal drugs.

(b) Regulations concerning DOE's contractor workplace substance abuse programs are promulgated at 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

923.570–1 Applicability.

The policies, criteria, and procedure specified in 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, apply to contracts for work performed at sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, where such work—

(a) Has a value of $25,000 or more; and

(b) Has been determined by DOE to involve—

(1) Access to or handling of classified information or special nuclear materials;

(2) High risk of danger to life, the environment, public health and safety or national security; or

(3) The transportation of hazardous materials to or from a DOE site.

[75 FR 69012, Nov. 10, 2010]

923.570–2 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 970.5223–3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites, in solicitations where the work to be performed by the contractor will occur on sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, as specified in 923.570–1, Applicability.

(b) The contracting officer shall insert the clause at 970.5223–4, Workplace

Substance Abuse Programs at DOE Sites, in contracts where the work to be performed by the contractor will occur on sites owned or controlled by DOE and operated under the authority of the Atomic Energy Act of 1954, as amended, as specified in 923.570–1, Applicability.

[57 FR 32676, July 22, 1992, as amended at 62 FR 42074, Aug. 5, 1997; 65 FR 81007, Dec. 22, 2000; 74 FR 36365, July 22, 2009]

923.570–3 Suspension of payments, termination of contract, and debarment and suspension actions.

(a) The contracting officer shall comply with the procedures of FAR 23.506 regarding the suspension of contract payments, the termination of the contract for default, and the debarment and suspension of a contractor relative to failure to comply with 970.5223–4, Workplace Substance Abuse Programs at DOE Sites.

(b) For purposes of 10 CFR part 707, the specific causes for suspension of contract payments, termination of the contract for default, and debarment and suspension of the contractor are—

(1) The contractor fails to either comply with the requirements of 10 CFR part 707 or perform in a manner consistent with its approved program;

(2) The contractor has failed to comply with the terms of the clause at 970.5223–4, Workplace Substance Abuse Programs at DOE Sites; or

(3) Such a number of contractor employees having been convicted of violations of criminal drug statutes for violations occurring on the DOE-owned or -controlled site, as to indicate that the contractor has failed to make a good faith effort to provide a drug free workplace.

[57 FR 32676, July 22, 1992, as amended at 62 FR 42074, Aug. 5, 1997; 65 FR 81007, Dec. 22, 2000; 74 FR 36365, July 22, 2009; 75 FR 69012, Nov. 10, 2010]

Subpart 923.9—Contractor Compliance With Environmental Management Systems

923.903 Contract clause.

The FAR Environmental Management Systems clause at 52.223–XX should be used in contracts where the contractor operates a DOE site or portion thereof. Some DOE sites have a single Environmental Management System for the site while others have separate Environmental Management Systems for various portions of the site which may be operated by different contractors. Check with local environmental management personnel regarding the applicability of the FAR 52.223–XX clause to a specific contract.

[75 FR 57693, Sept. 22, 2010]

Subpart 923.70—Environmental, Energy and Water Efficiency, Renewable Energy Technologies, and Occupational Safety Programs

923.7001 Nuclear safety.

The DOE regulates the nuclear safety of its major facilities under its own statutory authority derived from the Atomic Energy Act and other legislation. The DOE also regulates, under certain specific conditions, the use by its contractors of radioactive materials and ionizing radiation producing machines.

[49 FR 12003, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994; 74 FR 36365, July 22, 2009]

923.7002 Worker safety and health.

(a)(1) Except when the clause prescribed at 970.1504–8(c) is used, the clauses entitled ''952.223–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health'' or ''952.223–77, Conditional Payment of Fee or Profit—Protection of Worker Safety and Health'' implement the requirements of section 234C of the Atomic Energy Act for the use of a contract clause that provides for an appropriate reduction in the fee or amount paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any Departmental regulation relating to the enforcement of worker safety and health concerns. The clauses, in part, provide for reductions in the amount of fee, profit, or share of cost savings that is otherwise earned

by the contractor for performance failures relating to worker safety and health violations under the Department's regulations.

(2) The clauses provide for reductions of fee or profit that is earned by the contractor depending upon the severity of the contractor's failure to comply with contract terms or conditions relating to worker safety and health concerns. When reviewing performance failures that would otherwise warrant a reduction of earned fee, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clauses. Some of the mitigating factors that must be considered are specified in the clauses.

(3) The contracting officer must obtain the concurrence of the Head of the Contracting Activity—

(i) Prior to effecting any reduction of fee or amounts otherwise payable to the contractor in accordance with the terms and conditions of the clause entitled ''Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health'' or of the clause entitled ''Conditional Payment of Fee or Profit—Protection of Worker Safety and Health''; and

(ii) For determinations that no reduction of fee is warranted for a particular performance failure(s) that would otherwise warrant a reduction.

(4) Section 234C of the Atomic Energy Act provides that DOE shall either pursue civil penalties (implemented at 10 CFR part 851) for a violation under section 234C of the Atomic Energy Act (42 U.S.C. 2282c) or a contract fee reduction, but not both.

(5) The contracting officer must coordinate with the Office of Price Anderson Enforcement within the Office of the Assistant Secretary for Health, Safety and Security (or with any designated successor office) before pursuing a contract fee reduction in the event of a violation by the contractor or any contractor employee of any Departmental regulation relating to the enforcement of worker health and safety concerns.

[68 FR 68777, Dec. 10, 2003, as amended at 74 FR 36365, July 22, 2009]

923.7003 Contract clauses.

(a) A decision to include or not include environmental, safety and health clauses in DOE contracts shall be made by the contracting officer in consultation with appropriate Office of Health, Safety and Security personnel.

(b) When work is to be performed at a facility where the DOE will exercise its statutory authority to enforce occupational safety and health standards applicable to the working conditions of the contractor and subcontractor employees at such facility, the clause at 952.223–71, Integration of Environment, Safety, and Health into Work Planning and Execution, shall be used in such contract or subcontract if conditions (b)(1) through (3), are satisfied—

(1) DOE work is segregated from the contractor's or subcontractor's other work;

(2) The operation is of sufficient size to support its own safety and health services; and

(3) The facility is government-owned, or leased by or for the account of the government.

(c) In facilities not meeting the requirements of paragraph (b) of this section and which are a production or utilization facility where there is use or possession of source, special nuclear, or byproduct materials, DOE policy is not to enforce radiological safety and health standards pursuant to the contract or subcontract but rather to rely upon Nuclear Regulatory Commission (NRC) licensing requirements (including agreements with States under section 274 of the Atomic Energy Act). Pursuant to this policy, neither the clause found at 952.223–71, Integration of Environment, Safety, and Health into Work Planning and Execution, nor 952.223–72, Radiation Protection and Nuclear Criticality, is to be incorporated in the contracts or subcontracts for work at such facilities. Notwithstanding this general policy with respect to facilities not meeting the requirements of paragraph (b) of this section, the Secretary or his designee may determine in special cases, that DOE needs to enforce radiological safety and health standards pursuant to the contract or subcontract (see paragraph (d) of this section). When such a determination is made, the

clause found at 952.223–72, Radiation Protection and Nuclear Criticality, shall be included in the contract or subcontract.

(d) In facilities not meeting the requirements of paragraph (b) or (c) of this section and where there is a machine capable of producing ionizing radiation, it is DOE policy not to regulate such activity where it is adequately regulated by a State or other Federal agency. In such cases, neither clause 952.223–71, Integration of Environment, Safety, and Health into Work Planning and Execution, nor 952.223–72, Radiation Protection and Nuclear Criticality, shall be incorporated in the contract. Where the contracting officer, with appropriate environmental, safety and health advice determines that no State or other Federal agency exists to adequately regulate the operation and/or use of such machines, the clause found at 952.223–72, Radiation Protection and Nuclear Criticality, shall be included in the contract. The Assistant Secretary for Health, Safety and Security (or designee) shall be consulted to determine if a non-agreement State or a facility located in a non-agreement State has been reviewed by any other DOE office to establish that the State agency has the essential authority and resources for enforcing the radiation protection standards. This is to assure reasonable consistency in the assessment of radiation protection in non-agreement States and subsequent use of 952.223–72.

(e) In a situation where the contractor or subcontractor is performing DOE work at more than one location, inclusion of either, or both, 952.223–71, Integration of Environment, Safety, and Health into Work Planning and Execution, and 952.223–72, Radiation Protection and Nuclear Criticality, may be appropriate. In such cases, the contract or subcontract must include language to specify the extent of applicability of each clause used. For example, with a parenthetical: (Applicable only to work performed at a contractor site which has 952.223–71 or 952.223–72 clause in its contract or subcontract).

(f) Except as prescribed in 970.1504–8(c), the contracting officer shall insert the clause at 952.223–76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and Health, in all contracts that contain both the clause at 952.204–2, Security Requirements, and the clause at 952.250–70, Nuclear Hazards Indemnity Agreement.

(g) Except as prescribed in 970.1504–8(c), the contracting officer shall insert the clause at 952.223–77, Conditional Payment of Fee or Profit—Protection of Worker Safety and Health, in all contracts that do not contain the clause at 952.204–2, Security Requirements, but that do contain the clause at 952.250–70, Nuclear Hazards Indemnity Agreement.

(h) The contracting officer shall insert the clause at 952.223–75, Preservation of Individual Occupational Radiation Exposure Records, in contracts containing 952.223–71, Integration of Environment, Safety, and Health into Work Planning and Execution, or 952.223–72, Radiation Protection and Nuclear Criticality.

[74 FR 36365, July 22, 2009, as amended at 75 FR 69012, Nov. 10, 2010]

PART 924—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 75 FR 69013, Nov. 10, 2010, unless otherwise noted.

Subpart 924.1—Protection of Individual Privacy

924.103 Procedures.

(b)(2) The Department of Energy rules and regulations on Privacy Act are implemented under 10 CFR part 1008.

PART 925—FOREIGN ACQUISITION

Subpart 925.1—Buy American Act—Supplies

Sec.
925.103 Exceptions.

Subpart 925.2—Buy American Act—Construction Materials

925.202 Exceptions.

Subpart 925.7—Prohibited Sources

925.701–70 Prohibited sources.

Subpart 925.9 [Reserved]

Subpart 925.10—Additional Foreign Acquisition Regulations

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Subpart 925.71—Export Control

925.7100 Scope of subpart.
925.7101 Policy.
925.7102 Contract clause.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12003, Mar. 28, 1984, unless otherwise noted.

Subpart 925.1—Buy American Act—Supplies

925.103 Exceptions.

(b) *Nonavailabilty*—(2)(i) *Individual determinations.* Contracting officers may make the determination required by 48 CFR 25.103(b)(2)(i), provided such determination is factually supported in writing. If the contract is estimated to exceed $1 million, the Head of the Contracting Activity must approve the determination.

(ii) Proposals to add an article to the list of nonavailable articles at 48 CFR 25.104, with appropriate justifications, must be submitted for approval by the Senior Procurement Executive and submission to the appropriate council.

[74 FR 36366, July 22, 2009, as amended at 75 FR 69013, Nov. 10, 2010; 81 FR 45977, July 15, 2016]

Subpart 925.2—Buy American Act—Construction Materials

925.202 Exceptions.

(a)(2) Contracting officers may make the determination required by 48 CFR 25.202(a)(2), if the cost of the materials is not expected to exceed $100,000.

[75 FR 69013, Nov. 10, 2010]

Subpart 925.7—Prohibited Sources

925.701–70 Prohibited sources.

No contract may be awarded to a company owned by an entity controlled by a foreign government if performance of the contract will require access to proscribed information. See subpart 904.71 for additional guidance.

[74 FR 36366, July 22, 2009]

Subpart 925.9 [Reserved]

Subpart 925.10—Additional Foreign Acquisition Regulations

925.1001 Waiver of right to examination of records.

(b) *Determination and findings.* A determination and findings required by 48 CFR 25.1001(b) shall be forwarded to either the Director, Office of Contract Management, Office of Procurement and Assistance Management, or for the National Nuclear Security Administration (NNSA), to the Deputy Associate Administrator for Acquisition and Project Management, for coordination of the Secretary's approval.

[75 FR 69013, Nov. 10, 2010, as amended at 81 FR 45977, July 15, 2016]

Subpart 925.70—Acquisition of Nuclear Hot Cell Services

SOURCE: 58 FR 8910, Feb. 18, 1993, unless otherwise noted.

925.7000 Scope of subpart.

This subpart prescribes policies for selection for contract award of nuclear hot cell services when one of the competitors is a foreign company. This

subpart does not apply to the acquisition and use of nuclear hot cell facilities on-site at a DOE-owned or -leased facility.

925.7001 Definitions.

Costs related to the decommissioning of nuclear facilities, as used in this subpart, means any cost associated with the compliance with regulatory requirements governing the decommissioning of nuclear facilities licensed by the Nuclear Regulatory Commission. Such costs for foreign facilities and for Department of Energy facilities are costs of decommissioning associated with the compliance with foreign regulatory requirements or the Department's own requirements.

Costs related to the storage and disposal of nuclear waste, as used in this subpart, means any costs, whether required by regulation or incurred as a matter of prudent business practice, associated with the storage or disposal of nuclear waste.

Foreign company, as used in this subpart, means a company which offers to perform nuclear hot cell services at a facility which is not subject to the laws and regulations of the United States, its agencies, and its political subdivisions.

Nuclear hot cell services, as used in this subpart, means services related to the examination of, or performance of various operations on, nuclear fuel rods, control assemblies, or other components that are emitting large quantities of ionizing radiation, after discharge from nuclear reactors, which are performed in specialized facilities located away from commercial nuclear power plants, generally referred to in the industry as ''hot cells.''

Nuclear waste, as used in this subpart, means any radioactive waste material subject to regulation by the Nuclear Regulatory Commission or the Department of Energy, or in the case of foreign offers, by comparable foreign organizations.

United States company, as used in this subpart, means a company which offers to perform nuclear hot cell services at a facility subject to the laws and regulations of the United States, its agencies, and its political subdivisions.

[58 FR 8910, Feb. 18, 1993, as amended at 74 FR 36366, July 22, 2009]

925.7002 Policy.

In selecting offer(s) for award of contracts for nuclear hot cell services, costs related to the decommissioning of nuclear facilities and storage and disposal of nuclear waste are to be considered in a way which affords United States and foreign companies an equal competition in accordance with 925.7003. Upon determining that no offer from a foreign firm has a reasonable chance of being selected for award, the requirements of this subpart will not apply.

925.7003 Requirements.

(a) For the acquisition of nuclear hot cell services under the conditions in paragraph (b) of this section, the selection official in evaluating competitive offers for selection purposes only shall—

(1) Consider neither costs related to the decommissioning of nuclear waste facilities nor costs related to the storage and disposal of nuclear waste; or

(2) Add these costs to offers of foreign companies.

(b) The requirements of this section apply under the following circumstances—

(1) One or more of the offers is submitted by a United States company and includes costs related to the decommissioning of nuclear facilities and costs related to the storage and disposal of nuclear waste because it is subject to such costs; and

(2) One or more of the offers is submitted by a foreign company and does not include these types of costs. (A foreign company might not be subject to such costs or might not have to include these types of costs in its offer if the firm is subsidized in decommissioning activity or storage and disposal of nuclear waste, or a foreign government is performing the activities below the actual cost of the activity.)

[58 FR 8910, Feb. 18, 1993, as amended at 74 FR 36366, July 22, 2009]

925.7004 Contract clause.

The contracting officer shall insert the clause at 952.225–70, Subcontracting for Nuclear Hot Cell Services, in solicitations and contracts involving nuclear hot cell services. This clause does not flow down to second-tier subcontracts.

Subpart 925.71—Export Control

SOURCE: 80 FR 64367, Oct. 23, 2015, unless otherwise noted.

925.7100 Scope of subpart.

This subpart implements Department of Energy (DOE) requirements for contractors concerning compliance with U.S. export control laws and regulations.

925.7101 Policy.

(a) DOE and its contractors must comply with all applicable U.S. export control laws and regulations.

(b) Export control laws and regulations include, but are not limited to, the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*), as amended; the Arms Export Control Act (22 U.S.C. 2751 *et seq.*); the Export Administration Act of 1979 (50 U.S.C. app. 2401 *et seq.*), as continued under the International Emergency Economic Powers Act (Title II of Pub. L. 95–223, 91 Stat. 1626, October 28, 1977; 50 U.S.C. 1701 *et seq.*); Trading with the Enemy Act (50 U.S.C. App. 5(b), as amended by the Foreign Assistance Act of 1961); Assistance to Foreign Atomic Energy Activities (Title 10 of the Code of Federal Regulations (CFR) Part 810); Export Administration Regulations (15 CFR parts 730 through 774); International Traffic in Arms Regulations (22 CFR parts 120 through 130); Export and Import of Nuclear Equipment and Material (10 CFR part 110); and regulations administered by the Office of Foreign Assets Control of the Department of the Treasury (31 CFR parts 500 through 598).

(c) Contractors seeking guidance on how to comply with export control laws and regulations should review the illustrative list of laws and regulations set forth in Clause 952.225–71. Contractors also may contact the agencies responsible for administration of export laws or regulations applicable to a particular export (*e.g.*, Departments of State, Commerce, Treasury and Energy, or the Nuclear Regulatory Commission).

(d) DOE Contracting Officers will not answer contractor questions regarding how to comply with U.S. export laws and regulations. Contracting Officers should direct contractors to the export laws, regulations, and agencies cited in the Export Clause at section 952.225–71 of this subpart.

(e) It is the contractor's responsibility to comply with all applicable export control laws and regulations. This responsibility exists independent of, and is not established or limited by, this subpart.

925.7102 Contract clause.

The Contracting Officer shall insert the clause at 952.225–71, Compliance with Export Control Laws and Regulations (Export Clause), in all solicitations and contracts.

PART 926—OTHER SOCIOECONOMIC PROGRAMS

Subpart 926.70—Implementation of Section 3021 of the Energy Policy Act of 1992

Sec.

926.7001 Policy.
926.7002 Responsibilities.
926.7003 Review of the procurement request.
926.7004 Size standard for Energy Policy Act procurements.
926.7005 Preferences under the Energy Policy Act.
926.7006 Goal measurement and reporting requirements.
926.7007 Solicitation provisions and contract clauses.

Subpart 926.71—Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993

926.7101 Policy.
926.7102 Definition.
926.7103 Requirements.
926.7104 Contract clause.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 60 FR 22300, May 5, 1995, unless otherwise noted.

Subpart 926.70—Implementation of Section 3021 of the Energy Policy Act of 1992

926.7001 Policy.

(a) Section 3021(a) of the Energy Policy Act of 1992 (Pub. L. 102–486) specifies that the Department of Energy (DOE) shall, to the extent practicable, provide that not less than 10 percent of the total combined amounts obligated for competitively awarded contracts and subcontracts under the Energy Policy Act be expended with—

(1) Small business concerns controlled by socially and economically disadvantaged individuals or by women;

(2) Historically Black colleges and universities; or

(3) Colleges and universities having a student body in which more than 20 percent of the students are Hispanic Americans or Native Americans.

(b) These three groups are collectively referred to in this section as ''Energy Policy Act target groups.''

(c) Awards of Energy Policy Act procurements should be in the following descending order of preference—

(1) Competitive awards pursuant to a set-aside for small disadvantaged business;

(2) Competitive awards to small businesses owned and controlled by socially and economically disadvantaged individuals and by women for Energy Policy Act requirements under the Small Business Administration's section 8(a) program; and

(3) Competitive awards that provide an evaluation preference in accordance with 926.7006 to offerors from the Energy Policy Act target groups.

(d) The DOE implementation of Section 3021 requirements with regard to the award of subcontracts under Energy Policy Act procurements is discussed at 926.7006.

(e) Competitive procedures, for purposes of Energy Policy Act implementation, consist of awards under setasides to small disadvantaged business and firms certified as 8(a) Small Business Administration and competitive procedures in accordance with 48 CFR subpart 15.6 and subpart 915.6.

[60 FR 22300, May 5, 1995, as amended at 75 FR 69013, Nov. 10, 2010]

926.7002 Responsibilities.

Offices initiating procurement requests have primary responsibility to identify potential contract requirements falling within the scope of section 3021 of the Energy Policy Act. Identification shall occur at the earliest possible point in time in the acquisition cycle, but not later than the submission of the procurement request to the contracting officer. For purposes of Section 3021, a contract requirement is any award that directly satisfies an Energy Policy Act program or requirement.

926.7003 Review of the procurement request.

Any Energy Policy Act procurement, including basic research contracts with educational institutions, shall be reviewed in accordance with the Small Business and 8(a) Program Review Procedures in order to ensure that full consideration is given to the potential for making Energy Policy Act awards.

[60 FR 22300, May 5, 1995, as amended at 61 FR 21977, May 13, 1996]

926.7004 Size standard for Energy Policy Act procurements.

The size standard for Energy Policy Act engineering services procurements (SIC 8711) shall be the size standard specified for military and aerospace equipment and military weapons.

926.7005 Preferences under the Energy Policy Act.

(a) *Prime contracts.* Solicitations for all competitive Energy Policy Act procurements not for 8(a) firms and in excess of the simplified acquisition threshold shall provide for an evaluation preference for offers received from entities from among the Energy Policy Act target groups. The evaluation criteria shall provide that in instances in which two or more proposals being considered for final selection are ranked as essentially equal after consideration of all technical and cost evaluation factors, and if one of these proposals is

from an offeror from among an Energy Policy Act target group that offeror will be selected for award.

(b) *Subcontracts.* (1) The contracting officer shall assure that all competitive Energy Policy Act solicitations over the simplified acquisition threshold contain—

(i) A solicitation provision providing for consideration of the extent to which the offerors have provided for subcontracting opportunities to entities from among the Energy Policy Act target groups; and

(ii) A clause providing for the maximum utilization of entities from among Energy Policy Act target groups in the performance of Energy Policy Act contracts.

(2) In addition, the contracting officer shall assure that all competitive Energy Policy Act procurements expected to exceed $500,000 ($1,000,000 for construction) include a clause for reporting after award as part of the Small Business and Small Disadvantaged Business Subcontracting Plan process.

[60 FR 22300, May 5, 1995, as amended at 75 FR 69013, Nov. 10, 2010]

926.7006 Goal measurement and reporting requirements.

(a) *General.* The following types of contract awards for Energy Policy Act procurements shall be counted toward achievement by DOE of the 10 percent goal—

(1) Any award set-aside for small disadvantaged business;

(2) Any competitive section 8(a) award;

(3) Any competitive award to one of the three target groups under an unrestricted procurement;

(4) Any award to one of the three target groups conducted under simplified acquisition procedures in excess of the micro-purchase threshold; and,

(5) Any competitively awarded subcontract to one of the three target groups under a prime award.

(b) *Prime contract awards.* Award values and dollars obligated under prime contracts and modifications to prime contracts for Energy Policy Act requirements shall be reported through the Department of Energy Procurement and Assistance Data System.

(c) *Subcontract awards.* The contractor shall be required to report, on an annual Federal Government fiscal year basis, its progress against Section 3021 goals by providing the actual dollar value of subcontract payments and the relationship of those payments to the incurred contract cost. If the contract includes reporting requirements under 48 CFR 52.219–9, Small Business and Small Disadvantaged Business Subcontracting Plan, the contractor's progress against the Section 3021 goals shall be included as an addendum to Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF 295, Summary Subcontract Report, as applicable, for the period that corresponds to the end of the Federal Government fiscal year.

[60 FR 22300, May 5, 1995, as amended at 75 FR 69013, Nov. 10, 2010]

926.7007 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 952.226–70, Subcontracting Goals under Section 3021(a) of the Energy Policy Act of 1992 (Pub. L. 102–486) (Energy Policy Act), in solicitations for Energy Policy Act procurements.

(b) The contracting officer shall insert the clause at 952.226–71, Utilization of Energy Policy Act Target Entities, in contracts for the Energy Policy Act requirements with an award value in excess of the simplified acquisition threshold.

(c) The contracting officer shall insert the clause at 952.226–72, Energy Policy Act Subcontracting Goals and Reporting Requirements, in contracts for Energy Policy Act requirements with an award value in excess of $500,000 ($1,000,000 in the case of construction).

(d) The contracting officer shall insert the provision at 952.226–73, Energy Policy Act Target Group Representation, in solicitations for Energy Policy Act procurements.

(e) The contracting officer shall insert the clause at 48 CFR 52.219–14,

Limitation on Subcontracting, in contracts for Energy Policy Act requirements with an entity from among the Energy Policy Act target groups.

[60 FR 22300, May 5, 1995, as amended at 62 FR 42074, Aug. 5, 1997; 75 FR 69013, Nov. 10, 2010]

Subpart 926.71—Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.

SOURCE: 62 FR 34861, June 27, 1997, unless otherwise noted.

926.7101 Policy.

Consistent with the requirements of Section 3161(c)(2), 42 U.S.C. 7474h(c)(2), in instances where DOE has determined that a change in workforce at a DOE Defense Nuclear Facility is necessary, the Department, to the extent practicable, is required to provide employees under Department of Energy contracts whose employment in positions at such a facility is terminated with a preference in any hiring of the Department. Consistent with published DOE guidance regarding Section 3161, such preference in hiring extends to hiring by DOE contractors and subcontractors.

926.7102 Definition.

Eligible employee means a current or former employee of a contractor or subcontractor employed at a DOE Defense Nuclear Facility—

(1) Whose position of employment has been, or will be, involuntarily terminated (except if terminated for cause);

(2) Who has met the eligibility criteria contained in Department of Energy guidance for contractor work force restructuring, as may be amended or supplemented from time to time; and

(3) Who is qualified for a job vacancy with the Department or one of its contractors with respect to work under its contract with the Department at the time a position is available.

[62 FR 34861, June 27, 1997, as amended at 75 FR 69013, Nov. 10, 2010]

926.7103 Requirements.

(a) Section 3161, 42 U.S.C. 7474h, confers a continuing right to a preference in hiring to an eligible employee of Department of Energy Defense Nuclear Facilities. This right to a preference in hiring includes employment opportunities of any Department of Energy contractor, regardless of the place of performance of the contract. Accordingly, eligible former employees of contractors and subcontractors employed at Department of Energy Defense Nuclear Facilities, to the extent practicable, shall be provided a hiring preference in employment opportunities of other Department of Energy contractors for work under their contracts.

(b) The Office of Worker and Community Transition (WT) is responsible for establishing policies and procedures relating to the Department of Energy implementation of Section 3161. Contracting Officers, in concert with representatives of the field office responsible for implementation of Section 3161 at the Department of Energy Defense Nuclear Facility and local counsel, should consult with the Office of Worker and Community Transition to determine applicability of Section 3161 requirements, including hiring preference requirements, for displaced workers.

926.7104 Contract clause.

The contracting officer shall insert the clause at 952.226–74, Displaced Employee Hiring Preference, in contracts (except for contracts for commercial items, pursuant to 41 U.S.C. 403) which exceed $500,000 in value.

[62 FR 34861, June 27, 1997, as amended at 75 FR 69013, Nov. 10, 2010]

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 927—PATENTS, DATA, AND COPYRIGHTS

Subpart 927.2—Patents

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927.201 Authorization and consent.
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927.206 Refund of royalties.
927.206–1 General.
927.206–2 Clause for refund of royalties.
927.207 Classified contracts.
927.207–1 General.

Subpart 927.3—Patent Rights Under Government Contracts

927.300 General.
927.302 Policy.
927.303 Contract clauses.
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927.370 [Reserved]

Subpart 927.4—Technical Data and Copyrights

927.400 Scope of subpart.
927.402 Acquisition and use of technical data.
927.402–1 General.
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927.404 Rights in technical data in subcontracts.
927.404–70 Statutory programs.
927.408 Cosponsored research and development activities.
927.409 Solicitation provisions and contract clauses.

Subpart 927.70 [Reserved]

AUTHORITY: Atomic Energy Act of 1954, as amended (42 U.S.C. 2168, 2182, 2201); Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5908); Department of Energy National Security and Military Applications of Nuclear Energy Authorization Act of 1987 (42 U.S.C. 7261a.); Department of Energy Organization Act (42 U.S.C. 7101 *et seq.*); National Nuclear Security Administration Act (50 U.S.C. 4201 *et seq.*)

SOURCE: 49 FR 12004, Mar. 28, 1984, unless otherwise noted.

Subpart 927.2—Patents

SOURCE: 60 FR 11815, Mar. 2, 1995, unless otherwise noted.

927.200 Scope of subpart.

When consulting 48 CFR part 27, subpart 27.2 of the FAR, consider ''research, development, and demonstration'' to replace the phrase ''research and development'' or ''R&D,'' for the purposes of DOE actions.

927.201 Authorization and consent.

927.201–1 General.

In certain contracting situations, such as those involving research, development, or demonstration projects, consideration should be given to the impact of third party-owned patents covering technology that may be incorporated in the project which patents may ultimately affect widespread commercial use of the project results. In such situations, Patent Counsel shall be consulted to determine what modifications, if any, are to be made to the utilization of the Authorization and Consent and Patent Indemnity provisions or what other action might be deemed appropriate.

927.206 Refund of royalties.

927.206–1 General.

The clause at 952.227–9, Refund of Royalties, obligates the contractor to inform DOE of the payment of royalties pertaining to the use of intellectual property, either patent or data related, in the performance of the contract. This information may result in identification of instances in which the Government already has a license for itself or others acting in its behalf or the right to sublicense others. Also, there may be pending antitrust actions or challenges to the validity of a patent or the proprietary nature of the data, or the contractor may be able to gain unrestricted access to the same data through other sources. In such situations the contractor may avoid the payment of a royalty in its entirety or may be charged a reduced royalty.

927.206–2 Clause for refund of royalties.

The contracting officer shall insert the clause at 952.227–9, Refund of Royalties, in solicitations and contracts for experimental, research, developmental, or demonstration work or other solicitations and contracts in which the contracting officer believes royalties will have to be paid by the contractor or a subcontractor of any tier.

927.207 Classified contracts.

927.207–1 General.

Unauthorized disclosure of classified subject matter, whether in a patent application or resulting from the issuance of a patent, may be a violation of the Atomic Energy Act of 1954, as amended, other laws relating to espionage and national security, and provisions of the proposed contract pertaining to disclosure of information.

Subpart 927.3—Patent Rights Under Government Contracts

927.300 General.

(a) One of the primary missions of the Department of Energy is the use of its procurement process to ensure the conduct of research, development, and demonstration leading to the ultimate commercialization of efficient sources of energy. To accomplish its mission, DOE must work in cooperation with industry in the development of new energy sources and in achieving the ultimate goal of widespread commercial use of those energy sources. To this end, Congress has provided DOE with the authority to invoke an array of incentives to secure the commercialization of new technologies developed for DOE. One such important incentive is provided by the patent system.

(b) Pursuant to 42 U.S.C. 2182 and 42 U.S.C. 5908, DOE takes title to all inventions conceived or first actually reduced to practice in the course of or under contracts with large, for-profit companies, foreign organizations, and others not beneficiaries of Pub. L. 96–517. Regulations dealing with Department's authority to waive its title to subject inventions, including the relevant statutory objectives, exist at 10 CFR part 784. Pursuant to that section, DOE may waive the Government's patent rights in appropriate situations at the time of contracting to encourage industrial participation, foster commercial utilization and competition, and make the benefits of DOE activities widely available to the public. In addition to considering the waiver of patent rights at the time of contracting, DOE will also consider the incentive of a waiver of patent rights upon the reporting of an identified invention when requested by such entities or by the employee-inventor with the permission of the contractor. These requests can be made whether or not a waiver request was made at the time of contracting. Waivers for identified inventions will be granted where it is determined that the patent waiver will be a meaningful incentive to achieving the development and ultimate commercial utilization of inventions. Where DOE grants a waiver of the Government's patent rights, either at the time of contracting or after an invention is made, certain minimum rights and obligations will be required by DOE to protect the public interest.

(c) Another major DOE mission is to manage the nation's nuclear weapons and other classified programs, where research and development procurements are directed toward processes and equipment not available to the public. To accomplish DOE programs for bringing private industry into these and other special programs to the maximum extent permitted by national security and policy considerations, it is desirable that the technology developed in these programs be made available on a selected basis for use in the particular fields of interest and under controlled conditions by properly cleared industrial and scientific research institutions. To ensure such availability and control, the grant of waivers in these programs may necessarily be more limited, either by the imposition of field of use restrictions or national security measures, than in other DOE programs.

[60 FR 11815, Mar. 2, 1995, as amended at 63 FR 10505, Mar. 4, 1998]

927.302 Policy.

(a) Except for contracts with organizations that are beneficiaries of Public Law 96–517, the United States, as represented by DOE, shall normally acquire title in and to any invention or discovery conceived or first actually reduced to practice in the course of or under the contract, allowing the contractor to retain a nonexclusive, revocable, paid-up license in the invention and the right to request permission to file an application for a patent and retain title to any ensuing patent in any foreign country in which DOE does not elect to secure patent rights. DOE may approve the request if it determines that such approval would be in the national interest. The contractor's nonexclusive license may be revoked or modified by DOE only to the extent necessary to achieve expeditious practical application of the invention pursuant to any application for and the grant of an exclusive license in the invention to another party.

(b) In contracts having as a purpose the conduct of research, development, or demonstration work and in certain other contracts, DOE may need to require those contractors that are not the beneficiaries of Public Law 96–517 to license background patents to ensure reasonable public availability and accessibility necessary to practice the subject of the contract in the fields of technology specifically contemplated in the contract effort. That need may arise where the contractor is not attempting to take the technology resulting from the contract to the commercial marketplace, or is not meeting market demands. The need for background patent rights and the particular rights that should be obtained for either the Government or the public will depend upon the type, purpose, and scope of the contract effort, impact on the DOE program, and the cost to the Government of obtaining such rights.

(c) Provisions to deal specifically with DOE background patent rights are contained in paragraph (k) of the clause at 952.227–13. That paragraph may be modified with the concurrence of Patent Counsel in order to reflect the equities of the parties in particular contracting situations. Paragraph (k) should normally be deleted for contracts with an estimated cost and fee or price of $250,000 or less and may not be appropriate for certain types of study contracts; for planning contracts; for contracts with educational institutions; for contracts for specialized equipment for in-house Government use, not involving use by the public; and for contracts the work products of which will not be the subject of future procurements by the Government or its contractors.

(d) The Assistant General Counsel for Technology Transfer and Intellectual Property shall:

(1) Make the determination that whether reported inventions are subject inventions under the patent rights clause of the contract;

(2) Determine whether and where patent protection will be obtained on inventions;

(3) Represent DOE before domestic and foreign patent offices;

(4) Accept assignments and instruments confirmatory of the Government's rights to inventions; and

(5) Represent DOE in patent, technical data, and copyright matters not specifically reserved to the Head of the Agency or designee.

[60 FR 11816, Mar. 2, 1995]

927.303 Contract clauses.

(a) In solicitations and contracts for experimental, research, developmental, or demonstration work (but see (FAR) 48 CFR 27.304–3 regarding contracts for construction work or architect-engineer services), the contracting officer shall include the clause:

(1) At 952.227–13, Patent Rights Acquisition by the Government, in all such contracts other than those described in paragraphs (a)(2) and (a)(3) of this section;

(2) At 952.227–11, Patent Rights by the Contractor (Short Form), in contracts in which the contractor is a domestic small business or nonprofit organization as defined at (FAR) 48 CFR 27.301, except where the work of the contract is subject to an Exceptional Circumstances Determination by DOE; and

(3) At 970.5227–10, 970.5227–11, or 970.5227–12, as discussed in 970.27, Patent, Data, and Copyrights, in contracts for the management and operation of

DOE laboratories and production facilities.

(b) DOE shall not use the clause at (FAR) 48 CFR 52.227–12 except in situations where patent counsel grants a request for advance waiver pursuant to 10 CFR part 784 and supplies the contracting officer with that clause with appropriate modifications. Otherwise, in instances in which DOE grants an advance waiver or waives its rights in an identified invention pursuant to 10 CFR part 784, contracting officers shall consult with patent counsel for the appropriate clause.

(c) Any contract that has as a purpose the design, construction, operation, or management integration of a collection of contracts for the same purpose, of a Government-owned research, development, demonstration or production facility must accord the Government certain rights with respect to further use of the facility by or on behalf of the Government upon termination of the contract. The patent rights clause in such contracts must include the following facilities license paragraph:

[Insert appropriate paragraph no.] *Facilities License.* In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the Contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility (1) to practice or have practiced by or for the Government at the facility, and (2) to transfer such license with the transfer of that facility. Notwithstanding the acceptance or exercise by the Government of these rights, the Government may contest at any time the enforceability, validity or scope of, title to, any rights or patents herein licensed.

(End of paragraph)

[60 FR 11816, Mar. 2, 1995, as amended at 63 FR 10505, Mar. 4, 1998; 65 FR 68935, Nov. 15, 2000; 65 FR 81007, Dec. 22, 2000]

927.304 Procedures.

Where the contract contains the clause at 952.227–11 and the contractor does not elect to retain title to a subject invention, DOE may consider and, after consultation with the contractor, grant requests for retention of rights by the inventor subject to the provisions of 35 U.S.C. 200 *et seq*. This statement is in lieu of (FAR) 48 CFR 27.304–1(c).

[60 FR 11816, Mar. 2, 1995]

927.370 [Reserved]

Subpart 927.4—Technical Data and Copyrights

927.400 Scope of subpart.

This subpart sets forth DOE's policy, procedures, and instructions for contract clauses with respect to the acquisition and use of technical data and copyrights in contracts or subcontracts entered into, with or for the benefit of the Government.

927.402 Acquisition and use of technical data.

927.402–1 General.

(a) The provisions herein pertain to research, development, demonstration and supply contracts. Special considerations for contracts for the operation, design, or construction of Government-owned facilities are covered by subpart 970.27. Under DOE's broad charter to perform research, development, and demonstration work, in both nuclear and nonnuclear fields, and to meet the objectives stated in 927.402–2, DOE has extensive needs for technical data. The satisfaction of these needs and the achievement of DOE's objectives through a sound data policy are found in the balancing of the needs and equities of the Government, its contractors, and the general public.

(b) It is important to keep a clear distinction between contract requirements for the delivery of technical data and rights in technical data. The legal rights which the Government acquires in technical data in DOE contracts, other than management and operating contracts (see 48 CFR 970.2704)

and other contracts involving the production of data necessary for the management or operation of DOE facilities or a DOE site, are set forth in Rights in Data—General clause at 48 CFR 52.227–14 as modified in accordance with 927.409 of this subpart. In those contracts involving the production of data necessary for the management or operation of DOE facilities or a DOE site, after consultation with Patent Counsel the clause at 48 CFR 970.5227–1 shall be used. However, those clauses do not obtain for the Government delivery of any data whatsoever. Rather, known requirements for the technical data to be delivered by the contractor shall be set forth as part of the contract. The Additional Technical Data Requirements clause at 48 CFR 52.227–16 may be used along with the Rights in Data—General clause to enable the contracting officer to require the contractor to furnish additional technical data, the requirement for which was not known at the time of contracting. There is, however, a built-in limitation on the kind of technical data which a contractor may be required to deliver under either the contract or the Additional Technical Data Requirements clause. This limitation is found in the withholding provision of paragraph (g) of the Rights in Data—General clause at 48 CFR 52.227–14, as amended at 48 CFR 927.409(a), which provides that the Contractor need not furnish limited rights data or restricted computer software. Unless Alternate II or III to the Rights in Data—General clause is used, it is specifically intended that the contractor may withhold limited rights data or restricted computer software even though a requirement for technical data specified in the contract or called for delivery pursuant to the Additional Technical Data Requirements clause would otherwise require the delivery of such data.

(c) In contracts involving access to certain categories of DOE-owned restricted data, as set forth in 10 CFR part 725, DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related data and technology. Accordingly, in contracts where access to such restricted data is to be provided to contractors, the following parenthetical phrase shall be inserted after ''contract data'' in paragraph (b)(2)(ii) of the clause at 952.227–75, after ''technical data'' in paragraph (b)(2) of the clause at 952.227–77, or after ''technical data'' in paragraph (b)(2)(ii) of the clause at 952.227–78 as appropriate: ''(except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology).'' In addition, there are other types of contract situations (e.g., no cost contracts for studies or evaluation) wherein the contractor is given access to restricted data. In such contract situations, limitations on the use of such data may be appropriate.

[49 FR 12004, Mar. 28, 1984, as amended at 63 FR 10505, Mar. 4, 1998; 65 FR 81007, Dec. 22, 2000]

927.402–2 Policy.

The technical data policy is directed toward achieving the following objectives:

(a) Making the benefits of the energy research, development and demonstration programs of DOE widely available to the public in the shortest practicable time;

(b) Promoting the commercial utilization of the technology developed under DOE programs;

(c) Encouraging participation by private persons in DOE energy research, development, and demonstration programs; and

(d) Fostering competition and preventing undue market concentration or the creation or maintenance of other situations inconsistent with the antitrust laws.

927.403 Negotiations and deviations.

Contracting officers shall contact Patent Counsel assisting their contracting activity or the Assistant General Counsel for Technology Transfer and Intellectual Property for assistance in selecting, negotiating, or approving appropriate data and copyright clauses in accordance with the procedures set forth in this subpart and 48 CFR part 27.4. In particular, contracting officers shall seek the prompt

and timely advice of Patent Counsel regarding any situation not in conformance with this subpart and prescribed clauses, including the inclusion or modification of alternate paragraphs of the Rights in Data clause at 48 CFR 52.227–14, as amended at 48 CFR 927.409(a), the exclusion of specific items from said clause, the exclusion of the Additional Technical Data Requirements clause at 48 CFR 52.227–16, and the inclusion of any special provisions in a particular contract.

[63 FR 10505, Mar. 4, 1998]

927.404 Rights in technical data in subcontracts. (DOE coverage—paragraphs (g), (k), (l), and (m))

(g)(4) Contractors are required by paragraph (d)(3) of the clause at FAR 52.227–14, as modified pursuant to 48 CFR 927.409(a)(1), to acquire permission from DOE to assert copyright in any computer software first produced in the performance of the contract. This requirement reflects DOE's established software distribution program, recognized at FAR 27.404(g)(2), and the Department's statutory dissemination obligations. When a contractor requests permission to assert copyright in accordance with paragraph (d)(3) of the Rights in Data—General clause as prescribed for use at 48 CFR 927.409(a)(1), Patent Counsel shall predicate its decision on the considerations reflected in paragraph (e) of the clause at 48 CFR 970.5227–2 Rights in Data—Technology Transfer.

(k) *Subcontracts.* (1)(i) It is the responsibility of prime contractors and higher tier subcontractors, in meeting their obligations with respect to contract data, to obtain from their subcontractor the rights in, access to, and delivery of such data on behalf of the Government. Accordingly, subject to the policy set forth in this subpart, and subject to the approval of the contracting officer, where required, selection of appropriate technical data provisions for subcontracts is the responsibility of the prime contractors or higher-tier subcontractors. In many, but not all instances, use of the Rights in Technical Data clause of FAR 52.227–14, as modified pursuant to 48 CFR 927.409(a)(1), in a subcontract will provide for sufficient Government rights in and access to technical data. The inspection rights afforded in Alternate V of that clause normally should be obtained only in first-tier subcontracts having as a purpose the conduct of research, development, or demonstration work or the furnishing of supplies for which there are substantial technical data requirements as reflected in the prime contract.

(ii) If a subcontractor refuses to accept technical data provisions affording rights in and access to technical data on behalf of the Government, the contractor shall so inform the contracting officer in writing and not proceed with the award of the subcontract without written authorization of the contracting officer.

(iii) In prime contracts (or higher-tier subcontracts) which contain the Additional Technical Data Requirements clause at FAR 52.227–16, it is the further responsibility of the contractor (or higher-tier subcontractor) to determine whether inclusion of such clause in a subcontract is required to satisfy technical data requirements of the prime contract (or higher-tier subcontract).

(2) As is the case for DOE in its determination of technical data requirements, the Additional Technical Data Requirements clause at FAR 52.227–16 should not be used at any subcontracting tier where the technical data requirements are fully known. Normally, the clause will be used only in subcontracts having as a purpose the conduct of research, development, or demonstration work. Prime contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in the subcontractor's limited rights data or restricted computer software for their private use, and they shall not acquire rights to limited rights data or restricted computer software on behalf of the Government for standard commercial items without the prior approval of Patent Counsel.

(l) *Contractor licensing.* In many contracting situations the achievement of DOE's objectives would be frustrated if the Government, at the time of contracting, did not obtain on behalf of responsible third parties and itself limited license rights in and to limited

rights data or restricted computer software or both necessary for the practice of subject inventions or data first produced or delivered in the performance of the contract. Where the purpose of the contract is research, development, or demonstration, contracting officers should consult with program officials and Patent Counsel to consider whether such rights should be acquired. No such rights should be obtained from a small business or non-profit organization, unless similar rights in background inventions of the small business or non-profit organization have been authorized in accordance with 35 U.S.C. 202(f). In all cases when the contractor has agreed to include a provision assuring commercial availability of background patents, consideration should be given to securing for the Government and responsible third parties at reasonable royalties and under appropriate restrictions, co-extensive license rights for data which are limited rights data and restricted computer software. When such license rights are deemed necessary, the Rights in Data-General clause at FAR 52.227–14 should be supplemented by the addition of Alternate VI as provided at 48 CFR 952.227–14. Alternate VI will normally be sufficient to cover limited rights data and restricted computer software for items and processes that were used in the contract and are necessary in order to insure widespread commercial use or practical utilization of a subject of the contract. The expression ''subject of the contract'' is intended to limit the licensing required in Alternate VI to the fields of technology specifically contemplated in the contract effort and may be replaced by a more specific statement of the fields of technology intended to be covered in the manner described in the patent clause at 48 CFR 952.227–13 pertaining to ''Background Patents.'' Where, however, limited rights data and restricted computer software cover the main purpose or basic technology of the research, development, or demonstration effort of the contract, rather than subcomponents, products, or processes which are ancillary to the contract effort, the limitations set forth in subparagraphs (k)(1) through (k)(4) of Alternate VI of 48 CFR 952.227–14 should be modified or deleted. Paragraph (k) of 48 CFR 952.227–14 further provides that limited rights data or restricted computer software may be specified in the contract as being excluded from or not subject to the licensing requirements thereof. This exclusion can be implemented by limiting the applicability of the provisions of paragraph (k) of 48 CFR 952.227–14 to only those classes or categories of limited rights data and restricted computer software determined as being essential for licensing. Although contractor licensing may be required under paragraph (k) of 48 CFR 952.227–14, the final resolution of questions regarding the scope of such licenses and the terms thereof, including provisions for confidentiality, and reasonable royalties, is then left to the negotiation of the parties.

(m) *Access to restricted data.* In contracts involving access to certain categories of DOE-owned Category C–24 restricted data, as set forth in 10 CFR part 725, DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related data and technology. Accordingly, in contracts where access to such restricted data is to be provided to contractors, Alternate VII shall be incorporated into the rights in technical data clause of the contract. In addition, in any other types of contracting situations in which the contractor may be given access to restricted data, appropriate limitations on the use of such data must be specified.

[63 FR 10505, Mar. 4, 1998, as amended at 65 FR 81007, Dec. 22, 2000]

927.404–70 Statutory programs.

Occasionally, Congress enacts legislation that authorizes or requires the Department to protect from public disclosure specific data first produced in the performance of the contract. Examples of such programs are ''the Metals Initiative'' and section 3001(d) of the Energy Policy Act. In such cases DOE Patent Counsel is responsible for providing the appropriate contractual provisions for protecting the data in accordance with the statute. Generally, such clauses will be based upon the Rights in Data-General clause prescribed for use at 48 CFR 927.409(a) with

appropriate modifications to define and protect the ''protected data'' in accordance with the applicable statute. When contracts under such statutes are to be awarded, contracting officers must acquire from Patent Counsel the appropriate contractual provisions. Additionally, the contracting officer must consult with DOE program personnel and Patent Counsel to identify data first produced in the performance of the contract that will be recognized by the parties as protected data and what data will be made available to the public notwithstanding the statutory authority to withhold the data from public dissemination.

[63 FR 10506, Mar. 4, 1998]

927.408 Cosponsored research and development activities.

Because of the Department of Energy's statutory duties to disseminate data first produced under its contracts for research, development, and demonstration, the provisions of FAR 27.408 do not apply to cosponsored or cost shared contracts.

[63 FR 10506, Mar. 4, 1998]

927.409 Solicitation provisions and contract clauses. (DOE coverage-paragraphs (a), (h), (s), and (t))

(a)(1) The contracting officer shall insert the clause at FAR 52.227–14, Rights in Data-General, substituting the following paragraph (a) and including the following paragraph (d)(3) and Alternate V in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract; except contracting officers are authorized to use Alternate IV rather than paragraph (d)(3) in contracts for basic or applied research with educational institutions except where software is specified for delivery or except where other special circumstances exist:

(a) *Definitions.* (1) *Computer data bases,* as used in this clause, means a collection of data 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.

(2) *Computer software,* as used in this clause, means (i) computer programs which are data comprising 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) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

(3) *Data,* as used in this clause, means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. For the purposes of this clause, the term does not include data incidental to the administration of this contract, such as financial, administrative, cost and pricing, or management information.

(4) *Form, fit, and function data,* as used in this clause, means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, as well as data identifying source, size, configuration, mating, and attachment characteristics, functional characteristics, and performance requirements; except that for computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithm, process, formulae, and flow charts of the software.

(5) *Limited rights data,* as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of subparagraph (g)(2) of this section if included in this clause.

(6) *Restricted computer software,* as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of subparagraph (g)(3) of this section if included in this clause.

(7) *Technical data,* as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

(8) *Unlimited rights,* as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform

publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(d)(3) The Contractor agrees not to assert copyright in computer software first produced in the performance of this contract without prior written permission of the DOE Patent Counsel assisting the contracting activity. When such permission is granted, the Patent Counsel shall specify appropriate terms, conditions, and submission requirements to assure utilization, dissemination, and commercialization of the data. The Contractor, when requested, shall promptly deliver to Patent Counsel a duly executed and approved instrument fully confirmatory of all rights to which the Government is entitled.

(2) However, rights in data in these specific situations will be treated as described, where the contract is—

(i) For the production of special works of the type set forth in FAR 27.405(a), but the clause at FAR 52.227–14, Rights in Data-General, shall be included in the contract and made applicable to data other than special works, as appropriate (See paragraph (i) of FAR 27.409);

(ii) For the acquisition of existing data works, as described in FAR 27.405(b) (See paragraph (j) of FAR 27.409);

(iii) To be performed outside the United States, its possessions, and Puerto Rico, in which case agencies may prescribe different clauses (See paragraph (n) of FAR 27.409);

(iv) For architect-engineer services or construction work, in which case contracting officers shall utilize the clause at FAR 52.227–17, Rights in Data-Special Works;

(v) A Small Business Innovation Research contract (See paragraph (l) of FAR 27.409);

(vi) For management and operation of a DOE facility (see 48 CFR 970.2704) or other contracts involving the production of data necessary for the management or operation of DOE facilities or a DOE site, after consultation with Patent Counsel (See 927.402–1(b)); or

(vii) Awarded pursuant to a statute expressly providing authority for the protection of data first produced thereunder from disclosure or dissemination. (See 927.404–70).

(h) The contracting officer shall insert the clause at FAR 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 to be known at the time of contracting and specified in the contract. See FAR 27.406(b). This clause may also be used in other contracts when considered appropriate.

* * * * *

(s) Contracting officers shall incorporate the solicitation provision at FAR 52.227–23, Rights to Proposal Data (Technical), in all requests for proposals.

(t) Contracting officers shall include the solicitation provision at 952.227–84 in all solicitations involving research, developmental, or demonstration work.

[63 FR 10506, Mar. 4, 1998, as amended at 65 FR 81007, Dec. 22, 2000]

Subpart 927.70 [Reserved]

PART 928—BONDS AND INSURANCE

Subpart 928.1—Bonds and Other Financial Protections

Sec.

928.101 Bid guarantees.
928.101–1 Policy on use.
928.103 Performance and payment bonds for other than construction contracts.
928.103–3 Payment bonds.
928.103–70 Review of performance and payment bonds for other than construction.

Subpart 928.3—Insurance

928.301 Policy.
928.370 Service-type insurance policies.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12010, Mar. 28, 1984, unless otherwise noted.

Subpart 928.1—Bonds and Other Financial Protections

SOURCE: 61 FR 41708, Aug. 9, 1996, unless otherwise noted.

928.101 Bid guarantees.

928.101–1 Policy on use.

In addition to the restriction on use of bid guarantees in 48 CFR 28.101–1(a), a bid guarantee may be required only for fixed price or unit price contracts entered into as a result of sealed bidding. They may not be required for negotiated contracts.

[61 FR 41708, Aug. 9, 1996, as amended at 75 FR 29459, May 26, 2010]

928.103 Performance and payment bonds for other than construction contracts.

928.103–3 Payment bonds.

A determination that is in the best interest of the Government to require payment bonds in connection with other than construction contracts may be made by the contracting officer on individual acquisitions.

928.103–70 Review of performance and payment bonds for other than construction.

A performance or payment bond, other than an annual bond, shall not antedate the contract to which it pertains.

Subpart 928.3—Insurance

928.301 Policy.

The DOE policies and procedures for indemnification of DOE contractors are set forth in 48 CFR part 50 and part 950.

[61 FR 41708, Aug. 9, 1996, as amended at 74 FR 36366, July 22, 2009; 75 FR 29459, May 26, 2010]

928.370 Service-type insurance policies.

(a) Service-type insurance policies are cost-reimbursement type contracts or subcontracts in which the insurer provides claim and loss adjustment services on a cost reimbursement basis, which satisfies state and Federal insurance requirements.

(b) Service-type insurance policies may be used with contracting officer approval, when one or more of the following conditions are present—

(1) Pure risk commercial insurance is not available or, if available, cost is not considered reasonable;

(2) Inherent risks in the contract are new and a part of the process of commercialization;

(3) The service-type insurance is needed to implement jointly funded projects; or

(4) The service-type insurance arrangement is considered in the Government's best interest.

[61 FR 41708, Aug. 9, 1996, as amended at 74 FR 36366, July 22, 2009]

PART 931—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 931.1—Applicability

Sec.

931.102 Fixed-price contracts.

Subpart 931.2—Contracts With Commercial Organizations

931.205 Selected costs.
931.205–18 Independent research and development (IR&D) and bid and proposal (B&P) costs.
931.205–19 Insurance and indemnification.
931.205–32 Pre-contract costs.
931.205–33 Professional and consultant service costs.
931.205–47 Costs related to legal and other proceedings.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

Subpart 931.1—Applicability

931.102 Fixed-price contracts.

The intent of the first sentence of 48 CFR 31.102 is that applicable subparts of 48 CFR part 31 shall be used by the Government in—

(a) Pricing fixed-price prime contracts and modifications,

(b) Evaluating the reasonableness of a prime contractor's (or prospective prime contractor's) proposed subcontract (or subcontract modification) prices, and

(c) Determining the allowability of contractor payments to subcontractors in accordance with the provisions of 48 CFR 31.204(b).

[49 FR 12011, Mar. 28, 1984, as amended at 75 FR 29459, May 26, 2010]

Subpart 931.2—Contracts With Commercial Organizations

931.205 Selected costs.

931.205–18 Independent research and development (IR&D) and bid and proposal (B&P) costs.

(c) In addition to all the other FAR requirements for allowability of IR&D costs, costs for IR&D are allowable under DOE contracts to the extent: They are not otherwise unallowable; and they have potential benefit or relationship to the DOE program. The term ''DOE program'' encompasses the DOE total mission and its objectives. In addition to all the other FAR requirements for allowability of B&P costs, costs for B&P are allowable under DOE contracts to the extent they are not otherwise unallowable.

[81 FR 45977, July 15, 2016]

931.205–19 Insurance and indemnification.

(f) The contracting officer shall insert the clause at 952.231–71, Insurance-litigation and claims, instead of the clause at 48 CFR 52.228–7, in

(1) Non-management and operating cost reimbursement contracts exceeding $100,000,000, and

(2) Non-management and operating contracts exceeding $100,000,000 that include cost reimbursable elements exceeding $10,000,000 (e.g. contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time and materials contracts where the materials portions exceed $10,000,000.

[78 FR 25816, May 3, 2013]

931.205–32 Pre-contract costs.

(a) To the extent practical, known expenditures of pre-contract costs under DOE contracts should be governed by establishing advance understandings as contemplated by 48 CFR 31.109. Contracts that include authorized precontract costs shall include the ''Date of Incurrence of Cost'' clause specified at 952.231–70.

(b) The following limitations apply to establishment of advance understandings relative to pre-contract costs:

(1) Pre-contract cost authorizations shall not be used to cover a period in excess of 15 days, unless a longer period is approved by the HCA based upon a written finding that such an allowance is reasonable, and shall not be extended or renewed. A copy of the findings shall be forwarded to the Senior Procurement Executive at the time of approval. If prolonged coverage is necessary, a letter contract shall be issued.

(2) All pre-contract cost authorizations shall be reviewed and approved at a management level above the contracting officer.

(3) Retroactive precontract cost authorization and the predating of contractual agreements shall not be used.

(4) Pre-contract cost authorizations shall not authorize the delivery or furnishing of any goods or services from a contractor until after the contract is executed.

[49 FR 12011, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 74 FR 36366, 36378, July 22, 2009; 75 FR 29459, May 26, 2010]

931.205–33 Professional and consultant service costs.

(g) If the clause at 48 CFR 952.231–71 or the clause at 48 CFR 970.5228–1 is included in the contract, or the contract is a non-management and operating contract exceeding $100,000,000 that includes cost reimbursable elements exceeding $10,000,000 (for example, contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time and materials contracts where the materials portions exceed $10,000,000), litigation and other legal costs are only allowable if both: incurred in accordance with 10 CFR part 719, Contractor Legal Management Requirements; and not otherwise made unallowable by law, regulation, or the terms of the contract.

[78 FR 25816, May 3, 2013]

931.205–47 Costs related to legal and other proceedings.

(h) *Costs associated with whistleblower actions.* (1) Definitions for purposes of this paragraph (h):

Covered contractors and subcontractors means those contractors and subcontractors with contracts exceeding $5,000,000.

Employee whistleblower action means any action filed by an employee in Federal or state court for redress of a retaliatory act by a contractor and any administrative procedure initiated by an employee under 29 CFR part 24, 48 CFR subpart 3.9, 10 CFR part 708 or 42 U.S.C. 7239.

Retaliatory act means a discharge, demotion, reduction in pay, coercion, restraint, threat, intimidation or other similar negative action taken against an employee by a contractor as a result of an employee's activity protected as a whistleblower activity by a Federal or state statute or regulation.

Settlement and award costs means defense costs and costs arising from judicial orders, negotiated agreements, arbitration, or an order from a Federal agency or board and includes compensatory damages, underpayment for work performed, and reimbursement for a complainant employee's legal counsel.

(2) For costs associated with employee whistleblower actions where a retaliatory act is alleged against a covered contractor or subcontractor, the contracting officer—

(i) May authorize reimbursement of costs on a provisional basis, in appropriate cases;

(ii) Must consult with the Office of General Counsel whistleblower costs point of contact, who will consult with other Headquarters points of contact as appropriate, before making a final allowability determination; and

(iii) Must determine allowability of defense, settlement and award costs on a case-by-case basis after considering the terms of the contract, relevant cost regulations, and the relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, available at the conclusion of the employee whistleblower action.

(3) Covered contractors and subcontractors must segregate legal costs, including costs of in-house counsel, incurred in the defense of an employee whistleblower action so that the costs are separately identifiable.

(4) If a contracting officer provisionally disallows costs associated with an employee whistleblower action for a covered contractor or subcontractor, funds advanced by the Department may not be used to finance costs connected with the defense, settlement and award of an employee whistleblower action.

(5) Contractor defense, settlement and award costs incurred in connection with the defense of suits brought by employees under section 2 of the Major Fraud Act of 1988 are excluded from coverage of this section.

[65 FR 62301, Oct. 18, 2000, as amended at 74 FR 36366, July 22, 2009; 75 FR 29459, May 26, 2010]

PART 932—CONTRACT FINANCING

Sec.

932.006 Reduction or suspension of contract payments upon finding of fraud.
932.006–4 Procedures.

Subpart 932.1—Non-Commercial Item Purchase Financing

932.102 Description of contract financing methods.

Subpart 932.3—Loan Guarantees for Defense Production

932.304 Procedures.
932.304–2 Certificate of eligibility.

Subpart 932.4—Advance Payments for Non-Commercial Items

932.402 General.
932.407 Interest.

Subpart 932.5—Progress Payments Based on Costs

932.501 General.
932.501–2 Unusual progress payments.

Subpart 932.6—Contract Debts

932.602 Responsibilities.

Subpart 932.8—Assignment of Claims

932.803 Policies.

Subpart 932.9—Prompt Payment

932.970 Implementing DOE policies and procedures.

Subpart 932.70—DOE Loan Guarantee Authority

932.7002 Authority.
932.7003 Policies.
932.7004 Procedures.
932.7004–1 Guaranteed loans for civilian programs.
932.7004–2 Criteria.
932.7004–3 Eligibility.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12011, Mar. 28, 1984, unless otherwise noted.

932.006 Reduction or suspension of contract payments upon finding of fraud.

932.006–4 Procedures.

(a) The remedy coordination official shall follow the procedures identified in 48 CFR 32.006–4.

(b) [Reserved]

[63 FR 5273, Feb. 2, 1998, as amended at 75 FR 29459, May 26, 2010]

Subpart 932.1—Non-Commercial Item Purchase Financing

932.102 Description of contract financing methods.

(e)(2) Progress payments based on a percentage or stage of completion may be authorized by the Head of the Contracting Activity when a determination is made that progress payments based on costs cannot be practically employed and that there are adequate safeguards provided for the administration of progress payments based on a percentage or stage of completion.

[61 FR 41708, Aug. 9, 1996]

Subpart 932.3—Loan Guarantees for Defense Production

932.304 Procedures.

932.304–2 Certificate of eligibility.

(h) Guaranteed loan applications shall be authorized and transmitted to the Federal Reserve Bank only by the Secretary or designee specified for that purpose.

Subpart 932.4—Advance Payments for Non-Commercial Items

932.402 General.

(e)(1) The Head of the Contracting Activity or designee shall have the responsibility and authority for making findings and determinations, and for approval of contract terms concerning advance payments.

(2) Before authorizing any advance payment arrangements, the approving official shall obtain the advice, and other inputs of the servicing finance office.

932.407 Interest.

(d)(4) Advance payments may be made without interest under cost-reimbursement contracts for construction or engineering services.

Subpart 932.5—Progress Payments Based on Costs

932.501 General

932.501–2 Unusual progress payments.

(a)(3) For DOE, the Head of the Contracting Activity shall forward all requests which are considered favorable, with supporting information, to the DOE Senior Procurement Executive, who, after coordination with the Chief Financial Officer, Headquarters, will approve or deny the request. For NNSA, the NNSA Senior Procurement Executive will coordinate with the NNSA Chief Financial Officer before approving or denying the request.

(d) Requests for unusual progress payments will not be considered as a handicap or adverse factor in the award of a contract; provided the bid or proposal is not conditioned on approval of such request.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994; 75 FR 29458, May 26, 2010]

Subpart 932.6—Contract Debts

932.602 Responsibilities.

The Department of Energy (DOE) contracting officer has primary responsibility for determining the amount of

contract debt and notifying the cognizant finance office of such debt due the Government. The servicing DOE finance office making payments under the contract has primary responsibility for debt collection.

[49 FR 12011, Mar. 28, 1984, as amended at 74 FR 36367, July 22, 2009. Redesignated and amended at 75 FR 29458, May 26, 2010]

Subpart 932.8—Assignment of Claims

932.803 Policies.

(d) In the case of prime contracts, when it has been determined that the financing of contracts will be facilitated in the interest of DOE programs, it is the policy of DOE that such contracts provide, or be amended without consideration (see Assignment of Claims Act of 1940) to provide, in conformance with 48 CFR 32.804, that payments to be made to an assignee shall not be subject to reduction or setoff. In the case of subcontracts, when loans are made for the purpose of financing performance of subcontracts under DOE prime contracts, financing institutions or the Government as guarantor in those instances in which such loans are guaranteed should not be required to incur risks of loss by reason of possible diversion of assigned subcontracts proceeds for payment of other claims of the prime contractor against the borrower, otherwise unrelated to the assigned subcontracts. The Head of the Contracting Activity shall require the adoption of these policies and practices by DOE prime contractors with respect to DOE subcontract work. The Head of the Contracting Activity should inform the Chief Financial Officer, Headquarters of each DOE contractor who is unwilling to adopt policies consistent with this paragraph and the reasons given in support of the contractor's position.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994; 75 FR 29459, May 26, 2010]

Subpart 932.9—Prompt Payment

932.970 Implementing DOE policies and procedures.

(a) *Invoice payments*—(1) *Contract settlement date.* For purposes of determining any interest penalties under cost-type contracts, the effective date of contract settlement shall be the effective date of the final contract modification issued to acknowledge contract settlement and to close out the contract.

(2) *Constructive acceptance periods.* Where the contracting officer determines, in writing, on a case-by-case basis, that it is not reasonable or feasible for DOE to perform the acceptance or approval function within the standard period, the contracting officer should specify a longer constructive acceptance or approval period, as appropriate. Considerations include, but are not limited to, the nature of supplies or services involved, geographical site location, inspection and testing requirements, shipping and acceptance terms, and available DOE resources.

(b) *Contract financing payments.* Contracting officers may specify payment due dates that are less than the standard 30 days when a determination is made, in writing, on a case-by-case basis, that a shorter contract financing payment cycle will be required to finance contract work. In such cases, the contracting officer should coordinate with the finance and program officials that will be involved in the payment process to ensure that the contract payment terms to be specified in solicitations and resulting contract awards can be reasonably met. Consideration should be given to geographical separation, workload, contractor ability to submit a proper request, and other factors that could affect timing of payment. However, payment due dates that are less than 7 days for progress payments or less than 14 days for interim payments on cost-type contracts are not authorized.

[61 FR 41708, Aug. 9, 1996]

Subpart 932.70—DOE Loan Guarantee Authority

932.7002 Authority.

Guaranteed loan applications shall be authorized and transmitted to the Federal Reserve Board only by the Secretary, or designee specified for that purpose, and only when made pursuant to enabling legislation or other authority; e.g., by executive order or regulation.

932.7003 Policies.

The following policies governing the exercise of its loan guarantee authority have been established by DOE:

(a) The use of the loan guarantee authority is not restricted to contracts or subcontracts of any particular type or class. Each case is to be evaluated on its own merits and under the particular circumstances applicable thereto.

(b) The fact that a contract has been awarded as a result of competitive bidding should not, of itself, render the loan ineligible for guarantee by DOE if the contractor is financially responsible and its need for working capital is the result of the impact of a defense program or any other DOE program for which guaranteed loans are authorized.

(c) The guarantee authority should, in general, not be used in connection with loans to contractors required to furnish performance bonds, except in those cases in which the time likely to be required for the surety or DOE to take over in the event of default will result in delays which cannot be tolerated by the particular program concerned. When performance bonds have been furnished, the surety shall be required to subordinate its rights in favor of the guaranteed loan.

(d) The criterion that the materials or services to be provided cannot readily be acquired from alternative sources does not require the finding that the materials or services are absolutely unobtainable elsewhere. The criterion should be so applied as to permit guarantees of loans when, although the materials or services can be obtained elsewhere, such factors as the urgency of supply schedules, technical capacity of the contractor, comparative prices, and time and expense involved in reissuing the contract, including termination payment, establish that it is to the Government's advantage not to resort to alternative sources merely because the contractor or subcontractor may require a guaranteed loan.

(e) If it is known at the time the contract is to be awarded that the low offeror who is technically qualified and competent to furnish the required materials and services will require a guaranteed loan, the contracting officer should obtain appropriate advice and in reaching a decision should consider at least the following—

(1) The savings to be realized by awarding the contract to the low offeror;

(2) The risk to the Government in guaranteeing a loan; and

(3) The likelihood, if award is made to the second low offeror, of that offeror's applying for a guaranteed loan at a later date.

Extreme care should be exercised in rejecting a low bid or proposal simply because the low offeror requires a guaranteed loan.

(f) The amount of the loan should bear reasonable relationship to such factors as the value and terms of the contract, the probable investment required to be made by the contractor in payrolls and inventories, the frequency with which contract payments are to be made, and the borrower's current working capital position.

(g) Borrowings for working capital purposes under guaranteed loans shall be limited to the amount necessary to perform the contract for which the loan is sought. In order that the contractor will also use its own funds in the performance of the contracts, amounts outstanding under the loan or line-of-credit shall be limited to an amount not to exceed 90 percent of the borrower's investment in its contracts, regardless of the total amount of the loan or line of credit authorized. The borrower's investment includes all items for which the borrower would be entitled to payment on performance or termination of contracts, but does not include any items for which no work has been done nor expenditures made.

(h) Unless there are exceptional circumstances, the loan should mature

not later than 30 days after the estimated date of final payment under the contract.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994; 74 FR 36367, July 22, 2009]

932.7004 Procedures.

932.7004–1 Guaranteed loans for civilian programs.

The procedures for authorizing a guaranteed loan under legislation other than section 301 of the Defense Production Act of 1950 (50 U.S.C. App. 2091) shall be essentially the same as those set forth in 48 CFR 32.304, Procedures, 48 CFR 32.305, Loan Guarantees for Terminated Contracts, and 48 CFR 32.306 Loan Guarantee for Subcontacts; except that any contrary provisions required by enabling legislation authorizing the loan shall govern.

[49 FR 12011, Mar. 28, 1984, as amended at 75 FR 29459, May 26, 2010]

932.7004–2 Criteria.

(a) The materials or services to be furnished by the contractor are necessary to the Government interest.

(b) The materials or services cannot as a practical matter be obtained from alternate sources without delay or impeding the Government's interest, except that no small business concern shall be held ineligible for the issuance of such guarantee by reason of alternative sources of supply.

(c) The contractor has demonstrated its inability to obtain the necessary financing in conventional credit channels without the guarantee.

(d) There is reasonable assurance that the loan can be repaid.

(e) The contractor is competent to perform the contract.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994]

932.7004–3 Eligibility.

The applicant's eligibility for a guaranteed loan will be based on—

(a) Contracting officer determinations and findings regarding items (a), (b) and (e) in 932.7004–2 as incorporated in a Certificate of Eligibility (48 CFR 32.304–2); and

(b) The Chief Financial Officer's determination for items (c) and (d) in 932.7004–2 based on information contained in the application, the Federal Reserve Bank's report, and information furnished by the contracting activity concerned.

[49 FR 12011, Mar. 28, 1984, as amended at 59 FR 9106, Feb. 25, 1994; 74 FR 36367, July 22, 2009; 75 FR 29459, May 26, 2010]

PART 933—PROTESTS, DISPUTES, AND APPEALS

Subpart 933.1—Protests

Sec.
933.102 General.
933.103 Protests to the agency.
933.104 Protests to GAO.
933.106 Solicitation provisions.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 51 FR 31336, Sept. 3, 1986, unless otherwise noted.

Subpart 933.1—Protests

SOURCE: 61 FR 41708, Aug. 9, 1996, unless otherwise noted.

933.102 General.

(b) The Heads of Contracting Activities (HCA), for contracts estimated to be within the limits of their delegated authority, may, without power of redelegation, provide corrective relief in response to a protest in accordance with 48 CFR 33.102(b).

[63 FR 53758, Oct. 16, 1997, as amended at 74 FR 36367, July 22, 2009]

933.103 Protests to the agency.

(i) Protests filed with the contracting officer before or after award shall be decided by the HCA except for the following cases, which shall be decided by the Senior Procurement Executive:

(1) The protester requests that the protest be decided by the Senior Procurement Executive.

(2) The HCA is the contracting officer of record at the time the protest is filed, having signed either the solicitation where the award has not been made, or the contract, where the award or nomination of the apparent successful offeror has been made.

(3) The HCA concludes that one or more of the issues raised in the protest have the potential for significant impact on Department of Energy (DOE) acquisition policy.

(j) The Department of Energy encourages direct negotiations between an offeror and the contracting officer in an attempt to resolve protests. In those situations where the parties are not able to achieve resolution, the Department favors the use of alternative dispute resolution (ADR) techniques to resolve protests. A protest requesting a decision at the Headquarters level shall state whether the protester is willing to utilize ADR techniques such as mediation or nonbinding evaluation of the protest by a neutral party. Both the protester and the Department must agree that the use of such techniques is appropriate. If the parties do not mutually agree to utilize ADR techniques to resolve the protest, the protest will be processed in accordance with the procedures set forth in paragraph (k).

(k) Upon receipt of a protest lodged with the Department, the contracting officer shall prepare a report similar to that discussed in 48 CFR 33.104(a)(3)(iv). The Senior Procurement Executive (for protests at the Headquarters level or those specific HCA protests cited in paragraph (i) of this section) or an HCA (for protests at the contracting activity level) will render a decision on a protest within 35 calendar days, unless a longer period of time is determined to be needed.

[74 FR 36367, July 22, 2009, as amended at 75 FR 29459, May 26, 2010]

933.104 Protests to GAO.

(a)(2) The contracting officer shall provide the notice of protest.

(b) *Protests before award.* (1) When the Department has received notice from the Government Accountability Office (GAO) of a protest filed directly with the GAO, a contract may not be awarded until the matter is resolved, unless authorized by the HCA in accordance with 48 CFR 33.104(b). Before the HCA authorizes the award, the required finding shall be concurred in by the DOE counsel handling the protest, endorsed by the Senior Program Official, and approved by the Senior Procurement Executive. The finding shall address the likelihood that the protest will be sustained by the GAO.

(c) *Protests after award.* Before the HCA authorizes performance, the finding required by 48 CFR 33.104(c)(2) shall be concurred in by the DOE counsel handling the protest, endorsed by the Senior Program Official, and approved by the Senior Procurement Executive.

(g) *Notice to GAO.* (1) The report to the GAO regarding a decision not to comply with the GAO's recommendation, discussed at 48 CFR 33.104(f), shall be provided by the HCA making the award, after approval of the Senior Procurement Executive. If a DOE-wide policy issue is involved, the report shall be provided by the Senior Procurement Executive.

(2) It is the policy of the Department to comply promptly with recommendations set forth in Comptroller General Decisions except for compelling reasons.

(3) The GAO does not have jurisdiction to consider subcontractor protests. 933.106 Solicitation provisions.

[61 FR 41708, Aug. 9, 1996, as amended at 74 FR 36367, 36378, July 22, 2009; 75 FR 29459, May 26, 2010]

933.106 Solicitation provisions.

(a) The contracting officer shall supplement the provision at 48 CFR 52.233–2, Service of Protest, in solicitations for other than simplified acquisitions by adding the provision at 952.233–2.

(b) The contracting officer shall include the provision at 952.233–4 in solicitations for purchases above the simplified acquisition threshold.

(c) The contracting officer shall include the provision at 952.233–5 in solicitations for purchases above the simplified acquisition threshold.

[61 FR 41708, Aug. 9, 1996, as amended at 74 FR 36367, July 22, 2009; 75 FR 29459, May 26, 2010]

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 935—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.
935.010 Scientific and technical reports.
935.070 Research misconduct.
935.071 Contract clause.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12016, Mar. 28, 1984, unless otherwise noted.

935.010 Scientific and technical reports.

(c) All research and development contracts which require reporting of research and development results conveyed in scientific and technical information (STI) shall include an instruction requiring the contractor to submit all STI, including reports and notices relating thereto, electronically to the U.S. Department of Energy (DOE), Office of Scientific and Technical Information (OSTI), using the DOE Energy Link System (E-link) at *http://www.osti.gov/elink*. The phrase ''reports and notices relating thereto'' does not include reports or notices concerning administrative matters such as contract cost or financial data and information. The DOE Order 241.1B Scientific and Technical Information Management, or its successor version, sets forth requirements for STI management.

(d) As prescribed in DOE Order 241.1B, the contracting officer shall ensure that the requirements of the attendant Contractor Requirements Document are included in applicable contracts.

[75 FR 29458, May 26, 2010]

935.070 Research misconduct.

(a) *Applicability*. The DOE research misconduct policy set forth at 10 CFR part 733 addresses research misconduct by individuals who propose, perform or review research of any kind for the Department of Energy pursuant to a contract. The regulation applies regardless of where the research or other activity is conducted or by whom.

(b) *Definition*. Research misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. Research misconduct does not include honest error or differences of opinion. A finding of research misconduct means a determination, based on a preponderance of the evidence, that research misconduct has occurred, including a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

[70 FR 37015, June 28, 2005]

935.071 Contract clause.

The contracting officer must insert the clause at 952.235–71, Research Misconduct, in contracts, including management and operating contracts, that involve research.

[70 FR 37015, June 28, 2005]

PART 936—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 936.2—Special Aspects of Contracting for Construction

Sec.
936.202–70 [Reserved]
936.202–71 Specifications.

Subpart 936.6—Architect-Engineer Services

936.602–70 DOE selection criteria.
936.609–3 Work oversight in architect-engineer contracts.

Subpart 936.7 [Reserved]

Subpart 936.71—Inspection and Acceptance

936.7100 Scope of subpart.
936.7101 Construction contracts.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12016, Mar. 28, 1984, unless otherwise noted.

Subpart 936.2—Special Aspects of Contracting for Construction

936.202–70 [Reserved]

936.202–71 Specifications.

When developing specifications for the work to be performed, plan for ways to ensure that construction and demolition debris can be diverted or recycled in sufficient quantities as to ensure that the Agency goal from section 2(e) of Executive Order 13514 of diverting at least 50% of the debris stream may be attained.

[75 FR 57693, Sept. 22, 2010]

Subpart 936.6—Architect-Engineer Services

936.602–70 DOE selection criteria.

Contracting officers or architect-engineer evaluation boards shall apply the evaluation criteria contained in this subsection, as appropriate, and any special criteria developed for individual selections. When special and additional criteria are to be used, they shall be set forth in the public announcement, and a written justification for their use shall be placed in the DOE file maintained for the project.

(a) *General qualifications, including—*

(1) Reputation and standing of the firm and its principal members;

(2) Experience and technical competence of the firm in comparable work;

(3) Past record in performing work for DOE, other Government agencies, and private industry, including projects or contracts implemented with no overruns; performance from the standpoint of cost including cost overruns (last 5 years); the nature, extent, and effectiveness of contractor's cost reduction program; quality of work; and ability to meet schedules including schedule overruns (last 5 years) (where applicable);

(4) The volume of past and present workloads;

(5) Interest of company management in the project and expected participation and contribution of top officials;

(6) Adequacy of central or branch office facilities for the proposed work, including facilities for any special services that may be required;

(7) Geographic location of the home office and familiarity with the locality in which the project is located; or

(8) In addition to these requirements, consider the Architect-Engineer firm's experience in energy efficiency, pollution prevention, waste reduction, and the use of recovered and environmentally preferable materials and other criteria at 48 CFR 36.602–1.

(b) *Personnel and organizations.* (1) Specific experience and qualifications of personnel proposed for assignment to the project, including, as required for various phases of the work—

(i) Technical skills and abilities in planning, organizing, executing, and controlling;

(ii) Abilities in overall project coordination and management; and

(iii) Experience in working together as a team;

(2) Proposed project organization, delegations of responsibility, and assignments of authority;

(3) Availability of additional competent, regular employees for support of the project, and the depth and size of the organization so that any necessary expansion or acceleration could be handled adequately;

(4) Experience and qualifications of proposed consultants and subcontractors; and

(5) Ability to assign adequate qualified personnel from the proposed organization (firms own organization, joint-venture organizations, consulting firms etc.) including key personnel and a competent supervising representative.

(c) Additional (or special) criteria developed for the specific project shall be considered and evaluated as may be appropriate.

[49 FR 12016, Mar. 28, 1984, as amended at 68 FR 6358, Feb. 7, 2003; 74 FR 36367, July 22, 2009; 75 FR 29459, May 26, 2010]

936.609–3 Work oversight in architect-engineer contracts.

In addition to the clause at 48 CFR 52.236–24, the contracting officer shall insert the clause at 952.236–71 in architect-engineer contracts.

[49 FR 12016, Mar. 28, 1984, as amended at 75 FR 29459, May 26, 2010]

Subpart 936.7 [Reserved]

Subpart 936.71—Inspection and Acceptance

936.7100 Scope of subpart.

This subpart implements and supplements 48 CFR part 36 by prescribing the policies and requirements for inspection and acceptance under construction contracts.

[49 FR 12016, Mar. 28, 1984, as amended at 75 FR 29459, May 26, 2010]

936.7101 Construction contracts.

(a) Inspection services may be performed by the architect-engineer responsible for the design. Inspection services may not be procured from a construction contractor with respect to its own work.

(b) When one contractor is to inspect the work of another, the inspection contractor will be given written instructions defining its responsibilities and stating that it is not authorized to modify the terms and conditions of the contract, to direct additional work, to waive any requirements of the contract, or to settle any claim or dispute. Copies of the instructions will be given to the contractor who is to be inspected, with a request to acknowledge receipt on a copy to be returned to the contracting officer. In this manner, both contractors are on express notice of the authority and limitations of the authority of the inspecting contractor.

PART 937—SERVICE CONTRACTING

Subpart 937.2—Advisory and Assistance Services

Sec.

937.204 Guidelines for determining availability of personnel.

Subpart 937.70—Protective Services Contracting

937.7040 Contract clauses.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

Subpart 937.2—Advisory and Assistance Services

937.204 Guidelines for determining availability of personnel.

(a) The determination, that there is sufficient DOE personnel with the requisite training and capabilities for each evaluation or analysis of proposals, shall be determined in accordance with 915.207–70(f)(2)(i).

(b) If it is determined that there is no such DOE personnel available, then other Federal agencies may have the required personnel with the requisite training and capabilities for the evaluation or the analysis of proposals. The determination, to use employees of other Federal agencies for the evaluation or analysis of proposals, shall be in accordance with 915.207–70(f)(2)(ii).

(d) The determination, to employ non-Federal evaluators or advisors, shall be determined in accordance with 915.207–70(f)(3).

(e) The determination that covered personnel are unavailable for a class of proposals, necessitating employment of non-Federal evaluators or advisors, shall be determined in accordance with 915.207–70(f)(3).

[75 FR 29458, May 26, 2010]

Subpart 937.70—Protective Services Contracting

937.7040 Contract clauses.

The contracting officer shall insert the clause at 952.237–70 entitled ''Collective bargaining agreements—protective services'' in all protective services solicitations and contracts involving DOE-owned facilities requiring continuity of services for public safety and national defense reasons. See also, 922.103–5, Contract clauses, which prescribes use of the clause at 48 CFR 52.222–1, Notice to the Government of Labor Disputes.

[58 FR 36151, July 6, 1993, as amended at 75 FR 29459, May 26, 2010]

PART 939—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 939.70—Implementing DOE Policies and Procedures

Sec.
939.7000 Scope.
939.7001 [Reserved]
939.7002 Contractor acquisition of information technology.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 62 FR 53758, Oct. 16, 1997, unless otherwise noted.

Subpart 939.70—Implementing DOE Policies and Procedures

939.7000 Scope.

This part sets forth the policies and procedures that apply to the acquisition of information technology by the Department of Energy (DOE).

939.7001 [Reserved]

939.7002 Contractor acquisition of information technology.

(a) *Management and operating (M&O) contracts.* Except as provided in paragraph (c) of this section, M&O contractors and their subcontractors shall not be used to acquire information technology unrelated to the mission of the M&O contract either for sole use by DOE employees or employees of other DOE contractors, or for use by other Federal agencies or their contractors.

(b) *Other than M&O contracts.* Where it has been determined that a contractor (other than an M&O contractor or its subcontractor) will acquire information technology either for sole use by DOE employees or for the furnishing of the information technology as government-furnished property under another contract, and after receiving written authorization from their cognizant DOE contracting office pursuant to 48 CFR part 51, DOE contractors working under cost-reimbursement-type contracts may place orders against authorized contracts. All authorizations to contractors shall expressly and specifically reference the restriction regarding contractor use of the items acquired, cited at 951.102(e)(4)(iii).

(c) *Consolidated contractor acquisitions.* When common information technology requirements in support of DOE programs have been identified and it is anticipated that the consolidation of such requirements will promote cost or other efficiencies, the Designated Senior Official for Information Management may authorize an M&O contractor to acquire information technology for use by the following—

(1) One or more other contractor(s) performing on-site at the same DOE-owned or -leased facility as the M&O contractor; or

(2) Other M&O contractors.

[62 FR 53758, Oct. 16, 1997, as amended at 74 FR 36367, July 22, 2009]

PART 941—ACQUISITION OF UTILITY SERVICES

Subpart 941.2—Acquiring Utility Services

Sec.
941.201–70 DOE Directives.
941.201–71 Use of subcontracts.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 61 FR 41710, Aug. 9, 1996, unless otherwise noted.

Subpart 941.2—Acquiring Utility Services

941.201–70 DOE Directives.

Utility services (defined at 48 CFR 41.101) shall be acquired in accordance with 48 CFR part 41 and the Department of Energy (DOE) Order 430.2B, Departmental Energy, Renewable Energy and Transportation Management, or its successor.

[75 FR 29458, May 26, 2010]

941.201–71 Use of subcontracts.

Utility services for the furnishing of electricity, gas (natural or manufactured), steam, water and/or sewerage at facilities owned or leased by DOE shall not be acquired under a subcontract arrangement, except as provided for at 970.4102–1 or if the prime contract is with a utility company.

[61 FR 41710, Aug. 9, 1996, as amended at 65 FR 81007, Dec. 22, 2000; 74 FR 36367, July 22, 2009]

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 942—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Subpart 942.2—Contract Administration Services

Sec.
942.270–1 Contracting Officer's Representatives
942.270–2 Contract Clause

Subpart 942.7—Indirect Cost Rates

942.704 Billing rates.
942.705 Final indirect cost rates.
942.705–1 Contracting officer determination procedure.
942.705–3 Educational institutions.
942.705–4 State and local governments.
942.705–5 Nonprofit organizations other than educational and state and local governments.

Subpart 942.8—Disallowance of Costs

942.803 Disallowing costs after incurrence.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12026, Mar. 28, 1984, unless otherwise noted.

Subpart 942.2—Contract Administration Services

SOURCE: 65 FR 81007, Dec. 22, 2000, unless otherwise noted.

942.270–1 Contracting Officer's Representatives.

In accordance with internal agency procedures, a contracting officer may designate other qualified personnel to be the Contracting Officer's Representative (COR) for the purpose of performing certain technical functions in administering a contract. These functions include, but are not limited to, technical monitoring, inspection, approval of shop drawings, testing, and approval of samples. The COR acts solely as a technical representative of the contracting officer and is not authorized to perform any function that results in a change in the scope, price, terms or conditions of the contract. COR designations must be made in writing by the contracting officer, and shall identify the responsibilities and limitations of the designation. A copy of the COR designation must be furnished to the contractor and the contract administration office.

942.270–2 Contract clause.

The clause at 952.242–70, Technical Direction, or a clause substantially the same, may be inserted in solicitations and contracts when a designated Contracting Officer's Representative will issue technical direction to the contractor under the contract.

[74 FR 36367, July 22, 2009]

Subpart 942.7—Indirect Cost Rates

942.704 Billing rates.

(b) When the contracting officer or auditor responsible for establishing billing rates, in accordance with 48 CFR 42.704, has not established such rates or such rates are not current for the performance periods (contractor FY) under contract, the DOE contracting officer responsible for administration of the contract shall establish an appropriate rate(s) for billing purposes. If the contractor holds more than one DOE contract covering that period of performance, the DOE office with the largest unliquidated obligations as of the beginning of that performance period shall take the lead in establishing the required billing rate for use on DOE contracts. Once appropriate billing rates are established by the responsible contracting officer designated by 48 CFR 42.704, such rates shall be adopted by the contracting officer and all billings and payments shall be retroactively revised to reflect the agreed upon rate(s).

[65 FR 81007, Dec. 22, 2000, as amended at 75 FR 29459, May 26, 2010]

942.705 Final indirect cost rates.

942.705–1 Contracting officer determination procedure.

(a)(3) The Department of Energy shall use the contracting officer determination procedure for all business units for which it shall be required to negotiate final indirect cost rates. A

list of such business units is maintained by the Office of Procurement and Assistance Policy, within the Headquarters procurement organization.

(b)(1) Pursuant to 48 CFR 52.216–7, Allowable Cost and Payment, contractors shall be requested to submit their final indirect cost rate proposals reflecting actual cost experience during the covered period to the cognizant contracting officer responsible for negotiating their final rates.

The DOE negotiating official shall request all needed audit service in accordance with internal procedures.

[61 FR 41710, Aug. 9, 1996, as amended at 74 FR 36368, July 22, 2009; 75 FR 29459, May 26, 2010]

942.705–3 Educational institutions.

The negotiated rates established for the institutions cited in OMB Circular No. A–21 are distributed to the Cognizant DOE Office (CDO) assigned lead office responsibility for all DOE indirect cost matters relating to a particular contractor by the Office of Procurement and Assistance Policy, within the Headquarters procurement organization.

[61 FR 41710, Aug. 9, 1996, as amended at 74 FR 36368, July 22, 2009; 81 FR 45978, July 15, 2016]

942.705–4 State and local governments.

A list of cognizant agencies for State/local government organizations is periodically published in the FEDERAL REGISTER by the Office of Management and Budget (OMB). The responsible agencies are notified of such assignments. The current negotiated rates for State/local government activities is distributed to each CDO by the Office of Procurement and Assistance Policy, within the Headquarters procurement organization.

[61 FR 41710, Aug. 9, 1996, as amended at 74 FR 36368, July 22, 2009]

942.705–5 Nonprofit organizations other than educational and state and local governments.

OMB Circular A–122 establishes the rules for assigning cognizant agencies for the negotiation and approval of indirect cost rates. The Federal agency with the largest dollar value of awards (contracts plus federal financial assistance dollars) will be designated as the cognizant agency. There is no published list of assigned agencies. The Office of Procurement and Assistance Policy, within the Headquarters procurement organization, distributes to each CDO the rates established by the cognizant agency.

[61 FR 41710, Aug. 9, 1996, as amended at 74 FR 36368, July 22, 2009]

Subpart 942.8—Disallowance of Costs

942.803 Disallowing costs after incurrence.

(a) *Contracting officer receipt of vouchers.* Vouchers and invoices submitted to DOE shall be submitted to the contracting officer or designee for review and approval for payment. If the examination of a voucher or invoice raises a question regarding the allowability of a cost submitted therein, the contracting officer, shall:

(1) Hold informal discussion with the contractor as appropriate.

(2) Issue a notice (letter, memo, etc.) to the contractor advising of cost disallowed or to be disallowed and advising the contractor that it may:

(i) Submit a written claim as to why the cost should be reimbursed—if in disagreement with the disallowance.

(ii) File a claim under the disputes clause, which will be processed in accordance with disputes procedures in the event disagreements cannot be settled.

(3) Process the voucher or invoice for payment and advise the finance office to deduct the disallowed cost when scheduling the voucher for payment.

(c) *Auditor reports and other sources of questioned costs.* (1) From time to time reports are received from professional auditors that may question the allowability of an incurred cost. Such reports are received as the result of auditors, in their independent role under OMB Circular A–73 or their own charters, scheduling and conducting financial or compliance audits of government contracts or as the result of an independent request for auditor service.

(2) When auditor reports or other notifications question cost or consider them unallowable, the contracting officer shall follow up such reports and resolve all such cost issues promptly by determining, through discussions with the contractor and/or auditor within six months of the audit report date, or date of receipt if a non-Federal audit. One of the following courses of action shall be pursued:

(i) Accept and implement audit recommendations as submitted.

(ii) Accept the principle of the audit recommendation but reject the cost questioned amount.

(iii) Reject audit findings and recommendations.

(3) When implementing the accepted course of action, the contracting officer shall—

(i) Hold discussions with the auditor and contractor as appropriate.

(ii) Issue a notice in writing advising the contractor of the government's intent to disallow the cost questioned, if the contracting officer agrees with the auditor concerning the questioned costs.

(iii) Negotiate a mutual settlement of questioned costs if they are agreed with in principle but there is a difference of opinion as to a proper amount.

(iv) Negotiate a mutual settlement of questioned costs if the auditor recommendations are acceptable to the contracting officer but the contractor does not accept the finding or disallowance.

(v) Issue a final decision of the contracting officer disallowing the questionable cost where differences cannot be resolved, advising of the contractor's right to appeal the decision, and advising the procedure to be followed if it is decided to make such an appeal.

(vi) Initiate immediate recoupment actions for all disallowed cost owed the government by:

(A) Requesting the contractor to provide a credit adjustment (offset) against amounts billed the government on the next or future invoice(s) if such shall be submitted under a contract for which the disallowed cost applies.

(B) Deducting (offset) the disallowed cost from the next or future invoice(s) submitted under the contract; if the contractor provides no adjustment under the contract for which the disallowed cost applies; provided such reduction is deemed appropriate.

(C) Advising the contractor that a refund shall be directly payable to the government in situations where there are insufficient payments owed by the government to effect recovery via (A) or (B) above or an offset is otherwise inappropriate.

(vii) Promptly notify the appropriate finance office of refunds directly payable to the government to ensure proper billing and follow-up action for collection.

[49 FR 12026, Mar. 28, 1984, as amended at 59 FR 9107, Feb. 25, 1994; 75 FR 29458, May 26, 2010]

PART 945—GOVERNMENT PROPERTY

Sec.

945.000 Scope of part.

Subpart 945.1—General

945.101 Definitions.
945.102–70 Reporting of contractor-held property.
945.102–71 Maintenance of records.
945.102–72 Reporting of contractor sensitive property inventory.
945.170 Providing Government property to contractors.
945.170–1 Policy.

Subparts 945.3–945.4 [Reserved]

Subpart 945.5—Support Government Property Administration

945.570 Management of Government property in the possession of contractors.
945.570–1 Acquisition of motor vehicles.
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Subpart 945.6—Reporting, Reutilization, and Disposal

945.602 Reutilization of Government property.
945.602–3 Screening.
945.602–70 Local screening.
945.603 Abandonment, destruction or donation of excess personal property.
945.604 Disposal of surplus property.
945.604–1 Disposal methods.
945.670 DOE disposal methods.
945.670–1 Plant clearance function.
945.670–2 Disposal of radioactively contaminated personal property.

945.670–3 Waiver of screening requirements.
945.671 Contractor inventory in foreign countries.

AUTHORITY: 42 U.S.C. 7101, *et seq.;* 50 U.S.C. 2401, *et seq*.

SOURCE: 77 FR 74387, Dec. 14, 2012, unless otherwise noted.

945.000 Scope of part.

This part and 48 CFR part 45 are not applicable to the management of property by management and operating contractors, unless otherwise stated.

Subpart 945.1—General

945.101 Definitions.

Capital equipment, as used in this part, means personal property items having anticipated service life in excess of two years, regardless of type of funding, and having the potential for maintaining their integrity as capital items, i.e., not expendable due to use; dollar threshold for capital equipment is as established by the DOE Financial Management Handbook.

Personal property, as used in this part, means property of any kind or interest therein, except real property, records of the Federal Government, and nuclear and special source materials, atomic weapons, and by-product materials.

Sensitive property, as used in this part, has the meaning contained in 48 CFR 45.101.

945.102–70 Reporting of contractor-held property.

The Head of the Contracting Activity may be required to report the following information to the Personal Property Policy Division, within the Headquarters procurement organization:

(a) Name and address of each contractor with DOE personal property in their possession, or in the possession of their subcontractors (do not include grantees, cooperative agreements, interagency agreements, or agreements with state or local governments).

(b) Contract number of each DOE contract with Government personal property.

(c) Date contractor's property management system was approved and by whom (DOE office, Defense Contract Management Command, or the Office of Naval Research).

(d) Date of most current appraisal of contractor's property management system, who conducted the appraisal, and status of the system (satisfactory or unsatisfactory).

(e) Total acquisition value of DOE personal property for each DOE contract administered by the contracting activity.

945.102–71 Maintenance of records.

The contracting activity shall maintain records of approvals and reviews of contractors' property management systems, the dollar value of DOE property as reported on the most recent semiannual financial report, and records on property administration delegations to other Government agencies.

945.102–72 Reporting of contractor sensitive property inventory.

The contractor must develop and maintain a list of personal property items considered sensitive. Sensitive Items List must be approved by the PA/OPMO annually.

945.170 Providing Government property to contractors.

945.170–1 Policy.

The DOE has established specific policies concerning special nuclear material requirements needed under DOE contracts for fabricating end items using special nuclear material, and for conversion or scrap recovery of special nuclear material. *Special nuclear material* means uranium enriched in the isotopes U233 or U235, and/or plutonium, other than PU238. The policies to be followed are:

(a) Special nuclear material will be furnished by the DOE for fixed-price contracts and subcontracts, at any tier, which call for the production of special nuclear products, including fabrication and conversion, for Government use. (The contractor or subcontractor must have the appropriate license or licenses to receive the special nuclear material. The Nuclear Regulatory Commission is the licensing agency.)

(b) Contracts and subcontracts for fabrication of end items using special

nuclear material generally shall be of the fixed-price type. Cost-type contracts or subcontracts for fabrication shall be used only with the approval of the Head of the Contracting Activity. This approval authority shall not be further delegated.

(c) Contracts and subcontracts for conversion or scrap recovery of special nuclear material shall be of a fixed-price type, except as otherwise approved by the Head of the Contracting Activity.

Subparts 945.3–945.4 [Reserved]

Subpart 945.5—Support Government Property Administration

945.570 Management of Government property in the possession of contractors.

945.570–1 Acquisition of motor vehicles.

(a) GSA Interagency Fleet Management System (GSA–IFMS) is the first source of supply for providing motor vehicles to contractors; however, contracting officer approval is required for contractors to utilize this service.

(b) Prior approval of GSA must be obtained before—

(1) Fixed-price contractors can use the GSA–IFMS;

(2) DOE-owned motor vehicles can be furnished to any contractor in an area served by GSA–IFMS; and

(3) A contractor can commercially lease a motor vehicle for more than 60 days after GSA has determined that it cannot provide the required vehicle.

(c) GSA has the responsibility for acquisition of motor vehicles for Government agencies. All requisitions shall be processed via GSA AutoChoice in accordance with 41 CFR 101–26.501.

(d) Contractors shall submit all motor vehicle requirements to the contracting officer for approval.

(e) The acquisition of sedans and station wagons is limited to small, subcompact, and compact vehicles which meet Government fuel economy standards. The acquisition of light trucks is limited to those vehicles which meet the current fuel economy standards set by Executive Orders 12003 and 12375.

(f) Cost reimbursement contractors may be authorized by the contracting officer to utilize GSA Federal Supply Schedule 751, Leasing of Automobiles and Light Trucks, for short term rentals not to exceed 60 days, and are required to utilize available GSA consolidated leasing programs for long term (60 continuous days or longer) commercial leasing of passenger vehicles and light trucks.

(g) The Personal Property Policy Division, within the Headquarters procurement organization shall certify all requisitions prior to submittal to GSA for the following:

(1) The acquisition of sedans and station wagons.

(2) The lease (60 continuous days or longer) of any passenger automobile.

(3) The acquisition or lease (60 continuous days or longer) of light trucks less than 8,500 GVWR.

(h) Purchase requisitions for other motor vehicles may be submitted directly to GSA when approved by the contracting officer.

(i) Contractors shall thoroughly examine motor vehicles acquired under a GSA contract for defects. Any defect shall be reported promptly to GSA, and repairs shall be made under terms of the warranty.

945.570–2 Disposition of motor vehicles.

(a) The contractor shall dispose of DOE-owned motor vehicles as directed by the contracting officer.

(b) DOE-owned motor vehicles may be disposed of as exchange/sale items when directed by the contracting officer; however, a designated DOE official must execute the Title Transfer forms (SF–97).

945.570–3 Reporting motor vehicle data.

(a) Contractors conducting motor vehicle operations shall forward annually to the contracting officer their plan for acquisition of motor vehicles for the next fiscal year for review, approval and submittal to DOE Headquarters. This plan shall conform to the fuel efficiency standards for motor vehicles for the applicable fiscal year, as established by Executive Orders 12003 and 12375 and as implemented by GSA and

current DOE directives. Additional guidance for the preparation of the plan will be issued by the contracting officer, as required.

(b) Contractors operating DOE-owned, GSA leased and/or commercially leased (for 60 continuous days or longer) motor vehicles shall prepare and electronically submit the following annual year-end reports to the contracting officer:

(1) Annual Motor Vehicle Fleet Report.

(2) Federal Fleet Report (41 CFR 102–34.335).

Subpart 945.6—Reporting, Reutilization, and Disposal

945.602 Reutilization of Government property.

945.602–3 Screening.

(a) *Standard screening.* (1) Prior to reporting excess property to GSA, all reportable property, as identified in Federal Management Regulations 41 CFR 102–36.220, shall be reported for centralized screening in the DOE Energy Asset Disposal System (EADS). Reportable excess personal property will be screened internally via the EADS system for a period of 12 days.

(i) EADS requires the inclusion of a six character Activity Address Code (AAC) which identifies the reporting contractor. The AAC will be assigned by DOE Headquarters upon receipt of a formal letter of authorization signed by the DOE contracting officer.

(ii) Requests to establish, extend or delete an Activity Address Code shall be submitted by the contracting officer to the Office of Property Management, Personal Property Policy Division, within the Headquarters procurement organization.

(b) *Special screening requirements.* (2) *Special test equipment with commercial components.*—Prior to reporting the property to GSA in accordance with 48 CFR 45.604–1 (a), (b) and (c), the property shall be reported and screened within DOE in accordance with 945.602–3(a) and 945.602–70.

(3) *Printing equipment.* All printing equipment excess to requirements shall be reported to the Office of Administration at Headquarters.

945.602–70 Local screening.

Local screening shall be done using EADS.

945.603 Abandonment, destruction or donation of excess personal property.

See 945.670 for DOE disposal methods.

945.604 Disposal of surplus property.

945.604–1 Disposal methods.

(b)(3) *Recovering precious metals.* Contractors generating contractor inventory containing precious metals or possessing precious metals excess to their programmatic requirements, shall identify and promptly report such items to the contracting officer for review, approval and reporting to the DOE Business Center for Precious Metals Sales & Recovery (Business Center). This includes Gold, Silver, Platinum, Rhodium, Palladium, Iridium, Osmium, and Ruthenium in any form, shape, concentration, or purity. Report all RCRA contaminated precious metals, but not radiological contaminated. The Y–12 NNSA Site Office is responsible for maintaining the DOE Business Center. Precious metals scrap will be reported to the DOE Business Center.

(d) See 945.670 for DOE disposal methods.

945.670 DOE disposal methods.

945.670–1 Plant clearance function.

If the plant clearance function has not been formally delegated to another Federal agency, the contracting officer shall assume all responsibilities of the plant clearance officer identified in 48 CFR 45.606–3.

945.670–2 Disposal of radioactively contaminated personal property.

Special procedures regarding the disposal of radioactively contaminated property may be found at 41 CFR 109–45.50 and 45.51, or its successor.

945.670–3 Waiver of screening requirements.

(a) The Director of the Personal Property Policy Division, within the Headquarters procurement organization may authorize exceptions from screening requirements.

(b) A request to the Director of the Personal Property Policy Division, within the Headquarters procurement organization for the waiver of screening requirements must be submitted by the Procurement Directors with a justification setting forth the compelling circumstances warranting the exception.

945.671 Contractor inventory in foreign countries.

Contractor inventory located in foreign countries will be utilized and disposed of in accordance with 41 CFR 109–43.5 and 45.41, or its successor and 48 CFR 45.302.

PART 947—TRANSPORTATION

Subpart 947.70—Foreign Travel

Sec.
947.7000 [Reserved]
947.7001 Policy.
947.7002 Contract clause.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12038, Mar. 28, 1984, unless otherwise noted.

Subpart 947.70—Foreign Travel

SOURCE: 65 FR 81007, Dec. 22, 2000, unless otherwise noted.

947.7000 [Reserved]

947.7001 Policy.

Contractor foreign travel shall be conducted pursuant to the requirements contained in DOE Order 551.1C, or its successor, Official Foreign Travel, or any subsequent version of the order in effect at the time of award.

[65 FR 81007, Dec. 22, 2000, as amended at 74 FR 36368, July 22, 2009]

947.7002 Contract clause.

When foreign travel may be required under the contract, the contracting officer shall insert the clause at 952.247–70, Foreign Travel.

[65 FR 81007, Dec. 22, 2000, as amended at 74 FR 36368, July 22, 2009]

PART 949—TERMINATION OF CONTRACTS

Subpart 949.1—General Principles

Sec.
949.101 Authorities and responsibilities.
949.106 Fraud or other criminal conduct.
949.111 Review of proposed settlements.

Subpart 949.5 [Reserved]

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12038, Mar. 28, 1984, unless otherwise noted.

Subpart 949.1—General Principles

949.101 Authorities and responsibilities.

The Senior Procurement Executive shall be notified prior to taking any action to terminate (a) contracts for the operation of Government-owned facilities, (b) any prime contract or subcontract in excess of $10 million, and (c) any contract the termination of which is likely to provoke unusual interest.

[49 FR 12038, Mar. 28, 1984, as amended at 75 FR 29458, May 26, 2010]

949.106 Fraud or other criminal conduct.

Any evidence of fraud or other criminal conduct in connection with the settlement of a contract termination shall be reported in accordance with 909.406.

949.111 Review of proposed settlements.

(a) The Heads of Contracting Activities shall establish settlement review boards for the review of each termination settlement or determination of amount due under the termination clause of a contract or approval or ratification of a subcontract settlement when the action involves $50,000 or more.

(b) Settlement review boards may be established for actions below $50,000 when considered desirable by the Head of the Contracting Activity or when specifically requested by the contracting officer.

(c) Proposed settlement agreements or determinations in excess of contractual authority of the Heads of Contracting Activities will be transmitted to the Senior Procurement Executive for review and approval.

(d) Contracting officers shall not conclude proposed settlement or determinations until the approvals required by this subsection have been obtained.

[49 FR 12038, Mar. 28, 1984, as amended at 59 FR 9108, Feb. 25, 1994; 74 FR 36378, July 22, 2009]

Subpart 949.5 [Reserved]

PART 950—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

Subpart 950.70—Nuclear Indemnification of DOE Contractors

Sec.

950.7000 Scope of subpart.
950.7001 General policy.
950.7002 Definitions.
950.7003 Nuclear hazards indemnity.
950.7004–950.7005 [Reserved]
950.7006 Statutory nuclear hazards indemnity agreement.
950.7007–950.7008 [Reserved]
950.7009 Fees.
950.7010 Financial protection requirements.

Subpart 950.71—General Contract Authority Indemnity

950.7101 Applicability.

AUTHORITY: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12039, Mar. 28, 1984, unless otherwise noted.

Subpart 950.70—Nuclear Indemnification of DOE Contractors

950.7000 Scope of subpart.

This subpart describes the established policies concerning indemnification of Department of Energy (DOE) contractors against public liability for a nuclear incident arising out of or in connection with the contract activity.

[49 FR 12039, Mar. 28, 1984, as amended at 56 FR 57827, Nov. 14, 1991; 74 FR 36368, July 22, 2009]

950.7001 Applicability

The policies and procedures of this subpart shall govern DOE's entering into agreements of indemnification with recipients of a contract whose work under the contract involves the risk of public liability for a nuclear incident or precautionary evacuation.

[49 FR 12039, Mar. 28, 1984, as amended at 56 FR 57827, Nov. 14, 1991]

950.7002 Definitions.

DOE contractor means any DOE prime contractor, including any agency of the Federal Government with which DOE has entered into an interagency agreement.

Nuclear incident means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material. The term includes any such occurrence outside the United States if such occurrence involves source, special nuclear, or byproduct material owned by, and used by or under contract with, the United States.

Person indemnified means—

(1) With respect to a nuclear incident occurring within the United States or outside the United States as the term is defined above and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance, or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability; or

(2) With respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Secretary of Energy or any project to

which indemnification under the provisions of section 170d. of the Atomic Energy Act of 1954, as amended, has been extended or under any subcontract, purchase order, or other agreement, or any tier under any such contract or project.

Public liability means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or precautionary evacuation), except: (1) Claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (2) claims arising out of an act of war; and (3) whenever used in subsections a., c., and k. of section 170 of the Atomic Energy Act of 1954, as amended, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. *Public liability* also includes damage to property of persons indemnified: Provided, that such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

[49 FR 12039, Mar. 28, 1984, as amended at 50 FR 12185, Mar. 27, 1985; 56 FR 57827, Nov. 14, 1991; 74 FR 36368, July 22, 2009]

950.7003 Nuclear hazards indemnity.

(a) Section 170d. of the Atomic Energy Act, as amended, requires DOE ''to enter into agreements of indemnification with any person who may conduct activities under a contract with DOE that involve the risk of public liability * * *.'' However, DOE contractors whose activities are already subject to indemnification by the Nuclear Regulatory Commission are not eligible for such statutory indemnity. See 950.7006 below.

(b) The Heads of Contracting Activities shall assure that contracts subject to this requirement contain the appropriate nuclear hazards indemnity provisions.

[56 FR 57828, Nov. 14, 1991, as amended at 59 FR 9108, Feb. 25, 1994; 75 FR 29459, May 26, 2010]

950.7004–950.7005 [Reserved]

950.7006 Statutory nuclear hazards indemnity agreement.

(a) The contract clause contained in 952.250–70 shall be incorporated in all contracts in which the contractor is under risk of public liability for a nuclear incident or precautionary evacuation arising out of or in connection with the contract work, including such events caused by a product delivered to a DOE-owned facility for use by DOE or its contractors. The clause at 952.250–70 shall be included in contracts with architect-engineer contractors for the design of a DOE facility, the construction or operation of which may involve the risk of public liability for a nuclear incident or a precautionary evacuation.

(b) However, this clause shall not be included in contracts in which the contractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170c. or k. of the Act for activities to be performed under the contract.

[56 FR 57828, Nov. 14, 1991, as amended at 59 FR 9108, Feb. 25, 1994]

950.7007–950.7008 [Reserved]

950.7009 Fees.

No fee will be charged a DOE contractor for a statutory nuclear hazards indemnity agreement.

[49 FR 12039, Mar. 28, 1984, as amended at 56 FR 57828, Nov. 14, 1991]

950.7010 Financial protection requirements.

DOE contractors with whom statutory nuclear hazards indemnity agreements under the authority of section 170d. of the Atomic Energy Act of 1954, as amended, are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability

for nuclear incidents. However, if authorized by the DOE Headquarters office having responsibility for contractor casualty insurance programs, DOE contractors may be (a) permitted to furnish financial protection to themselves or (b) permitted to continue to carry such insurance at cost to the Government if they currently maintain insurance for such liability.

[56 FR 57828, Nov. 14, 1991]

Subpart 950.71—General Contract Authority Indemnity

950.7101 Applicability.

(a) The DOE also has general contract authority to enter into indemnity agreements with its contractors. Under such authority a certain measure of protection is extended to the DOE contractor against risk of liability, but the assumption of liability by DOE will be expressly subject to the availability of appropriated funds. Prior to enactment of section 170 of the Atomic Energy Act 1954, as amended, this authority was exercised in a number of Atomic Energy Commission contracts and this type of indemnification remains in some DOE contracts.

(b) It is the policy of the DOE, subsequent to the enactment of section 170, to restrict indemnity agreements with DOE contractors, with respect to protection against public liability for a nuclear incident, to the statutory indemnity provided under section 170. However, it is recognized that circumstances may exist under which a DOE contractor may be exposed to a risk of public liability for a nuclear occurrence which would not be covered by the statutory indemnity.

(c) While it is normally DOE policy to require its non-management and operating contractors to obtain insurance coverage against public liability for nonnuclear risks, there may be circumstances in which a contractual indemnity may be warranted to protect a DOE non-management and operating contractor against liability for uninsured nonnuclear risks.

(d) If circumstances as mentioned in paragraph (b) or (c) of this section do arise, it shall be the responsibility of the Heads of Contracting Activities to submit to the Head of the Agency or designee for review and decision, all pertinent information concerning the need for, or desirability of, providing a general authority indemnity to a DOE contractor.

(e) Where the indemnified risk is nonnuclear, the amount of general authority indemnity extended to a fixed-price contractor should normally have a maximum obligation equivalent to the amount of insurance that the contractor usually carries to cover such risks in its other commercial operations or, if the risk involved is dissimilar to those normally encountered by the contractor, the amount that it otherwise would have reasonably procured to insure this contract risk.

(f) In the event that a DOE contractor has been extended both a statutory indemnity and a general authority indemnity, the general authority indemnity will not apply to the extent that the statutory indemnity applies.

(g) The provisions of this subsection do not restrict or affect the policy of DOE to pay its cost-reimbursement type contractors for the allowable cost of losses and expenses incurred in the performance of the contact work, within the maximum amount of the contract obligation.

[49 FR 12039, Mar. 28, 1984, as amended at 56 FR 28102, June 19, 1991. Redesignated and amended at 56 FR 57828, Nov. 14, 1991; 59 FR 9108, Feb. 25, 1994; 61 FR 21977, May 13, 1996; 62 FR 34861, June 27, 1997]

PART 951—USE OF GOVERNMENT SOURCES BY CONTRACTORS

Subpart 951.1—Contractor Use of Government Supply Sources

Sec.

951.101 Policy.
951.102 Authorization to use Government supply sources.
951.103 Ordering from Government supply sources.

Subpart 951.70—Contractor Employee Travel Discounts

951.7002 Responsibilities.

AUTHORITY: 42 U.S.C. 7101 *et seq.* and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12042, Mar. 28, 1984, unless otherwise noted.

Subpart 951.1—Contractor Use of Government Supply Sources

951.101 Policy.

(a) It is Department of Energy (DOE) policy that contractors performing under cost-reimbursement contracts should meet their requirements from Government sources of supply when these sources are available to them, and if it is economically advantageous or otherwise in the best interest of the Government.

[49 FR 12042, Mar. 28, 1984, as amended at 74 FR 36368, July 22, 2009]

951.102 Authorization to use Government supply sources.

(a) The Head of the Contracting Activity may authorize contractors performing under cost-reimbursement contracts and subcontractors performing under cost-reimbursement subcontracts, where all higher tier contracts and subcontracts are cost-type, to use Government supply sources in accordance with the requirements and procedures in 48 CFR part 51, DOE PMR 41 CFR 109, and any necessary approval from the agency involved. This authority may be redelegated to the level of contracting officer. Direct acquisition by the DOE, rather than by a contractor under cost-reimbursement contracts, shall be required where deemed necessary by the Head of the Contracting Activity in order to carry out special requirements of appropriation acts or other applicable laws relating to particular items.

(c)(1) The DOE central point of contact for the assignment, correction, or deletion of FEDSTRIP activity address codes is the Office of Resource Management, within the Headquarters procurement organization.

(e)(4) Materials, supplies, and equipment acquired from Government sources of supply under the procedures described herein must be used exclusively in connection with Government work, except as otherwise authorized by the Head of the Contracting Activity.

[49 FR 12042, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 59 FR 9108, Feb. 25, 1994; 74 FR 36368, July 22, 2009; 75 FR 29458, 29459, May 26, 2010]

951.103 Ordering from Government supply sources.

(b) The Senior Procurement Executive shall be informed of instances in which GSA sources of supply are not used because of the quality of the items available from GSA or when a Federal Supply Schedule contractor refuses to honor an order.

[49 FR 12042, Mar. 28, 1984, as amended at 74 FR 36378, July 22, 2009]

Subpart 951.70—Contractor Employee Travel Discounts

951.7002 Responsibilities.

The contracting officer shall insert the clause at 952.251–70, Contractor employee travel discounts, in all cost-reimbursable solicitations and contracts when significant costs for rail travel, car rental, or lodging will be required to perform the contract. The contracting officer may furnish the contractor with appropriate identification letters.

[65 FR 81007, Dec. 22, 2000]

SUBCHAPTER H—CLAUSES AND FORMS

PART 952—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 952.0—General

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952.000 Scope of part.
952.001 General policy.

Subpart 952.2—Text of Provisions and Clauses

952.202 Clauses related to definitions.
952.202–1 Definitions.
952.203–1 Whistleblower protection for contractor employees.
952.204 Clauses related to administrative matters.
952.204–2 Security requirements.
952.204–70 Classification/Declassification.
952.204–71 Sensitive foreign nations controls.
952.204–72 Disclosure of information.
952.204–73 Facility clearance.
952.204–75 Public Affairs.
952.204–76 Conditional payment of fee or profit—safeguarding restricted data and other classified information.
952.204–77 Computer security.
952.208 Clauses related to required sources of supply.
952.208–7 Tagging of leased vehicles.
952.208–70 Printing.
952.209 Clauses related to contractor's qualifications.
952.209–8 Organizational Conflicts of Interest-Disclosure.
952.209–71 [Reserved]
952.209–72 Organizational conflicts of interest.
952.211 Clauses related to contract delivery or performance.
952.211–70 Priorities and allocations for energy programs (solicitations).
952.211–71 Priorities and allocations for energy programs (contracts).
952.211–72—952.211–73 [Reserved]
952.215–70 Key personnel.
952.216 Clauses related to types of contracts.
952.216–7 Allowable cost and payment.
952.216–15 Predetermined indirect cost rates.
952.217–70 Acquisition of real property.
952.219–70 DOE Mentor-Protege program.
952.223 Clauses related to environment, energy and water efficiency, renewable energy technologies, occupational safety, and drug-free workplace.
952.223–71 Integration of environment, safety, and health into work planning and execution.
952.223–72 Radiation protection and nuclear criticality.
952.223–73—952.223–74 [Reserved]
952.223–75 Preservation of individual occupational radiation exposure records.
952.223–76 Conditional payment of fee or profit—safeguarding restricted data and other classified information and protection of worker safety and health.
952.223–77 Conditional payment of fee or profit—protection of worker safety and health.
952.223–78 Sustainable acquisition program.
952.225–70 Subcontracting for nuclear hot cell services.
952.225–71 Compliance with export control laws and regulations (Export Clause)
952.226–70 Subcontracting goals under section 3021(a) of the Energy Policy Act of 1992.
952.226–71 Utilization of Energy Policy Act target entities.
952.226–72 Energy Policy Act subcontracting goals and reporting requirements.
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952.226–74 Displaced employee hiring preference.
952.227 Provisions and clauses related to patents, technical data and copyrights.
952.227–9 Refund of royalties.
952.227–11 Patent rights—retention by the contractor (short form).
952.227–13 Patent rights—acquisition by the Government.
952.227–14 Rights in data-general.
952.227–70—952.227–74 [Reserved]
952.227–82 Rights to proposal data.
952.227–84 Notice of right to request patent waiver.
952.231–70 Date of incurrence of cost.
952.231–71 Insurance-litigation and claims.
952.233–2 Service of protest.
952.233–4 Notice of protest file availability.
952.233–5 Agency protest review.
952.235–71 Research misconduct.
952.236 Construction and architect-engineer contracts.
952.236–71 Inspection in architect-engineer contracts.
952.236–72 [Reserved]
952.237–70 Collective bargaining agreements—protective services.
952.242–70 Technical direction.
952.245 Clauses related to Government property.
952.245–2 Government property (fixed-price contracts).
952.245–5 Government property (cost-reimbursement, time-and-materials, or labor-hour contracts).
952.247–70 Foreign travel.
952.249 Clauses related to termination.

952.250 Clauses related to indemnification of contractors.
952.250–70 Nuclear hazards indemnity agreement.
952.250–71—952.250–72 [Reserved]
952.251–70 Contractor employee travel discounts.

AUTHORITY: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.*; 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 12042, Mar. 28, 1984, unless otherwise noted.

Subpart 952.0—General

952.000 Scope of part.

This part implements FAR part 52 which sets forth contract clauses for use in connection with the acquisition of personal property and nonpersonal services (including construction), and supplements, as well as modifies, FAR part 52 by prescribing certain modifications to be made to FAR clauses when used in Department of Energy (DOE) contracts and specifying certain Department of Energy Acquisition Regulation clauses to be used in addition to or in place of such FAR clauses.

[49 FR 12042, Mar. 28, 1984, as amended at 74 FR 36368, July 22, 2009]

952.001 General policy.

It is DOE policy to use the prescribed FAR and DOE contract clauses wherever practicable. Uniformity in the use of contract clauses helps to ensure impartial treatment of all contractors, expedites negotiation and contract review, and facilitates contract administration.

Subpart 952.2—Text of Provisions and Clauses

952.202 Clauses related to definitions.

952.202–1 Definitions.

As prescribed in 902.201, insert the clause at 48 CFR 52.202–1, Definitions, in all contracts. The following shall be added to the clause as paragraph (c):

(c) When a solicitation provision or contract clause uses a word or term that is defined in the Department of Energy Acquisition Regulation (DEAR) (48 CFR chapter 9), the word or term has the same meaning as the definition in 48 CFR 902.101 or the definition in the part, subpart, or section of 48 CFR chapter 9 where the provision or clause is prescribed in effect at the time the solicitation was issued, unless an exception in (a) applies.

[76 FR 7693, Feb. 11, 2011]

952.203–70 Whistleblower protection for contractor employees.

As prescribed in 903.971, insert the following clause:

WHISTLEBLOWER PROTECTION FOR CONTRACTOR EMPLOYEES (DEC 2000)

(a) The Contractor shall comply with the requirements of ''DOE Contractor Employee Protection Program'' at 10 CFR part 708 for work performed on behalf of DOE directly related to activities at DOE-owned or -leased sites.

(b) The Contractor shall insert or have inserted the substance of this clause, including this paragraph (b), in subcontracts at all tiers, for subcontracts involving work performed on behalf of DOE directly related to activities at DOE-owned or leased sites.

(End of clause)

[65 FR 81008, Dec. 22, 2000, as amended at 74 FR 36368, 36378, July 22, 2009]

952.204 Clauses related to administrative matters.

952.204–2 Security requirements.

As prescribed in 904.404(d)(1), the following clause shall be included in contracts entered into under section 31 (research assistance, 42 U.S.C. 2051), or section 41 (ownership and operation of production facilities, 42 U.S.C. 2061) of the Atomic Energy Act of 1954, and in other contracts and subcontracts which involve or are likely to involve classified information or special nuclear material:

SECURITY REQUIREMENTS (AUG 2016)

(a) *Responsibility.* It is the Contractor's duty to protect all classified information, special nuclear material, and other DOE property. The Contractor shall, in accordance with DOE security regulations and requirements, be responsible for protecting all classified information and all classified matter (including documents, material and special nuclear material) which are in the Contractor's possession in connection with the performance of work under this contract against sabotage, espionage, loss or theft. Except as otherwise expressly provided in

this contract, the Contractor shall, upon completion or termination of this contract, transmit to DOE any classified matter or special nuclear material in the possession of the Contractor or any person under the Contractor's control in connection with performance of this contract. If retention by the Contractor of any classified matter is required after the completion or termination of the contract, the Contractor shall identify the items and classification levels and categories of matter proposed for retention, the reasons for the retention, and the proposed period of retention. If the retention is approved by the Contracting Officer, the security provisions of the contract shall continue to be applicable to the classified matter retained. Special nuclear material shall not be retained after the completion or termination of the contract.

(b) *Regulations.* The Contractor agrees to comply with all security regulations and contract requirements of DOE as incorporated into the contract.

(c) *Definition of classified information.* The term *Classified Information* means information that is classified as Restricted Data or Formerly Restricted Data under the Atomic Energy Act of 1954, or information determined to require protection against unauthorized disclosure under Executive Order 12958, *Classified National Security Information,* as amended, or prior executive orders, which is identified as *National Security Information.*

(d) *Definition of restricted data.* The term *Restricted Data* means all data concerning design, manufacture, or utilization of atomic weapons; production of special nuclear material; or use of special nuclear material in the production of energy, but excluding data declassified or removed from the Restricted Data category pursuant to 42 U.S.C. 2162 [Section 142, as amended, of the Atomic Energy Act of 1954].

(e) *Definition of formerly restricted data.* The term ''*Formerly Restricted Data*'' means information removed from the Restricted Data category based on a joint determination by DOE or its predecessor agencies and the Department of Defense that the information—(1) Relates primarily to the military utilization of atomic weapons; and (2) can be adequately protected as National Security Information. However, such information is subject to the same restrictions on transmission to other countries or regional defense organizations that apply to Restricted Data.

(f) *Definition of national security information.* The term ''*National Security Information*'' means information that has been determined, pursuant to Executive Order 12958, Classified National Security Information, as amended, or any predecessor order, to require protection against unauthorized disclosure, and that is marked to indicate its classified status when in documentary form.

(g) *Definition of special nuclear material.* The term ''special nuclear material'' means—(1) Plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which, pursuant to 42 U.S.C. 2071 [section 51 as amended, of the Atomic Energy Act of 1954] has been determined to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(h) *Access authorizations of personnel.* (1) The Contractor shall not permit any individual to have access to any classified information or special nuclear material, except in accordance with the Atomic Energy Act of 1954, and the DOE's regulations and contract requirements applicable to the particular level and category of classified information or particular category of special nuclear material to which access is required.

(2) The Contractor must conduct a thorough review, as defined at 48 CFR 904.401, of an uncleared applicant or uncleared employee, and must test the individual for illegal drugs, prior to selecting the individual for a position requiring a DOE access authorization.

(i) A review must—Verify an uncleared applicant's or uncleared employee's educational background, including any high school diploma obtained within the past five years, and degrees or diplomas granted by an institution of higher learning; contact listed employers for the last three years and listed personal references; conduct local law enforcement checks when such checks are not prohibited by state or local law or regulation and when the uncleared applicant or uncleared employee resides in the jurisdiction where the Contractor is located; and conduct a credit check and other checks as appropriate.

(ii) Contractor reviews are not required for an applicant for DOE access authorization who possesses a current access authorization from DOE or another Federal agency, or whose access authorization may be reapproved without a federal background investigation pursuant to Executive Order 12968, Access to Classified Information (August 4, 1995), Sections 3.3(c) and (d).

(iii) In collecting and using this information to make a determination as to whether it is appropriate to select an uncleared applicant or uncleared employee to a position requiring an access authorization, the Contractor must comply with all applicable laws, regulations, and Executive Orders, including those—(A) Governing the processing and privacy of an individual's information, such as the Fair Credit Reporting Act, Americans with Disabilities Act (ADA), and Health Insurance Portability and Accountability Act; and (B) prohibiting discrimination in employment, such as under the ADA,

Title VII and the Age Discrimination in Employment Act, including with respect to pre- and post-offer of employment disability related questioning.

(iv) In addition to a review, each candidate for a DOE access authorization must be tested to demonstrate the absence of any illegal drug, as defined in 10 CFR 707.4. All positions requiring access authorizations are deemed *testing designated positions* in accordance with 10 CFR part 707. All employees possessing access authorizations are subject to applicant, random or for cause testing for use of illegal drugs. DOE will not process candidates for a DOE access authorization unless their tests confirm the absence from their system of any illegal drug.

(v) When an uncleared applicant or uncleared employee receives an offer of employment for a position that requires a DOE access authorization, the Contractor shall not place that individual in such a position prior to the individual's receipt of a DOE access authorization, unless an approval has been obtained from the head of the cognizant local security office. If the individual is hired and placed in the position prior to receiving an access authorization, the uncleared employee may not be afforded access to classified information or matter or special nuclear material (in categories requiring access authorization) until an access authorization has been granted.

(vi) The Contractor must maintain a record of information concerning each uncleared applicant or uncleared employee who is selected for a position requiring an access authorization. Upon request only, the following information will be furnished to the head of the cognizant local DOE Security Office:

(A) The date(s) each Review was conducted;

(B) Each entity that provided information concerning the individual;

(C) A certification that the review was conducted in accordance with all applicable laws, regulations, and Executive Orders, including those governing the processing and privacy of an individual's information collected during the review;

(D) A certification that all information collected during the review was reviewed and evaluated in accordance with the Contractor's personnel policies; and

(E) The results of the test for illegal drugs.

(i) *Criminal liability*. It is understood that disclosure of any classified information relating to the work or services ordered hereunder to any person not entitled to receive it, or failure to protect any classified information, special nuclear material, or other Government property that may come to the Contractor or any person under the Contractor's control in connection with work under this contract, may subject the Contractor, its agents, employees, or Subcontractors to criminal liability under the laws of the United States (see the Atomic Energy Act of 1954, 42 U.S.C. 2011 *et seq.;* 18 U.S.C. 793 and 794).

(j) *Foreign ownership, control, or influence.* (1) The Contractor shall immediately provide the cognizant security office written notice of any change in the extent and nature of foreign ownership, control or influence over the Contractor which would affect any answer to the questions presented in the Standard Form (SF) 328, *Certificate Pertaining to Foreign Interests,* executed prior to award of this contract. The Contractor will submit the Foreign Ownership, Control or Influence (FOCI) information in the format directed by DOE. When completed the Contractor must print and sign one copy of the SF 328 and submit it to the Contracting Officer. In addition, any notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice, shall also be furnished concurrently to the Contracting Officer.

(2) If a Contractor has changes involving foreign ownership, control, or influence, DOE must determine whether the changes will pose an undue risk to the common defense and security. In making this determination, DOE will consider proposals made by the Contractor to avoid or mitigate foreign influences.

(3) If the cognizant security office at any time determines that the Contractor is, or is potentially, subject to foreign ownership, control, or influence, the Contractor shall comply with such instructions as the Contracting Officer shall provide in writing to protect any classified information or special nuclear material.

(4) The Contracting Officer may terminate this contract for default either if the Contractor fails to meet obligations imposed by this clause or if the Contractor creates a foreign ownership, control, or influence situation in order to avoid performance or a termination for default. The Contracting Officer may terminate this contract for convenience if the Contractor becomes subject to foreign ownership, control, or influence and for reasons other than avoidance of performance of the contract, cannot, or chooses not to, avoid or mitigate the foreign ownership, control, or influence problem.

(k) *Employment announcements.* When placing announcements seeking applicants for positions requiring access authorizations, the Contractor shall include in the written vacancy announcement, a notification to prospective applicants that reviews, and tests for the absence of any illegal drug as defined in 10 CFR 707.4, will be conducted by the employer and a background investigation by the Federal government may be required to obtain an access authorization prior to employment, and that subsequent

reinvestigations may be required. If the position is covered by the Counterintelligence Evaluation Program regulations at 10 CFR part 709, the announcement should also alert applicants that successful completion of a counterintelligence evaluation may include a counterintelligence-scope polygraph examination.

(l) *Flow down to subcontracts.* The Contractor agrees to insert terms that conform substantially to the language of this clause, including this paragraph, in all subcontracts under its contract that will require subcontractor employees to possess access authorizations. Additionally, the Contractor must require such subcontractors to have an existing DOD or DOE facility clearance or submit a completed SF 328, *Certificate Pertaining to Foreign Interests*, as required in 48 CFR 952.204–73, Facility Clearance, and obtain a foreign ownership, control and influence determination and facility clearance prior to award of a subcontract. Information to be provided by a subcontractor pursuant to this clause may be submitted directly to the Contracting Officer. For purposes of this clause, subcontractor means any subcontractor at any tier and the term ''Contracting Officer'' means the DOE Contracting Officer. When this clause is included in a subcontract, the term ''Contractor'' shall mean subcontractor and the term ''contract'' shall mean subcontract.

(End of clause)

[74 FR 23124, May 18, 2009, as amended at 74 FR 36368, 36370, July 22, 2009; 76 FR 7694, Feb. 11, 2011; 81 FR 45978, July 15, 2016]

952.204–70 Classification/Declassification.

As prescribed in 904.404(d)(2), the following clause shall be included in all contracts which involve classified information:

CLASSIFICATION/DECLASSIFICATION (SEP 1997)

In the performance of work under this contract, the Contractor or subcontractor shall comply with all provisions of the Department of Energy's regulations and mandatory DOE directives which apply to work involving the classification and declassification of information, documents, or material. In this section, ''information'' means facts, data, or knowledge itself; ''document'' means the physical medium on or in which information is recorded; and ''material'' means a product or substance which contains or reveals information, regardless of its physical form or characteristics. Classified information is ''Restricted Data'' and ''Formerly Restricted Data'' (classified under the Atomic Energy Act of 1954, as amended) and ''National Security Information'' (classified under Executive Order 12958 or prior Executive Orders).

The original decision to classify or declassify information is considered an inherently Governmental function. For this reason, only Government personnel may serve as original classifiers, i.e., Federal Government Original Classifiers. Other personnel (Government or Contractor) may serve as derivative classifiers which involves making classification decisions based upon classification guidance which reflect decisions made by Federal Government Original Classifiers.

The Contractor or subcontractor shall ensure that any document or material that may contain classified information is reviewed by either a Federal Government or a Contractor Derivative Classifier in accordance with classification regulations including mandatory DOE directives and classification/declassification guidance furnished to the Contractor by the Department of Energy to determine whether it contains classified information prior to dissemination. For information which is not addressed in classification/declassification guidance, but whose sensitivity appears to warrant classification, the Contractor or subcontractor shall ensure that such information is reviewed by a Federal Government Original Classifier.

In addition, the Contractor or subcontractor shall ensure that existing classified documents (containing either Restricted Data or Formerly Restricted Data or National Security Information) which are in its possession or under its control are periodically reviewed by a Federal Government or Contractor Derivative Declassifier in accordance with classification regulations, mandatory DOE directives and classification/declassification guidance furnished to the Contractor by the Department of Energy to determine if the documents are no longer appropriately classified. Priorities for declassification review of classified documents shall be based on the degree of public and researcher interest and the likelihood of declassification upon review. Documents which no longer contain classified information are to be declassified. Declassified documents then shall be reviewed to determine if they are publicly releasable. Documents which are declassified and determined to be publicly releasable are to be made available to the public in order to maximize the public's access to as much Government information as possible while minimizing security costs.

The Contractor or subcontractor shall insert this clause in any subcontract which involves or may involve access to classified information.

(End of clause)

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9108, Feb. 25, 1994; 62 FR 51802, Oct. 3, 1997; 74 FR 36370, 36378, July 22, 2009]

952.204–71 Sensitive foreign nations controls.

In accordance with 904.404(d)(3), the contracting officer shall include the following clause:

SENSITIVE FOREIGN NATIONS CONTROLS (MAR 2011)

(a) In connection with any activities in the performance of this contract, the Contractor agrees to comply with the ''Sensitive Foreign Nations Controls'' requirements attached to this contract, relating to those countries, which may from time to time, be identified to the Contractor by written notice as sensitive foreign nations. The Contractor shall have the right to terminate its performance under this contract upon at least 60 days' prior written notice to the Contracting Officer if the Contractor determines that it is unable, without substantially interfering with its polices or without adversely impacting its performance to continue performance of the work under this contract as a result of such notification. If the Contractor elects to terminate performance, the provisions of this contract regarding termination for the convenience of the Government shall apply.

(b) The provisions of this clause shall be included in any subcontracts which may involve making unclassified information about nuclear technology available to sensitive foreign nations.

(End of clause)

[49 FR 12042, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 59 FR 9108, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997; 74 FR 36370, 36378, 36380, July 22, 2009; 76 FR 7694, Feb. 11, 2011]

952.204–72 Disclosure of information.

As prescribed in 904.404(d)(4) this clause may be used in place of the clauses entitled ''Security,'' 952.204–2, and ''Classification/Declassification,'' 952.204–70, in contracts with educational institutions for research involving nuclear technology which could but is not expected to produce classified information or restricted data:

DISCLOSURE OF INFORMATION (APR 1994)

(a) It is mutually expected that the activities under this contract will not involve classified information. It is understood, however, that if in the opinion of either party, this expectation changes prior to the expiration or terminating of all activities under this contract, said party shall notify the other party accordingly in writing without delay. In any event, the Contractor shall classify, safeguard, and otherwise act with respect to all classified information in accordance with applicable law and the requirements of DOE, and shall promptly inform DOE in writing if and when classified information becomes involved, or in the mutual judgment of the parties it appears likely that classified information or material may become involved. The Contractor shall have the right to terminate performance of the work under this contract and in such event the provisions of this contract respecting termination for the convenience of the Government shall apply.

(b) The Contractor shall not permit any individual to have access to classified information except in accordance with the Atomic Energy Act 1954, as amended, Executive Order 12356, and DOE's regulations or requirements.

(c) The term *Restricted Data* as used in this article means all data concerning the design, manufacture, or utilization of atomic weapons, the production of special nuclear material or the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act of 1954, as amended.

(End of clause)

[49 FR 12042, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 59 FR 9108, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997; 74 FR 36368, 36370, 36378, July 22, 2009]

952.204–73 Facility clearance.

As prescribed in 904.404(d)(5), insert the following provision in all solicitations which require the use of Standard Form 328, Certificate Pertaining to Foreign Interests, for contracts or subcontracts subject to the provisions of 904.70:

FACILITY CLEARANCE (AUG 2016)

Notices

Section 2536 of title 10, United States Code, prohibits the award of a contract under a national security program to an entity controlled by a foreign government if it is necessary for that entity to be given access to information in a proscribed category of information in order to perform the contract unless a waiver is granted by the Secretary of Energy. In addition, a Facility Clearance and foreign ownership, control and influence (FOCI) information are required when the contract or subcontract to be awarded is expected to require employees to have access authorizations.

Offerors who have either a Department of Defense or a Department of Energy Facility Clearance generally need not resubmit the following foreign ownership information unless specifically requested to do so. Instead, provide your DOE Facility Clearance code or your DOD assigned commercial and government entity (CAGE) code. If uncertain, consult the office which issued this solicitation.

(a) *Use of Certificate Pertaining to Foreign Interests, Standard Form 328.* (1) The contract work anticipated by this solicitation will require access to classified information or special nuclear material. Such access will require a Facility Clearance for the Contractor's organization and access authorizations (security clearances) for Contractor personnel working with the classified information or special nuclear material. To obtain a Facility Clearance the Contractor must submit the Standard Form 328, Certificate Pertaining to Foreign Interests, and all required supporting documents to form a complete Foreign Ownership, Control or Influence (FOCI) Package. The Contractor will submit the Foreign Ownership, Control or Influence (FOCI) information in the format directed by DOE. When completed the Contractor must print and sign one copy of the SF 328 and submit it to the Contracting Officer.

(2) Information submitted by the offeror in response to the Standard Form 328 will be used solely for the purposes of evaluating foreign ownership, control or influence and will be treated by DOE, to the extent permitted by law, as business or financial information submitted in confidence.

(3) Following submission of a Standard Form 328 and prior to contract award, the Contractor shall immediately submit to the Contracting Officer written notification of any changes in the extent and nature of FOCI which could affect the offeror's answers to the questions in Standard Form 328. Following award of a contract, the Contractor must immediately submit to the cognizant security office written notification of any changes in the extent and nature of FOCI which could affect the offeror's answers to the questions in Standard Form 328. Notice of changes in ownership or control which are required to be reported to the Securities and Exchange Commission, the Federal Trade Commission, or the Department of Justice must also be furnished concurrently to the cognizant security office.

(b) *Definitions.* (1) *Foreign Interest* means any of the following—

(i) A foreign government, foreign government agency, or representative of a foreign government;

(ii) Any form of business enterprise or legal entity organized, chartered or incorporated under the laws of any country other than the United States or its possessions and trust territories; and

(iii) Any person who is not a citizen or national of the United States.

(2) *Foreign Ownership, Control, or Influence (FOCI)* means the situation where the degree of ownership, control, or influence over a Contractor by a foreign interest is such that a reasonable basis exists for concluding that compromise of classified information or special nuclear material may result.

(c) *Facility Clearance* means an administrative determination that a facility is eligible to access, produce, use or store classified information, or special nuclear material. A Facility Clearance is based upon a determination that satisfactory safeguards and security measures are carried out for the activities being performed at the facility. It is DOE policy that all Contractors or Subcontractors requiring access authorizations be processed for a Facility Clearance at the level appropriate to the activities being performed under the contract. Approval for a Facility Clearance shall be based upon—

(1) A favorable foreign ownership, control, or influence (FOCI) determination based upon the Contractor's response to the ten questions in Standard Form 328 and any required, supporting data provided by the Contractor;

(2) A contract or proposed contract containing the appropriate security clauses;

(3) Approved safeguards and security plans which describe protective measures appropriate to the activities being performed at the facility;

(4) An established Reporting Identification Symbol code for the Nuclear Materials Management and Safeguards Reporting System if access to nuclear materials is involved;

(5) A survey conducted no more than 6 months before the Facility Clearance date, with a composite facility rating of satisfactory, if the facility is to possess classified matter or special nuclear material at its location;

(6) Appointment of a Facility Security Officer, who must possess or be in the process of obtaining an access authorization equivalent to the Facility Clearance; and, if applicable, appointment of a Materials Control and Accountability Representative; and

(7) Access authorizations for key management personnel who will be determined on a case-by-case basis, and must possess or be in the process of obtaining access authorizations equivalent to the level of the Facility Clearance.

(d) A Facility Clearance is required prior to the award of a contract requiring access to classified information and the granting of any access authorizations under a contract. Prior to award of a contract, the DOE must determine that award of the contract to the offeror will not pose an undue risk to the common defense and security as a result of its access to classified information or special nuclear material in the performance of the

contract. The Contracting Officer may require the offeror to submit such additional information as deemed pertinent to this determination.

(e) A Facility Clearance is required even for contracts that do not require the Contractor's corporate offices to receive, process, reproduce, store, transmit, or handle classified information or special nuclear material, but which require DOE access authorizations for the Contractor's employees to perform work at a DOE location. This type facility is identified as a non-possessing facility.

(f) Except as otherwise authorized in writing by the Contracting Officer, the provisions of any resulting contract must require that the Contractor insert provisions similar to the foregoing in all subcontracts and purchase orders. Any Subcontractors requiring access authorizations for access to classified information or special nuclear material shall be directed to provide responses to the questions in Standard Form 328, Certificate Pertaining to Foreign Interests, directly to the prime Contractor or the Contracting Officer for the prime contract.

NOTICE TO OFFERORS—CONTENTS REVIEW (PLEASE REVIEW BEFORE SUBMITTING)

Prior to submitting the Standard Form 328, required by paragraph (a)(1) of this clause, the offeror should review the FOCI submission to ensure that:

(1) The Standard Form 328 has been signed and dated by an authorized official of the company;

(2) If publicly owned, the Contractor's most recent annual report, and its most recent proxy statement for its annual meeting of stockholders have been attached; or, if privately owned, the audited, consolidated financial information for the most recently closed accounting year has been attached;

(3) A copy of the company's articles of incorporation and an attested copy of the company's by-laws, or similar documents filed for the company's existence and management, and all amendments to those documents;

(4) A list identifying the organization's owners, officers, directors, and executive personnel, including their names, social security numbers, citizenship, titles of all positions they hold within the organization, and what clearances, if any, they possess or are in the process of obtaining, and identification of the government agency(ies) that granted or will be granting those clearances; and

(5) A summary FOCI data sheet.

NOTE: A FOCI submission must be attached for each tier parent organization (i.e. ultimate parent and any intervening levels of ownership). If any of these documents are missing, award of the contract cannot be completed.

(End of provision)

[67 FR 14877, Mar. 28, 2002, as amended at 74 FR 36368, 36370, 36378, July 22, 2009; 76 FR 7694, Feb. 11, 2011; 81 FR 45978, July 15, 2016]

952.204–75 Public affairs.

As prescribed in 904.7201, insert the following clause:

PUBLIC AFFAIRS (DEC 2000)

(a) The Contractor must cooperate with the Department in releasing unclassified information to the public and news media regarding DOE policies, programs, and activities relating to its effort under the contract. The responsibilities under this clause must be accomplished through coordination with the Contracting Officer and appropriate DOE public affairs personnel in accordance with procedures defined by the Contracting Officer.

(b) The Contractor is responsible for the development, planning, and coordination of proactive approaches for the timely dissemination of unclassified information regarding DOE activities onsite and offsite, including, but not limited to, operations and programs. Proactive public affairs programs may utilize a variety of communication media, including public workshops, meetings or hearings, open houses, newsletters, press releases, conferences, audio/visual presentations, speeches, forums, tours, and other appropriate stakeholder interactions.

(c) The Contractor's internal procedures must ensure that all releases of information to the public and news media are coordinated through, and approved by, a management official at an appropriate level within the Contractor's organization.

(d) The Contractor must comply with DOE procedures for obtaining advance clearances on oral, written, and audio/visual informational material prepared for public dissemination or use.

(e) Unless prohibited by law, and in accordance with procedures defined by the Contracting Officer, the Contractor must notify the Contracting Officer and appropriate DOE public affairs personnel of communications or contacts with Members of Congress relating to the effort performed under the contract.

(f) In accordance with procedures defined by the Contracting Officer, the Contractor must notify the Contracting Officer and appropriate DOE public affairs personnel of activities or situations that may attract regional or national news media attention and of non-routine inquiries from national news media relating to the effort performed under the contract.

(g) In releases of information to the public and news media, the Contractor must fully and accurately identify the Contractor's relationship to the Department and fully and accurately credit the Department for its role in funding programs and projects resulting in scientific, technical, and other achievements.

(End of clause)

[65 FR 81008, Dec. 22, 2000, as amended at 74 FR 36368, 36370, July 22, 2009]

952.204–76 Conditional payment of fee or profit—safeguarding restricted data and other classified information.

As prescribed at 904.404(d)(6), insert the following clause:

CONDITIONAL PAYMENT OF FEE OR PROFIT—SAFEGUARDING RESTRICTED DATA AND OTHER CLASSIFIED INFORMATION (JAN 2004)

(a) *General.* (1) The payment of fee or profit (i.e., award fee, fixed fee, and incentive fee or profit) under this contract is dependent upon the Contractor's compliance with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information (i.e., Formerly Restricted Data and National Security Information) including compliance with applicable law, regulation, and DOE directives. The term ''Contractor'' as used in this clause to address failure to comply shall mean ''Contractor or Contractor employee.''

(2) In addition to other remedies available to the Government, if the Contractor fails to comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information, the Contracting Officer may unilaterally reduce the amount of fee or profit that is otherwise payable to the Contractor in accordance with the terms and conditions of this clause.

(3) Any reduction in the amount of fee or profit earned by the Contractor will be determined by the severity of the Contractor's failure to comply with contract terms and conditions relating to the safeguarding of restricted data or other classified information pursuant to the degrees specified in paragraph (c) of this clause.

(b) *Reduction amount.* (1) If in any period (see 48 CFR 952.204–76 (b)(2)) it is found that the Contractor has failed to comply with contract terms and conditions relating to the safeguarding of Restricted Data or other classified information, the Contractor's fee or profit of the period may be reduced. Such reduction shall not be less than 26 percent nor greater than 100 percent of the total fee or profit earned for a first degree performance failure, not less than 11 percent nor greater than 25 percent for a second degree performance failure, and up to 10 percent for a third degree performance failure. The Contracting Officer must consider mitigating factors that may warrant a reduction below the specified range (see 48 CFR 904.402(c)). The mitigating factors include, but are not limited to, the following:

(i) Degree of control the Contractor had over the event or incident.

(ii) Efforts the Contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of safeguarding Restricted Data and other classified information and compliance in related security areas.

(2)(i) Except in the case of performance-based firm-fixed-price contracts (see paragraph (b)(3) of this clause), the Contracting Officer, for purposes of this clause, will at the time of contract award, or as soon as practicable thereafter, allocate the total amount of fee or profit that is available under this contract to equal periods of [insert 6 or 12] months to run sequentially for the entire term of the contract (i.e., from the effective date of the contract to the expiration date of the contract, including all options). The amount of fee or profit to be allocated to each period shall be equal to the average monthly fee or profit that is available or otherwise payable during the entire term of the contract, multiplied by the number of months established above for each period.

(ii) Under this clause, the total amount of fee or profit that is subject to reduction in a period in which a performance failure occurs, in combination with any reduction made under any other clause in the contract that provides for a reduction to the fee or profit, shall not exceed the amount of fee or profit that is earned by the Contractor in the period established pursuant to paragraph (b)(2)(i) of this clause.

(3) For performance-based firm-fixed-price contracts, the Contracting Officer will at the time of contract award include negative monetary incentives in the contract for Contractor violations relating to the safeguarding of Restricted Data and other classified information.

(c) *Safeguarding restricted data and other classified information.* Performance failures occur if the Contractor does not comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information. The degrees of performance failures relating to the Contractor's obligations under this contract for safeguarding of Restricted Data and other classified information are as follows:

(1) *First Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered first degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating a risk of, loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a Special Access Program (SAP), information identified as sensitive compartmented information (SCI), or high risk nuclear weapons-related data.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(2) *Second Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered second degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Sceret Restricted Data, or other information classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other information regardless of classification (except for information covered by paragraph (c)(1)(iii) of this clause).

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(3) *Third Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, undue risk to the common defense and security. In addition, this category includes performance failures that result from a lack of Contractor management and/or employee attention to the proper safeguarding of Restricted Data and other classified information. These performance failures may be indicators of future, more severe performance failures and/or conditions, and if identified and corrected early would prevent serious incidents. The following are examples of performance failures or performance failures of similar import that will be considered third degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other information classified as Confidential.

(ii) Failure to promptly report alleged or suspected violations of laws, regulations, or directives pertaining to the safeguarding of Restricted Data or other classified information.

(iii) Failure to identify or timely execute corrective actions to mitigate or eliminate identified vulnerabilities and reduce residual risk relating to the protection of Restricted Data or other classified information in accordance with the Contractor's Safeguards and Security Plan or other security plan, as applicable.

(iv) Contractor actions that result in performance failures which unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the Contractor's safeguards and security management system relating to the protection of Restricted Data and other classified information.

(End of clause)

[68 FR 68777, Dec. 10, 2003, as amended at 74 FR 36368, 36370, 36378, 36380, July 22, 2009]

952.204–77 Computer security.

As prescribed in 904.404(d)(7), the following clause shall be included:

COMPUTER SECURITY (AUG 2006)

(a) *Definitions.* (1) *Computer* means desktop computers, portable computers, computer networks (including the DOE Network and local area networks at or controlled by DOE organizations), network devices, automated information systems, and or other related computer equipment owned by, leased, or operated on behalf of the DOE.

(2) *Individual* means a DOE Contractor or subcontractor employee, or any other person who has been granted access to a DOE computer or to information on a DOE computer, and does not include a member of the public who sends an e-mail message to a DOE computer or who obtains information available to the public on DOE Web sites.

(b) *Access to DOE computers.* A Contractor shall not allow an individual to have access to information on a DOE computer unless—

(1) The individual has acknowledged in writing that the individual has no expectation of privacy in the use of a DOE computer; and

(2) The individual has consented in writing to permit access by an authorized investigative agency to any DOE computer used during the period of that individual's access to information on a DOE computer, and for a period of three years thereafter.

(c) *No expectation of privacy.* Notwithstanding any other provision of law (including any provision of law enacted by the Electronic Communications Privacy Act of 1986), no individual using a DOE computer shall have any expectation of privacy in the use of that computer.

(d) *Written records.* The Contractor is responsible for maintaining written records for itself and subcontractors demonstrating compliance with the provisions of paragraph (b) of this section. The Contractor agrees to provide access to these records to the DOE, or its authorized agents, upon request.

(e) *Subcontracts.* The Contractor shall insert this clause, including this paragraph (e), in subcontracts under this contract that may provide access to computers owned, leased or operated on behalf of the DOE.

(End of clause)

[71 FR 40885, July 19, 2006, as amended at 74 FR 36368, 36378, July 22, 2009]

952.208 Clauses related to required sources of supply.

952.208–7 Tagging of leased vehicles.

As prescribed in 908.1104, insert the following clause when leasing commercial vehicles for periods in excess of 60 days:

TAGGING OF LEASED VEHICLES (APR 1984)

(a) DOE intends to use U.S. Government license tags.

(b) While it is the intention that vehicles leased hereunder shall operate on Federal tags, the DOE reserves the right to utilize State tags if necessary to accomplish its mission. Should State tags be required, the Contractor shall furnish the DOE the documentation required by the State to acquire such tags.

(End of clause)

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9108, Feb. 25, 1994; 67 FR 14872, Mar. 28, 2002; 74 FR 36370, 36378, July 22, 2009]

952.208–70 Printing.

As prescribed in 908.802, insert the following clause:

PRINTING (APR 1984)

The Contractor shall not engage in, nor subcontract for, any printing (as that term is defined in Title I of the U.S. Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with the performance of work under this contract. Provided, however, that performance of a requirement under this contract involving the duplication of less than 5,000 copies of a single unit, or no more than 25,000 units in the aggregate of multiple units, will not be deemed to be printing. A unit is defined as one sheet, size 8½ by 11 inches one side only, one color. A requirement is defined as a single publication document.

(1) The term *printing* includes the following processes: composition, plate making, presswork, binding, microform publishing, or the end items produced by such processes.

(2) If fulfillment of the contract will necessitate reproduction in excess of the limits set forth above, the Contractor shall notify the Contracting Officer in writing and obtain the Contracting Officer's approval prior to acquiring on DOE's behalf production, acquisition, and dissemination of printed matter. Such printing must be obtained from the Government Printing Office (GPO), a contract source designated by GPO or a Joint Committee on Printing authorized federal printing plant.

(3) Printing services not obtained in compliance with this guidance will result in the cost of such printing being disallowed.

(4) The Contractor will include in each of his subcontracts hereunder a provision substantially the same as this clause including this paragraph (4).

(End of clause)

[49 FR 12042, Mar. 28, 1984; 49 FR 38951, Oct. 2, 1984, as amended at 59 FR 9108, Feb. 25, 1994; 74 FR 36370, 36378, 36380, July 22, 2009]

952.209 Clauses related to contractor's qualifications.

952.209–8 Organizational conflicts of interest-disclosure.

As prescribed in 909.507–1(e), insert the following provision:

ORGANIZATIONAL CONFLICTS OF INTEREST DISCLOSURE-ADVISORY AND ASSISTANCE SERVICES (JUN 1997)

(a) 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.

(b) An offeror notified that it is the apparent successful offeror shall provide the statement described in paragraph (c) of this provision. For purposes of this provision, ''apparent successful offeror'' means the proposer selected for final negotiations or, where individual contracts are negotiated with all firms in the competitive range, it means all such firms.

(c) The statement must contain the following:

(1) A statement of any past (within the past twelve months), present, or currently planned financial, contractual, organizational, or other interests relating to the performance of the statement of work. For contractual interests, such statement must include the name, address, telephone number of the client or client(s), a description of the services rendered to the previous client(s), and the name of a responsible officer or employee of the offeror who is knowledgeable about the services rendered to each client, if, in the 12 months preceding the date of the statement, services were rendered to the Government or any other client (including a foreign government or person) respecting the same subject matter of the instant solicitation, or directly relating to such subject matter. The agency and contract number under which the services were rendered must also be included, if applicable. For financial interests, the statement must include the nature and extent of the interest and any entity or entities involved in the financial relationship. For these and any other interests enough such information must be provided to allow a meaningful evaluation of the potential effect of the interest on the performance of the statement of work.

(2) A statement that no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory and assistance services to be provided in connection with the instant contract or that any actual or potential conflict of interest or unfair competitive advantage that does or may exist with respect to the contract in question has been communicated as part of the statement required by (b) of this provision.

(d) Failure of the offeror to provide the required statement may result in the offeror being determined ineligible for award. Misrepresentation or failure to report any fact may result in the assessment of penalties associated with false statements or such other provisions provided for by law or regulation.

(End of provision)

[62 FR 40752, July 30, 1997, as amended at 74 FR 36368, July 22, 2009]

952.209–71 [Reserved]

952.209–72 Organizational conflicts of interest.

As prescribed at 909.507–2, insert the following clause:

ORGANIZATIONAL CONFLICTS OF INTEREST (AUG 2009)

(a) *Purpose.* The purpose of this clause is to ensure that the Contractor (1) is not biased because of its financial, contractual, organizational, or other interests which relate to the work under this contract, and (2) does not obtain any unfair competitive advantage over other parties by virtue of its performance of this contract.

(b) *Scope.* The restrictions described herein shall apply to performance or participation by the Contractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as ''Contractor'') in the activities covered by this clause as a prime Contractor, subcontractor, cosponsor, joint venturer, consultant, or in any similar capacity. For the purpose of this clause, affiliation occurs when a business concern is controlled by or has the power to control another or when a third party has the power to control both.

(1) *Use of contractor's work product.* (i) The Contractor shall be ineligible to participate in any capacity in Department contracts, subcontracts, or proposals therefore (solicited and unsolicited) which stem directly from the Contractor's performance of work under this contract for a period of (Contracting Officer see 48 CFR 909.507–2 and enter specific term) years after the completion of this contract. Furthermore, unless so

directed in writing by the Contracting Officer, the Contractor shall not perform any advisory and assistance services work under this contract on any of its products or services or the products or services of another firm if the Contractor is or has been substantially involved in their development or marketing. Nothing in this subparagraph shall preclude the Contractor from competing for follow-on contracts for advisory and assistance services.

(ii) If, under this contract, the Contractor prepares a complete or essentially complete statement of work or specifications to be used in competitive acquisitions, the Contractor shall be ineligible to perform or participate in any capacity in any contractual effort which is based on such statement of work or specifications. The Contractor shall not incorporate its products or services in such statement of work or specifications unless so directed in writing by the Contracting Officer, in which case the restriction in this subparagraph shall not apply.

(iii) Nothing in this paragraph shall preclude the Contractor from offering or selling its standard and commercial items to the Government.

(2) *Access to and use of information.* (i) If the Contractor, in the performance of this contract, obtains access to information, such as Department plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (5 U.S.C. 552a), or data which has not been released or otherwise made available to the public, the Contractor agrees that without prior written approval of the Contracting Officer it shall not—

(A) Use such information for any private purpose unless the information has been released or otherwise made available to the public;

(B) Compete for work for the Department based on such information for a period of six (6) months after either the completion of this contract or until such information is released or otherwise made available to the public, whichever is first;

(C) Submit an unsolicited proposal to the Government which is based on such information until one year after such information is released or otherwise made available to the public; and

(D) Release such information unless such information has previously been released or otherwise made available to the public by the Department.

(ii) In addition, the Contractor agrees that to the extent it receives or is given access to proprietary data, data protected by the Privacy Act of 1974 (5 U.S.C. 552a), or other confidential or privileged technical, business, or financial information under this contract, it shall treat such information in accordance with any restrictions imposed on such information.

(iii) The Contractor may use technical data it first produces under this contract for its private purposes consistent with paragraphs (b)(2)(i) (A) and (D) of this clause and the patent, rights in data, and security provisions of this contract.

(c) *Disclosure after award.* (1) The Contractor agrees that, if changes, including additions, to the facts disclosed by it prior to award of this contract, occur during the performance of this contract, it shall make an immediate and full disclosure of such changes in writing to the Contracting Officer. Such disclosure may include a description of any action which the Contractor has taken or proposes to take to avoid, neutralize, or mitigate any resulting conflict of interest. The Department may, however, terminate the contract for convenience if it deems such termination to be in the best interest of the Government.

(2) In the event that the Contractor was aware of facts required to be disclosed or the existence of an actual or potential organizational conflict of interest and did not disclose such facts or such conflict of interest to the Contracting Officer, DOE may terminate this contract for default.

(d) *Remedies.* For breach of any of the above restrictions or for nondisclosure or misrepresentation of any facts required to be disclosed concerning this contract, including the existence of an actual or potential organizational conflict of interest at the time of or after award, the Government may terminate the contract for default, disqualify the Contractor from subsequent related contractual efforts, and pursue such other remedies as may be permitted by law or this contract.

(e) *Waiver.* Requests for waiver under this clause shall be directed in writing to the Contracting Officer and shall include a full description of the requested waiver and the reasons in support thereof. If it is determined to be in the best interests of the Government, the Contracting Officer may grant such a waiver in writing.

(End of clause)

Alternate I: In accordance with 909.507–2 and 970.0905, include the following alternate in the specified types of contracts.

(f) *Subcontracts.* (1) The Contractor shall include a clause, substantially similar to this clause, including this paragraph (f), in subcontracts expected to exceed the simplified acquisition threshold determined in accordance with 48 CFR part 13 and involving the performance of advisory and assistance services as that term is defined at 48 CFR 2.101. The terms ''contract,'' ''Contractor,'' and ''contracting officer'' shall be appropriately modified to preserve the Government's rights.

(2) Prior to the award under this contract of any such subcontracts for advisory and assistance services, the Contractor shall obtain from the proposed subcontractor or consultant the disclosure required by 48 CFR 909.507–1, and shall determine in writing whether the interests disclosed present an actual or significant potential for an organizational conflict of interest. Where an actual or significant potential organizational conflict of interest is identified, the Contractor shall take actions to avoid, neutralize, or mitigate the organizational conflict to the satisfaction of the Contractor. If the conflict cannot be avoided or neutralized, the Contractor must obtain the approval of the DOE Contracting Officer prior to entering into the subcontract.

(End of alternate)

[62 FR 40752, July 30, 1997, as amended at 74 FR 36368, 36378, 36380, July 22, 2009; 76 FR 7694, Feb. 11, 2011]

952.211 Clauses related to contract delivery or performance.

952.211–70 Priorities and allocations for energy programs (solicitations):

As prescribed in 911.604(a), insert the following provision in solicitations that will result in the award of a contract in support of DOE atomic energy programs:

PRIORITIES AND ALLOCATIONS (ATOMIC ENERGY) (APR 2008)

Contracts or purchase orders awarded as a result of this solicitation shall be assigned a [ ] DO-Rating; [ ] DX Rating; and certified for national defense use in accordance with the Defense Priorities and Allocations System (DPAS) regulation (15 CFR part 700) (Contracting Officer check appropriate box.)

(End of provision)

[73 FR 10985, Feb. 29, 2008, as amended at 74 FR 36369, 36370, July 22, 2009]

952.211–71 Priorities and allocations for energy programs (contracts).

As prescribed in 911.604(b), insert the following clause in contracts and purchase orders that are placed in support of authorized DOE atomic energy programs pursuant to the Atomic Energy Act of 1954, as amended:

PRIORITIES AND ALLOCATIONS (ATOMIC ENERGY) (APR 2008)

The Contractor shall follow the provisions of Defense Priorities and Allocations System (DPAS) regulation (15 CFR part 700) in obtaining materials (including equipment), services, or facilities needed to fill this contract.

(End of clause)

[73 FR 10985, Feb. 29, 2008, as amended at 74 FR 36369, 36370, July 22, 2009]

952.211–72—952.211–73 [Reserved]

952.215–70 Key Personnel.

As prescribed in 915.408–70, the contracting officer shall insert the following clause:

KEY PERSONNEL (DEC 2000)

(a) The personnel listed below or elsewhere in this contract [Insert cross-reference, if applicable] are considered essential to the work being performed under this contract. Before removing, replacing, or diverting any of the listed or specified personnel, the Contractor must: (1) Notify the Contracting Officer reasonably in advance; (2) submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on this contract; and (3) obtain the Contracting Officer's written approval. Notwithstanding the foregoing, if the Contractor deems immediate removal or suspension of any member of its management team is necessary to fulfill its obligation to maintain satisfactory standards of employee competency, conduct, and integrity under the clause at 48 CFR 970.5203–3, Contractor's Organization, the Contractor may remove or suspend such person at once, although the Contractor must notify Contracting Officer prior to or concurrently with such action.

(b) The list of personnel may, with the consent of the contracting parties, be amended from time to time during the course of the contract to add or delete personnel.

[Insert List of Key Personnel unless listed elsewhere in the contract]

(End of clause)

[65 FR 81008, Dec. 22, 2000, as amended at 74 FR 36369, July 22, 2009; 76 FR 7694, Feb. 11, 2011]

952.216 Clauses related to types of contracts.

952.216–7 Allowable cost and payment.

As prescribed in 916.307(a), when contracting with a commercial organization modify paragraph (a) of the clause at 48 CFR 52.216–7 by adding the phrase ''as supplemented by subpart 931.2 of the Department of Energy Acquisition

Regulations (DEAR),'' after 48 CFR subpart 31.2.

[74 FR 36369, July 22, 2009, as amended at 76 FR 7694, Feb. 11, 2011]

952.216–15 Predetermined indirect cost rates.

Alternate (AUG 2009): As prescribed in 916.307(g), modify paragraph (c) of the clause at 48 CFR 52.216–15, Predetermined Indirect Cost Rates, by deleting the words ''Subpart 31.4'' and substituting for them ''Subpart 31.6'' and insert the clause in solicitations and contracts when a cost-reimbursement research and development contract with a State or local government is contemplated and predetermined indirect cost rates are to be used.

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997; 74 FR 36369, July 22, 2009; 76 FR 7694, Feb. 11, 2011]

952.217–70 Acquisition of real property.

Insert the following clause when required by 917.7403:

ACQUISITION OF REAL PROPERTY (MAR 2011)

(a) Notwithstanding any other provision of the contract, the prior approval of the Contracting Officer shall be obtained when, in performance of this contract, the Contractor acquires or proposes to acquire use of real property by:

(1) Purchase, on the Government's behalf or in the Contractor's own name, with title eventually vesting in the Government.

(2) Lease for which the Department of Energy will reimburse the incurred costs as a reimbursable contract cost.

(3) Acquisition of temporary interest through easement, license or permit, and the Government funds the entire cost of the temporary interest.

(b) Justification of and execution of any real property acquisitions shall be in accordance and compliance with directions provided by the Contracting Officer.

(c) The substance of this clause, including this paragraph (c), shall be included in any subcontract occasioned by this contract under which property described in paragraph (a) of this clause shall be acquired.

(End of clause)

[49 FR 12042, Mar. 28, 1984, as amended at 67 FR 14872, Mar. 28, 2002; 74 FR 36370, 36378, 36380, July 22, 2009; 76 FR 7694, Feb. 11, 2011]

952.219–70 DOE Mentor-Protege program.

In accordance with 919.7014 insert the following provision in applicable solicitations.

DOE MENTOR-PROTEGE PROGRAM (MAY 2000)

The Department of Energy has established a Mentor-Protege Program to encourage its prime contractors to assist firms certified under section 8(a) of the Small Business Act by SBA, other small disadvantaged businesses, women-owned small businesses, Historically Black Colleges and Universities and Minority Institutions, other minority institutions of higher learning and small business concerns owned and controlled by service disabled veterans in enhancing their business abilities. If the contract resulting from this solicitation is awarded on a cost-plus-award fee basis, the Contractor's performance as a Mentor may be evaluated as part of the award fee plan. Mentor and Protege firms will develop and submit ''lessons learned'' evaluations to DOE at the conclusion of the contract. Any DOE contractor that is interested in becoming a Mentor should refer to the applicable regulations at 48 CFR 919.70 and should contact the Department of Energy's Office of Small and Disadvantaged Business Utilization.

[65 FR 21371, Apr. 21, 2000, as amended at 75 FR 69014, Nov. 10, 2010]

952.223 Clauses related to environment, energy and water efficiency, renewable energy technologies, occupational safety, and drug-free workplace.

952.223–71 Integration of environment, safety, and health into work planning and execution.

As prescribed in 923.7003 the clause set forth at 970.5223–1 shall be included in all contracts and subcontracts for, and be made applicable to, work to be performed at a government-owned or leased facility where DOE has elected to assert its statutory authority to establish and enforce occupational safety and health standards applicable to the work conditions of contractor and subcontractor employees, and to the protection of the public health and safety.

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 65 FR 81008, Dec. 22, 2000; 74 FR 36369, July 22, 2009]

952.223–72 Radiation protection and nuclear criticality.

As prescribed in 923.7003 the clause set forth herein shall be included in those contracts or subcontracts for, and be made applicable to, work to be performed at a facility where DOE does not elect to assert its statutory authority to enforce occupational safety and health standards applicable to the working conditions of contractor and subcontractor employees, but does need to enforce radiological safety and health standards pursuant to provisions of the contract or subcontract rather than by reliance upon Nuclear Regulatory Commission licensing requirements (including agreements with states under section 274 of the Atomic Energy Act):

RADIATION PROTECTION AND NUCLEAR CRITICALITY (APR 1984)

The Contractor shall take all reasonable precautions in the performance of work under this contract to protect the safety and health of employees and of members of the public against the hazards of ionizing radiation and radioactive materials and shall comply with all applicable radiation protection and nuclear criticality safety standards and requirements (including reporting requirements) of DOE. The Contractor shall submit a management program and implementation plan to the Contracting Officer for review and approval within 30 days after the effective date of this contract or modification. In the event that the Contractor fails to comply with said standards and requirements of DOE, the Contracting Officer may, without prejudice to any other legal or contractual rights of DOE, issue an order stopping all or any part of the work. Thereafter, a start order for resumption of the work may be issued at the discretion of the Contracting Officer. The Contractor shall make no claim for an extension of time or for compensation or damages by reason of or in connection with such work stoppage.

(End of clause)

[49 FR 12042, Mar. 28, 1984; 49 FR 38952, Oct. 2, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 74 FR 36369, 36370, 36378, 36380, July 22, 2009]

952.223–73—952.223–74 [Reserved]

952.223–75 Preservation of individual occupational radiation exposure records.

As prescribed at 923.7003(h), insert the clause in contracts containing 952.223–71, Integration of environment, safety, and health into work planning and execution, or 952.223–72, Radiation protection and nuclear criticality:

PRESERVATION OF INDIVIDUAL OCCUPATIONAL RADIATION EXPOSURE RECORDS (APR 1984)

Individual occupational radiation exposure records generated in the performance of work under this contract shall be generated and maintained by the contractor in accordance with 36 CFR Chapter XII, Subchapter B, ''Records Management,'' the National Archives and Records Administration (NARA)-approved DOE Records Disposition Schedules, and shall be operated as a DOE Privacy Act system of records, in accordance with the Privacy Act.

(End of clause)

[49 FR 12042, Mar. 28, 1984; 49 FR 38952, Oct. 2, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 62 FR 34862, June 27, 1997; 74 FR 36369, 36370, 36378, July 22, 2009; 79 FR 56285, Sept. 19, 2014]

952.223–76 Conditional payment of fee or profit—safeguarding restricted data and other classified information and protection of worker safety and health.

As prescribed at 923.7003(f), insert the following clause:

CONDITIONAL PAYMENT OF FEE OR PROFIT—SAFEGUARDING RESTRICTED DATA AND OTHER CLASSIFIED INFORMATION AND PROTECTION OF WORKER SAFETY AND HEALTH (DEC 2010)

(a) *General.* (1) The payment of fee or profit (i.e., award fee, fixed fee, and incentive fee or profit) under this contract is dependent upon the Contractor's compliance with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information (i.e., Formerly Restricted Data and National Security Information) and relating to the protection of worker safety and health, including compliance with applicable law, regulation, and DOE directives. The term ''contractor'' as used in this clause to address failure to comply shall mean ''contractor or contractor employee.''

(2) In addition to other remedies available to the Federal Government, if the Contractor fails to comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information or relating to the protection of worker safety and health, the Contracting Officer may unilaterally reduce the amount of fee or profit that is otherwise payable to the Contractor in accordance with the terms and conditions of this clause.

(3) Any reduction in the amount of fee or profit earned by the Contractor will be determined by the severity of the Contractor's failure to comply with contract terms and conditions relating to the safeguarding of Restricted Data or other classified information or relating to worker safety and health pursuant to the degrees specified in paragraphs (c) and (d) of this clause.

(b) *Reduction amount.* (1) If in any period (see paragraph (b)(2) of this clause) it is found that the Contractor has failed to comply with contract terms and conditions relating to the safeguarding of Restricted Data or other classified information or relating to the protection of worker safety and health, the Contractor's fee or profit of the period may be reduced. Such reduction shall not be less than 26 percent nor greater than 100 percent of the total fee or profit earned for a first degree performance failure, not less than 11 percent nor greater than 25 percent for a second degree performance failure, and up to 10 percent for a third degree performance failure. The Contracting Officer must consider mitigating factors that may warrant a reduction below the specified range (see 48 CFR 904.402(c) and 48 CFR 923.7002(a)(2)). The mitigating factors include, but are not limited to, the following ((v), (vi), (vii), and (viii) apply to worker safety and health (WS&H) only :

(i) Degree of control the Contractor had over the event or incident.

(ii) Efforts the Contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of: Safeguarding Restricted Data and other classified information and compliance in related security areas; or of protecting WS&H and compliance in related areas.

(v) Contractor demonstration to the Contracting Officer's satisfaction that the principles of industrial WS&H standards are routinely practiced (e.g., Voluntary Protection Program Star Status).

(vi) Event caused by ''Good Samaritan'' act by the Contractor (e.g., offsite emergency response).

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain WS&H performance (including effective resource allocation) and to support DOE corporate decision-making (e.g., policy, WS&H programs).

(viii) Contractor demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in WS&H by use of lessons-learned and best practices inter- and intra-DOE sites.

(2)(i) Except in the case of performance-based, firm-fixed-price contracts (see paragraph (b)(3) of this clause), the Contracting Officer, for purposes of this clause, will at the time of contract award, or as soon as practicable thereafter, allocate the total amount of fee or profit that is available under this contract to equal periods of [insert 6 or 12] months to run sequentially for the entire term of the contract (i.e., from the effective date of the contract to the expiration date of the contract, including all options). The amount of fee or profit to be allocated to each period shall be equal to the average monthly fee or profit that is available or otherwise payable during the entire term of the contract, multiplied by the number of months established above for each period.

(ii) Under this clause, the total amount of fee or profit that is subject to reduction in a period in which a performance failure occurs, in combination with any reduction made under any other clause in the contract that provides for a reduction to the fee or profit, shall not exceed the amount of fee or profit that is earned by the Contractor in the period established pursuant to paragraph (b)(2)(i) of this clause.

(3) For performance-based firm-fixed-price contracts, the Contracting Officer will at the time of contract award include negative monetary incentives in the contract for Contractor violations relating to the safeguarding of Restricted Data and other classified information and relating to protection of worker safety and health.

(c) *Safeguarding restricted data and other classified information.* Performance failures occur if the Contractor does not comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information. The degrees of performance failures relating to the Contractor's obligations under this contract for safeguarding of Restricted Data and other classified information are as follows:

(1) *First Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered first degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating a risk of, loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a Special Access Program (SAP), information identified as sensitive compartmented information (SCI), or high risk nuclear weapons-related data.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other classified information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(2) *Second Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered second degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Secret Restricted Data, or other information classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information regardless of classification (except for information covered by paragraph (c)(1)(iii) of this clause).

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(3) *Third Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, undue risk to the common defense and security. In addition, this category includes performance failures that result from a lack of contractor management and/or employee attention to the proper safeguarding of Restricted Data and other classified information. These performance failures may be indicators of future, more severe performance failures and/or conditions, and if identified and corrected early would prevent serious incidents. The following are examples of performance failures or performance failures of similar import will be considered third degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other information classified as Confidential.

(ii) Failure to promptly report alleged or suspected violations of laws, regulations, or directives pertaining to the safeguarding of Restricted Data or other classified information.

(iii) Failure to identify or timely execute corrective actions to mitigate or eliminate identified vulnerabilities and reduce residual risk relating to the protection of Restricted Data or other classified information in accordance with the Contractor's Safeguards and Security Plan or other security plan, as applicable.

(iv) Contractor actions that result in performance failures which unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the Contractor's safeguards and security management system relating to the protection of Restricted Data and other classified information.

(d) *Protection of worker safety and health.* Performance failures occur if the contractor does not comply with the contract's WS&H terms and conditions, which may be included in the DOE approved contractor Integrated Safety Management System (ISMS). The degrees of performance failure under which reductions of fee or profit will be determined are:

(1) *First Degree:* Performance failures that are most adverse to WS&H or could threaten the successful completion of a program or project. For contracts including ISMS requirements, failure to develop and obtain required DOE approval of WS&H aspects of an ISMS is considered first degree. The Government will perform necessary review of the

ISMS in a timely manner and will not unreasonably withhold approval of the WS&H aspects of the Contractor's ISMS. The following performance failures or performance failures of similar import will be deemed first degree:

(i) Type A accident (defined in DOE Order 225.1A, Accident Investigations, or its successor).

(ii) Two Second Degree performance failures during an evaluation period.

(2) *Second Degree:* Performance failures that are significantly adverse to WS&H. They include failures to comply with approved WS&H aspects of an ISMS that result in an actual injury, exposure, or exceedence that occurred or nearly occurred but had minor practical long-term health consequences. The following performance failures or performance failures of similar import will be considered second degree:

(i) Type B accident (defined in DOE Order 225.1A, Accident Investigations, or its successor).

(ii) Non-compliance with approved WS&H aspects of an ISMS that results in a near miss of a Type A or B accident. A near miss is a situation in which an inappropriate action occurs, or a necessary action is omitted, but does not result in an adverse effect.

(iii) Failure to mitigate or notify DOE of an imminent danger situation after discovery, where such notification is a requirement of the contract.

(3) *Third Degree:* Performance failures that reflect a lack of focus on improving WS&H. They include failures to comply with approved WS&H aspects of an ISMS that result in potential breakdown of the Contractor's WS&H system. The following performance failures or performance failures of similar import will be considered third degree:

(i) Failure to implement effective corrective actions to address deficiencies/non-compliance documented through external (*e.g.*, Federal) oversight and/or reported per DOE Manual 231.1–2, Occurrence Reporting and Processing of Operations Information, or its successor, requirements, or internal oversight of DOE Order 470.2B, Independent Oversight and Performance Assurance Program, or its successor, requirements.

(ii) Multiple similar non-compliances identified by external (e.g., Federal) oversight that in aggregate indicate a significant WS&H system breakdown.

(iii) Non-compliances that either have, or may have, significant negative impacts to workers that indicate a significant WS&H system breakdown.

(iv) Failure to notify DOE upon discovery of events or conditions where notification is required by the terms and conditions of the contract.

(End of clause)

[68 FR 68778, Dec. 10, 2003, as amended at 74 FR 36369, 36370, 36378, 36380, July 22, 2009; 75 FR 69013, Nov. 10, 2010]

952.223–77 Conditional payment of fee or profit—protection of worker safety and health.

As prescribed at 923.7003(g), insert the following clause:

CONDITIONAL PAYMENT OF FEE OR PROFIT—PROTECTION OF WORKER SAFETY AND HEALTH (DEC 2010)

(a) *General.* (1) The payment of fee or profit (i.e., award fee, fixed fee, and incentive fee or profit) under this contract is dependent upon the Contractor's compliance with the terms and conditions of this contract relating to the protection of worker safety and health (WS&H), including compliance with applicable law, regulation, and DOE directives. The term ''Contractor'' as used in this clause to address failure to comply shall mean ''Contractor or Contractor employee.''

(2) In addition to other remedies available to the Federal Government, if the Contractor fails to comply with the terms and conditions of this contract relating to the protection of worker safety and health, the Contracting Officer may unilaterally reduce the amount of fee or profit that is otherwise payable to the Contractor in accordance with the terms and conditions of this clause.

(3) Any reduction in the amount of fee or profit earned by the Contractor will be determined by the severity of the Contractor's failure to comply with contract terms and conditions relating to worker safety and health pursuant to the degrees specified in paragraph (c) of this clause.

(b) *Reduction amount.* (1) If in any period (see paragraph (b)(2) of this clause) it is found that the Contractor has failed to comply with contract terms and conditions relating to the protection of worker safety and health, the Contractor's fee or profit of the period may be reduced. Such reduction shall not be less than 26% nor greater than 100% of the total fee or profit earned for a first degree performance failure, not less than 11% nor greater than 25% for a second degree performance failure, and up to 10% for a third degree performance failure. The Contracting Officer must consider mitigating factors that may warrant a reduction below the specified range (see 48 CFR 923.7001(b)). The mitigating factors include, but are not limited to, the following:

(i) Degree of control the Contractor had over the event or incident.

(ii) Efforts the Contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of protecting WS&H and compliance in related areas.

(v) Contractor demonstration to the Contracting Officer's satisfaction that the principles of industrial WS&H standards are routinely practiced (e.g., Voluntary Protection Program Star Status).

(vi) Event caused by ''Good Samaritan'' act by the Contractor (e.g., offsite emergency response).

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain WS&H performance (including effective resource allocation) and to support DOE corporate decision-making (e.g., policy, WS&H programs).

(viii) Contractor demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in WS&H by use of lessons-learned and best practices inter- and intra-DOE sites.

(2)(i) Except in the case of performance based firm-fixed-price contracts (see paragraph (b)(3) below), the Contracting Officer, for purposes of this clause, will at the time of contract award, or as soon as practicable thereafter, allocate the total amount of fee or profit that is available under this contract to equal periods of [insert 6 or 12] months to run sequentially for the entire term of the contract (i.e., from the effective date of the contract to the expiration date of the contract, including all options). The amount of fee or profit to be allocated to each period shall be equal to the average monthly fee or profit that is available or otherwise payable during the entire term of the contract, multiplied by the number of months established above for each period.

(ii) Under this clause, the total amount of fee or profit that is subject to reduction in a period in which a performance failure occurs, in combination with any reduction made under any other clause in the contract that provides for a reduction to the fee or profit, shall not exceed the amount of fee or profit that is earned by the Contractor in the period established pursuant to paragraph (b)(2)(i) of this clause.

(3) For performance-based firm-fixed-price contracts, the Contracting Officer will at the time of contract award include negative monetary incentives in the contract for contractor violations relating to the protection of worker safety and health.

(c) *Protection of worker safety and health.* Performance failures occur if the Contractor does not comply with the contract's WS&H terms and conditions, which may be included in the DOE approved contractor Integrated Safety Management System (ISMS). The degrees of performance failure under which reductions of fee or profit will be determined are:

(1) *First Degree:* Performance failures that are most adverse to WS&H or could threaten the successful completion of a program or project. For contracts including ISMS requirements, failure to develop and obtain required DOE approval of WS&H aspects of an ISMS is considered first degree. The Government will perform necessary review of the ISMS in a timely manner and will not unreasonably withhold approval of the WS&H aspects of the Contractor's ISMS. The following performance failures or performance failures of similar import will be deemed first degree:

(i) Type A accident (defined in DOE Order 225.1A, Accident Investigations, or its successor).

(ii) Two Second Degree performance failures during an evaluation period.

(2) *Second Degree:* Performance failures that are significantly adverse to WS&H. They include failures to comply with approved WS&H aspects of an ISMS that result in an actual injury, exposure, or exceedence that occurred or nearly occurred but had minor practical long-term health consequences. The following performance failures or performance failures of similar import will be considered second degree:

(i) Type B accident (defined in DOE Order 225.1A, Accident Investigations, or its successor).

(ii) Non-compliance with approved WS&H aspects of an ISMS that results in a near miss of a Type A or B accident. A near miss is a situation in which an inappropriate action occurs, or a necessary action is omitted, but does not result in an adverse effect.

(iii) Failure to mitigate or notify DOE of an imminent danger situation after discovery, where such notification is a requirement of the contract.

(3) *Third Degree:* Performance failures that reflect a lack of focus on improving WS&H. They include failures to comply with approved WS&H aspects of an ISMS that result in potential breakdown of the Contractor's WS&H system. The following performance failures or performance failures of similar import will be considered third degree:

(i) Failure to implement effective corrective actions to address deficiencies/non-compliance documented through external (*e.g.*, Federal) oversight and/or reported per DOE Manual 231.1–2, Occurrence Reporting and Processing of Operations Information, or its successor, requirements, or internal oversight of DOE Order 470.2B, Independent Oversight and Performance Assurance Program, or its successor, requirements.

(ii) Multiple similar non-compliances identified by external (e.g., Federal) oversight that in aggregate indicate a significant WS&H system breakdown.

(iii) Non-compliances that either have, or may have, significant negative impacts to workers that indicate a significant WS&H system breakdown.

(iv) Failure to notify DOE upon discovery of events or conditions where notification is required by the terms and conditions of the contract.

(End of clause)

[69 FR 68780, Dec. 10, 2004, as amended at 74 FR 36369, 36370, 36378, 36380, July 22, 2009; 75 FR 69013, Nov. 10, 2010]

952.223–78 Sustainable acquisition program.

In accordance with 923.103 insert the following clause or its Alternate I in all contracts under which the contractor operates Government-owned facilities, motor vehicle fleets, or significant portions thereof or performs construction at a DOE facility.

SUSTAINABLE ACQUISITION PROGRAM (OCT 2010)

(a) Pursuant to Executive Order 13423, Strengthening Federal Environmental, Energy and Transportation Management, and Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance, the Department of Energy (DOE) is committed to managing its facilities in an environmentally preferable and sustainable manner that will promote the natural environment and protect the health and well being of its Federal employees and contractor service providers. In the performance of work under this contract, the Contractor shall provide its services in a manner that promotes the natural environment, reduces greenhouse gas emissions and protects the health and well being of Federal employees, contract service providers and visitors using the facility.

(b) Green purchasing or sustainable acquisition has several interacting initiatives. The Contractor must comply with initiatives that are current as of the contract award date. DOE may require compliance with revised initiatives from time to time. The Contractor may request an equitable adjustment to the terms of its contract using the procedures in the Changes clause of the contract. The initiatives important to these Orders are explained on the following Government or Industry Internet Sites:

(1) Recycled Content Products are described at *http://epa.gov/cpg*.

(2) Biobased Products are described at *http://www.biopreferred.gov/*.

(3) Energy efficient products are at *http://energystar.gov/products* for Energy Star products.

(4) Energy efficient products are at *http://www.femp.energy.gov/procurement* for FEMP designated products.

(5) Environmentally preferable and energy efficient electronics including desktop computers, laptops and monitors are at *http://www.epeat.net* the Electronic Products Environmental Assessment Tool (EPEAT) the Green Electronics Council site.

(6) Green house gas emission inventories are required, including Scope 3 emissions which include contractor emissions. These are discussed at Section 13 of Executive Order 13514 which can be found at *http://www.archives.gov/federal-register/executive-orders/disposition.html*.

(7) Non-Ozone Depleting Alternative Products are at *http://www.epa.gov/ozone/strathome.html*.

(8) Water efficient plumbing products are at *http://epa.gov/watersense*.

(c) The clauses at FAR 52.223–2, Affirmative Procurement of Biobased Products under Service and Construction Contracts, 52.223–15, Energy Efficiency in Energy Consuming Products, and 52.223–17 Affirmative Procurement of EPA–Designated Items in Service and Construction Contracts, require the use of products that have biobased content, are energy efficient, or have recycled content. To the extent that the services provided by the Contractor require provision of any of the above types of products, the Contractor must provide the energy efficient and environmentally sustainable type of product unless that type of product—

(1) Is not available;

(2) Is not life cycle cost effective or does not exceed 110% of the price of alternative items if life cycle cost data is unavailable (EPEAT is an example of lifecycle costs that have been analyzed by DOE and found to be acceptable at the silver and gold level);

(3) Does not meet performance needs; or,

(4) Cannot be delivered in time to meet a critical need.

(d) In the performance of this contract, the Contractor shall comply with the requirements of Executive Order 13423, Strengthening Federal Environmental, Energy and Transportation Management, (*http://www.epa.gov/greeningepa/practices/eo13423.htm*) and Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance (*http://www.archives.gov/federal-register/executive-orders/disposition.html*). The Contractor shall also consider the best practices within the DOE Acquisition Guide, Chapter 23, *Acquisition Considerations Regarding Federal Leadership in Environmental, Energy, and Economic Performance*. This guide includes information concerning recycled content products, biobased products, energy efficient products, water efficient products, alternative fuels and vehicles, non-ozone depleting substances and other environmentally preferable products

and services. This guide is available on the Internet at: *http://management.energy.gov/documents/AcqGuide23pt0Rev1.pdf*.

(e) Contractors must establish and maintain a documented energy management program which includes requirements for energy and water efficient equipment, EnergyStar or WaterSense, as applicable and procedures for verification of purchases, following the criteria in DOE Order 430.2B, Departmental Energy, Renewable Energy, and Transportation Management, Attachment 1, or its successor to the extent required elsewhere in the contract. This requirement should not be flowed down to subcontractors.

(f) In complying with the requirements of paragraph (c) of this clause, the Contractor(s) shall coordinate its activities with and submit required reports through the Environmental Sustainability Coordinator or equivalent position. Reporting under this paragraph and paragraphs (g) and (h) of this clause is only required if the contract or subcontract offers subcontracting opportunities for energy efficient and environmentally sustainable products or services exceeding $100,000 in any contract year.

(g) The Contractor shall prepare and submit performance reports, if required, using prescribed DOE formats, at the end of the Federal fiscal year, on matters related to the acquisition of environmentally preferable and sustainable products and services. This is a material delivery under the contract. Failure to perform this requirement may be considered a failure that endangers performance of this contract and may result in termination for default.

(h) These provisions shall be flowed down only to first tier subcontracts exceeding the simplified acquisition threshold that support operation of the DOE facility and offer significant subcontracting opportunities for energy efficient or environmentally sustainable products or services. The Subcontractor, if subcontracting opportunities for sustainable and environmentally preferable products or services exceed the threshold in paragraph (f) of this clause, will comply with the procedures in paragraphs (c) through (f) of this clause regarding the collection of all data necessary to generate the reports required under paragraphs (c) through (f) of this clause, and submit the reports directly to the Prime Contractor's Environmental Sustainability Coordinator at the supported facility. The Subcontractor will advise the Contractor if it is unable to procure energy efficient and environmentally sustainable items and cite which of the reasons in paragraph (c) of this clause apply. The reports may be submitted at the conclusion of the subcontract term provided that the subcontract delivery term is not multi-year in nature. If the delivery term is multi-year, the Subcontractor shall report its accomplishments for each Federal fiscal year in a manner and at a time or times acceptable to both parties. Failure to comply with these reporting requirements may be considered a breach of contract with attendant consequences.

(i) When this clause is used in a subcontract, the word ''Contractor'' will be understood to mean ''Subcontractor.''

(End of clause)

Alternate I for Construction Contracts and Subcontracts (OCT 2010)—When contracting for construction, alteration, or renovation of DOE facilities, substitute the following paragraphs (d) through (i):

(d) In the performance of this contract, the Contractor shall comply with the requirements of Executive Order 13423, Strengthening Federal Environmental, Energy and Transportation Management, (*http://www.epa.gov/greeningepa/practices/eo13423.htm*) and Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance (*http://www.archives.gov/federal-register/executive-orders/disposition.html*). The Contractor shall also consider the best practices within the DOE Acquisition Guide, Chapter 23, *Acquisition Considerations Regarding Federal Leadership in Environmental, Energy, and Economic Performance*. This guide includes information concerning recycled content products, biobased products, energy efficient products, water efficient products, alternative fuels and vehicles, non-ozone depleting substances and other environmentally preferable products and services. This guide is available on the Internet at: *http://management.energy.gov/documents/AcqGuide23pt0Rev1.pdf*. When developing the Bill of Materials for approval of the Contracting Officer or Representative, the contractor shall specify energy efficient and environmentally sustainable materials to the extent possible within the constraints of the general design specifications. Compliance with the *Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings* (Guiding Principles) shall be achieved through certification to the Leadership in Energy and Environmental Design (LEED) Gold level under the LEED rating system most suited to the building type.

(e) [Reserved]

(f) In complying with the requirements of paragraph (c) of this clause, the Contractor(s) shall coordinate its activities with and submit required reports through the Environmental Sustainability Coordinator or equivalent position. Reporting under this paragraph and paragraphs (g) and (h) of this clause is only required if the contract or subcontract offers subcontracting opportunities for energy efficient and environmentally sustainable products or services exceeding

$100,000 in any contract year, except for reporting on high performance sustainable buildings which may be required elsewhere in this contract.

(g) The Contractor shall prepare and submit performance reports using prescribed DOE formats, at the end of the Federal fiscal year, on matters related to the acquisition of energy efficient and environmentally and sustainable products and services. This is a material delivery under the contract. Failure to perform this requirement may be considered a failure that endangers performance of this contract and may result in termination for default.

(h) These provisions shall be flowed down only to first tier construction subcontracts exceeding the simplified acquisition threshold that support operation of the DOE facility and offer significant opportunities for designating energy efficient or environmentally sustainable products or services in the materials selection process. The subcontractor, if subcontracting opportunities for sustainable and environmentally preferable products or services exceed the threshold in paragraph (f) of this clause, will comply with the procedures in paragraphs (c) through (f) of this clause regarding the collection of all data necessary to generate the reports required under paragraphs (c) through (f) of this clause, and submit the reports directly to the Prime Contractor's Environmental Sustainability Coordinator at the supported facility. The subcontractor will advise the contractor if it is unable to procure energy efficient and environmentally sustainable items and cite which of the reasons in paragraph (c) of this clause apply. The reports may be submitted at the conclusion of the subcontract term provided that the subcontract delivery term is not multi-year in nature. If the delivery term is multi-year, the subcontractor shall report its accomplishments for each Federal fiscal year in a manner and at a time or times acceptable to both parties. Failure to comply with these reporting requirements may be considered a breach of contract with attendant consequences.

(i) When this clause is used in a subcontract, the word ''Contractor'' will be understood to mean ''Subcontractor.''

(End of clause)

[75 FR 57693, Sept. 22, 2010]

952.225–70 Subcontracting for nuclear hot cell services.

As prescribed in 925.7004, insert the following clause in solicitations and contracts:

SUBCONTRACTING FOR NUCLEAR HOT CELL SERVICES (MAR 1993)

(a) *Definitions. Costs related to the decommissioning of nuclear facilities*, as used in this clause, means any cost associated with the compliance with regulatory requirements governing the decommissioning of nuclear facilities licensed by the Nuclear Regulatory Commission. Such costs for foreign facilities and for Department of Energy facilities are costs of decommissioning associated with the compliance with foreign regulatory requirements or the Department's own requirements.

Costs related to the storage and disposal of nuclear waste, as used in this clause, means any costs, whether required by regulation or incurred as a matter of prudent business practice, associated with the storage or disposal of nuclear waste.

Foreign company, as used in this clause, means a company which offers to perform nuclear hot cell services at a facility which is not subject to the laws and regulations of the United States, its agencies, and its political subdivisions.

Nuclear hot cell services, as used in this clause, means services related to the examination of, or performance of various operations on, nuclear fuel rods, control assemblies, or other components that are emitting large quantities of ionizing radiation, after discharge from nuclear reactors, which are performed in specialized facilities located away from commercial nuclear power plants, generally referred to in the industry as ''hot cells.''

Nuclear waste, as used in this clause, means any radioactive waste material subject to regulation by the Nuclear Regulatory Commission or the Department of Energy, or in the case of foreign offers, by comparable foreign organizations.

United States company, as used in this clause, means a company which offers to perform nuclear hot cell services at a facility subject to the laws and regulations of the United States, its agencies, and its political subdivisions.

(b) In selecting a competitive offer for a first-tier subcontract acquisition of nuclear hot cell services, the Contractor shall—

(1) Consider neither costs related to the decommissioning of nuclear waste facilities nor costs related to the storage and disposal of nuclear waste; or

(2) Add these costs to offers of foreign companies, if—

(i) One or more of the offers is submitted by a United States company and includes costs related to the decommissioning of nuclear facilities and costs related to the storage and disposal of nuclear waste because it is subject to such cost; and

(ii) One or more of the offers is submitted by a foreign company and does not include

these types of costs. (A foreign company might not be subject to such costs or might not have to include these types of cost in its offer if the firm is subsidized in decommissioning activity or storage and disposal of nuclear waste, or a foreign government is performing the activities below the actual cost of the activity.)

(c) Upon determining that no offer from a foreign firm has a reasonable chance of being selected for award, the requirements of this clause will not apply.

(End of clause)

[58 FR 8911, Feb. 18, 1993; 58 FR 39679, July 26, 1993, as amended at 74 FR 36369, 36370, July 22, 2009; 75 FR 69014, Nov. 10, 2010]

952.225–71 Compliance with export control laws and regulations (Export Clause)

As prescribed in 925.7102, use the following clause:

COMPLIANCE WITH EXPORT CONTROL LAWS AND REGULATIONS (NOV 2015)

(a) The Contractor shall comply with all applicable export control laws and regulations.

(b) The Contractor's responsibility to comply with all applicable export control laws and regulations exists independent of, and is not established or limited by, the information provided by this clause.

(c) Nothing in the terms of this contract adds to, changes, supersedes, or waives any of the requirements of applicable Federal laws, Executive Orders, and regulations, including but not limited to—

(1) The Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*), as amended;

(2) The Arms Export Control Act (22 U.S.C. 2751 *et seq.*);

(3) The Export Administration Act of 1979 (50 U.S.C. app. 2401 *et seq.*), as continued under the International Emergency Economic Powers Act (Title II of Pub. L. 95–223, 91 Stat. 1626, October 28, 1977; 50 U.S.C. 1701 *et seq.*);

(4) Trading with the Enemy Act (50 U.S.C. App. 5(b), as amended by the Foreign Assistance Act of 1961);

(5) Assistance to Foreign Atomic Energy Activities (10 CFR part 810);

(6) Export and Import of Nuclear Equipment and Material (10 CFR part 110);

(7) International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130);

(8) Export Administration Regulations (EAR) (15 CFR Parts 730 through 774); and

(9) The regulations administered by the Office of Foreign Assets Control of the Department of the Treasury (31 CFR parts 500 through 598).

(d) In addition to the Federal laws and regulations cited above, National Security Decision Directive (NSDD) 189, National Policy on the Transfer of Scientific, Technical, and Engineering Information, establishes a national policy that, to the maximum extent possible, the products of fundamental research shall remain unrestricted. NSDD 189 provides that no restrictions may be placed upon the conduct or reporting of federally funded fundamental research that has not received national security classification, except as provided in applicable U.S. statutes. As a result, contracts confined to the performance of unclassified fundamental research generally do not involve any export-controlled activities.

NSDD 189 does not take precedence over statutes. NSDD 189 does not exempt any research from statutes that apply to export controls such as the Atomic Energy Act, as amended; the Arms Export Control Act; the Export Administration Act of 1979, as amended; or the U.S. International Emergency Economic Powers Act, or regulations that implement parts of those statutes (*e.g.*, the ITAR, the EAR, 10 CFR part 110 and 10 CFR part 810). Thus, if items (*e.g.*, commodities, software or technologies) that are controlled by U.S. export control laws or regulations are used to conduct research or are generated as part of the research efforts, export control laws and regulations apply to the controlled items.

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all solicitations and subcontracts.

[80 FR 64368, Oct. 23, 2015]

952.226–70 Subcontracting goals under section 3021(a) of the Energy Policy Act of 1992.

As prescribed in 926.7007(a), insert the following provision:

SUBCONTRACTING GOALS UNDER SECTION 3021(a) OF THE ENERGY POLICY ACT OF 1992 (PUB. L. 102–486) (JUN 1996)

(a) *Definition.* Energy Policy Act target groups, as used in this provision means—

(1) An institution of higher education that meets the criteria of 34 CFR 600.4(a) and has a student enrollment that consists of at least 20 percent—

(i) Hispanic Americans, i.e., students whose origins are in Mexico, Puerto Rico, Cuba, or Central or South America, or any combination thereof, or

(ii) Native Americans, i.e., American Indians, Eskimos, Aleuts, and Native Hawaiians, or any combination thereof;

(2) Institutions of higher learning determined by the Secretary of Education to be

Historically Black Colleges and Universities pursuant to 34 CFR 608.2; and

(3) Small business concerns, as defined under section 3 of the Small Business Act (15 U.S.C. 632), that are owned and controlled by individuals who are both socially and economically disadvantaged within the meaning of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or by a woman or women.

(b) Section 3021 of the Energy Policy Act (Pub. L. 102–486) establishes a goal of award of 10 percent of the contract dollar value for prime and subcontract Energy Policy Act awards to Energy Policy Act target groups.

(c) The Offeror, if other than one of the three groups specified in paragraph (a) of this clause, shall submit, as part of its business management proposal or, if this solicitation requires the submission of a Small Business Subcontracting Plan, then as part of that plan, unless otherwise stated in the proposal preparation instructions, individual subcontracting goals for each of the three Energy Policy Act target groups. Individual goals shall be expressed in terms of a percentage of the Offeror's proposed contract dollar value. In addition, the Offeror shall provide a description of the nature of the effort to be performed by each of the three groups, and, if possible, the identity of the contemplated subcontractor(s).

(d) Unless otherwise stated, such goals shall be considered in the evaluation of the Business Management Proposal as discussed in Section M of this solicitation or, if applicable, as part of the evaluation of the Small Business Subcontracting Plan.

(End of provision)

[60 FR 22301, May 5, 1995, as amended at 61 FR 21977, May 13, 1996; 61 FR 30823, June 18, 1996; 75 FR 69014, Nov. 10, 2010]

952.226–71 Utilization of Energy Policy Act target entities.

As prescribed in 926.7007(b), insert the following clause:

UTILIZATION OF ENERGY POLICY ACT TARGET ENTITIES (JUN 1996)

(a) *Definition.* Energy Policy Act target groups, as used in this provision means—

(1) An institution of higher education that meets the requirements of 34 CFR 600.4(a) and has a student enrollment that consists of at least 20 percent—

(i) Hispanic Americans, i.e., students whose origins are in Mexico, Puerto Rico, Cuba, or Central or South America, or any combination thereof, or

(ii) Native Americans, i.e., American Indians, Eskimos, Aleuts, and Native Hawaiians, or any combination thereof;

(2) Institutions of higher learning determined to be Historically Black Colleges and Universities by the Secretary of Education pursuant to 34 CFR 608.2; and

(3) Small business concerns, as defined under section 3 of the Small Business Act (15 U.S.C. 632), that are owned and controlled by individuals who are both socially and economically disadvantaged within the meaning of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or by a woman or women.

(b) *Obligation.* In addition to its obligations under the clause of this contract entitled Utilization of Small Business, Small Disadvantaged and Women-Owned Small Business Concerns, the contractor, in performance of this contract, agrees to provide its best efforts to competitively award subcontracts to entities from among the Energy Policy Act target groups.

(End of clause)

[60 FR 22301, May 5, 1995, as amended at 61 FR 21977, May 13, 1996; 61 FR 30823, June 18, 1996; 75 FR 69014, Nov. 10, 2010]

952.226–72 Energy Policy Act subcontracting goals and reporting requirements.

As prescribed in 926.7007(c), insert the following clause:

ENERGY POLICY ACT SUBCONTRACTING GOALS AND REPORTING REQUIREMENTS (JUN 1996)

(a) *Definition.* Energy Policy Act target groups, as used in this provision means—

(1) An institution of higher education that meets the requirements of 34 CFR 600.4(a), and has a student enrollment that consists of at least 20 percent—

(i) Hispanic Americans, i.e., students whose origins are in Mexico, Puerto Rico, Cuba, or Central or South America, or any combination thereof, or

(ii) Native Americans, i.e., American Indians, Eskimos, Aleuts, and Native Hawaiians, or any combination thereof;

(2) Institutions of higher learning determined to be Historically Black Colleges and Universities by the Secretary of Education pursuant to 34 CFR 608.2; and

(3) Small business concerns, as defined under section 3 of the Small Business Act (15 U.S.C. 632), that are owned and controlled by individuals who are both socially and economically disadvantaged within the meaning of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or by a woman or women.

(b) *Goals.* The Contractor, in performance of this contract, agrees to provide its best efforts to award subcontracts to the following classes of entities—

(1) Small business concerns controlled by socially and economically disadvantaged individuals or by women: * * * percent;

(2) Historically Black colleges and universities: * * * percent; and

(3) Colleges or universities having a student body in which more than 20 percent of the students are Hispanic Americans or Native Americans: * * * percent.

[* * * These goals are stated in a percentage reflecting the relationship of estimated award value of subcontracts to the value of this contract and appear elsewhere in this contract.]

(c) *Reporting requirements.* (1) The Contractor agrees to report, on an annual Federal Government fiscal year basis, its progress against the goals by providing the actual annual dollar value of subcontract payments for the preceding 12-month period, and the relationship of those payments to the incurred contract costs for the same period. Reports submitted pursuant to this clause must be received by the Contracting Officer (or designee) not later than 45 days after the end of the reporting period.

(2) If the contract includes reporting requirements under FAR 52.219–9, Small Business Subcontracting Plan, the Contractor's progress against the goals stated in paragraph (b) of this clause shall be included as an addendum to Standard Form (SF) 294, Subcontracting Report for Individual Contracts, and/or SF 295, Summary Subcontract Report, as applicable, for the period that corresponds to the end of the Federal Government fiscal year.

(End of clause)

[60 FR 22302, May 5, 1995, as amended at 61 FR 21977, May 13, 1996; 61 FR 30823, June 18, 1996; 75 FR 69014, Nov. 10, 2010]

952.226–73 Energy Policy Act target group certification.

As prescribed in 926.7007(d), insert the following provision:

ENERGY POLICY ACT TARGET GROUP CERTIFICATION (SEP 1997)

(a) *Certification.* The Offeror is:

(1) ____ An institution of higher education that meets the requirements of 34 CFR 600.4(a), and has a student enrollment that consists of at least 20 percent—

(i) Hispanic Americans, i.e., students whose origins are in Mexico, Puerto Rico, Cuba, or Central or South America, or any combination thereof; or

(ii) Native Americans, i.e., American Indians, Eskimos, Aleuts, and Native Hawaiians, or any combination thereof;

(2) ____ An institution of higher learning determined to be a Historically Black College and University by the Secretary of Education pursuant to 34 CFR 608.2; or

(3) ____ A small business concern, as defined under section 3 of the Small Business Act (15 U.S.C. 632), that is owned and controlled by individuals who are both socially and economically disadvantaged within the meaning of section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or by a woman or women.

(b) By submission of an offer, the Offeror agrees to provide to the Contracting Officer, upon request, evidence satisfactory to the Contracting Officer that the Offeror is an entity from the Energy Policy Act target group identified.

(End of provision)

[60 FR 22302, May 5, 1995; 61 FR 30823, June 18, 1996, as amended at 62 FR 42074, Aug. 5, 1997; 75 FR 69014, Nov. 10, 2010]

952.226–74 Displaced employee hiring preference.

As prescribed in 926.7104, insert the following clause.

DISPLACED EMPLOYEE HIRING PREFERENCE (JUN 1997)

(a) *Definition. Eligible employee* means a current or former employee of a contractor or subcontractor employed at a Department of Energy Defense Nuclear Facility (1) whose position of employment has been, or will be, involuntarily terminated (except if terminated for cause), (2) who has also met the eligibility criteria contained in the Department of Energy guidance for contractor work force restructuring, as may be amended or supplemented from time to time, and (3) who is qualified for a particular job vacancy with the Department or one of its contractors with respect to work under its contract with the Department at the time the particular position is available.

(b) Consistent with Department of Energy guidance for contractor work force restructuring, as may be amended or supplemented from time to time, the Contractor agrees that it will provide a preference in hiring to an eligible employee to the extent practicable for work performed under this contract.

(c) The requirements of this clause shall be included in subcontracts at any tier (except for subcontracts for commercial items pursuant to 41 U.S.C. 403) expected to exceed $500,000.

[62 FR 34862, June 27, 1997, as amended at 75 FR 69014, Nov. 10, 2010]

952.227 Provisions and clauses related to patents, technical data and copyrights.

952.227–9 Refund of royalties.

As prescribed in 927.206–2, insert the following clause:

REFUND OF ROYALTIES (MAR 1995)

(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 here-under. The term also includes any costs or charges associated with the access to, use of, or other right pertaining to data that is represented to be proprietary and is related to the performance of this contract or the copying of such data or data that is copyrighted.

(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. The approval by DOE of any individual payments or royalties shall not prevent the Government from contesting at any time the enforceability, validity, scope of, or title to, any patent or the proprietary nature of data pursuant to which a royalty or other payment is to be or has been made.

(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)

[60 FR 11817, Mar. 2, 1995]

952.227–11 Patent rights—retention by the contractor (short form).

As prescribed in 927.303(a), insert the following clause:

PATENT RIGHTS—RETENTION BY THE CONTRACTOR (SHORT FORM) (MAR 1995)

(a) *Definitions*—(1) *Invention* means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

(2) *Made* when used in relation to any invention means the conception of first actual reduction to practice of such invention.

(3) *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.

(4) *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.

(5) *Small business firm* means a small business concern as defined at section 2 of Public Law 85–536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3–8 and 13 CFR 121.3–12, respectively, will be used.

(6) *Subject invention* means any invention of the contractor conceived or first actually reduced to practice in the performance of work under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) must also occur during the period of contract performance.

(7) *Agency licensing regulations* and *agency regulations concerning the licensing of Government-owned inventions* mean the Department of Energy patent licensing regulations at 10 CFR part 781.

(b) *Allocation of principal rights.* The Contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) *Invention disclosure, election of title, and filing of patent application by Contractor.* (1) The Contractor will disclose each subject invention to the Department of Energy (DOE) within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters. The disclosure to DOE shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the DOE, the Contractor will promptly notify that agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Contractor.

(2) The Contractor will elect in writing whether or not to retain title to any such invention by notifying DOE within 2 years of disclosure to DOE. However, in any case where publication, on sale or public use has initiated the l-year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by DOE to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor will file its initial patent application on a subject invention to which it elects to retain title within 1 year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Contractor will file patent applications in additional countries or international patent offices within either 10 months of the corresponding initial patent application or 6 months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure, election, and filing under subparagraphs (c)(l), (2), and (3) of this clause may, at the discretion of the agency, be granted.

(d) *Conditions when the Government may obtain title.* The Contractor will convey to the Federal agency, upon written request, title to any subject invention—

(1) If the Contractor fails to disclose or elect title to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain title; provided, that DOE may only request title within 60 days after learning of the failure of the Contractor to disclose or elect within the specified times.

(2) 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 Federal agency, the Contractor shall continue to retain title in that country.

(3) 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.

(e) *Minimum rights to Contractor and protection of the Contractor right to file.* (1) The Contractor will retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. The Contractor's license extends to its domestic subsidiary and affiliates, if any, within the corporate structure of which the Contractor is a party and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of the Federal agency, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(2) The Contractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR part 404 and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the

discretion of DOE to the extent the Contractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, DOE will furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor will be allowed 30 days (or such other time as may be authorized by DOE for good cause shown by the Contractor) 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 regulations concerning the licensing of Government owned inventions, any decision concerning the revocation or modification of the license.

(f) *Contractor action to protect the Government's interest.* (1) The Contractor agrees to execute or to have executed and promptly deliver to DOE all instruments necessary to (i) establish or confirm the rights the Government has throughout the world in those subject inventions to which the Contractor elects to retain title, and (ii) convey title to DOE when requested under paragraph (d) of this clause and to enable the government to obtain patent protection throughout the world in that subject invention.

(2) The Contractor agrees to 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 a format suggested by the Contractor each subject invention made under contract 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 subparagraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, on 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 will notify DOE of any decision not to 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 period required by the relevant patent office.

(4) The Contractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement, ''This invention was made with Government support under (identify the contract) awarded by the United States Department of Energy. The Government has certain rights in the invention.''

(g) *Subcontracts.* (1) The Contractor will include this clause, suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or domestic nonprofit organization. The subcontractor will retain all rights provided for the Contractor in this clause, and the Contractor will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) The contractor shall include in all other subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work the patent rights clause at 952.227–13.

(3) In the case of subcontracts, at any tier, DOE, subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and DOE 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 Act in connection with proceedings under paragraph (j) of this clause.

(h) *Reporting on utilization of subject inventions.* The Contractor agrees to submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received, by the Contractor, and such other data and information as DOE may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceeding undertaken by that agency in accordance with paragraph (j) of this clause. As required by 35 U.S.C. 202(c)(5), DOE agrees it will not disclose such information to persons outside the Government without permission of the Contractor.

(i) *Preference for United States industry.* Notwithstanding any other provision of this clause, the Contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any product 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 such an agreement may be waived by DOE 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.

(j) *March-in rights.* The Contractor agrees that, with respect to any subject invention in which it has acquired title, DOE has the right in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency to require the Contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and, if the Contractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that—

(1) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or

(4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) *Special provisions for contracts with nonprofit organizations.* If the Contractor is a nonprofit organization, it agrees that—

(1) Rights to a subject invention in the United States may not be assigned without the approval of the Federal agency, except where such assignment is made to an organization which has as one of its primary functions the management of inventions; provided, that such assignee will be subject to the same provisions as the Contractor;

(2) The Contractor will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when DOE deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;

(3) 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 will be utilized for the support of scientific research or education; and

(4) It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention if the Contractor determines that the small business firm 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 firms; provided, that the Contractor is also satisfied that the small business firm 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. However, the Contractor agrees that the Secretary of Commerce may review the Contractor's licensing program and decisions regarding small business applicants, and the Contractor will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when that Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of this subparagraph (k)(4).

(l) *Communications.* (1) The contractor shall direct any notification, disclosure, or request to DOE provided for in this clause to the DOE patent counsel assisting the DOE contracting activity, with a copy of the communication to the Contracting Officer.

(2) Each exercise of discretion or decision provided for in this clause, except subparagraph (k)(4), is reserved for the DOE Patent Counsel and is not a claim or dispute and is not subject to the Contract Disputes Act of 1978.

(3) Upon request of the DOE Patent Counsel or the contracting officer, the contractor shall provide any or all of the following:

(i) A copy of the patent application, filing date, serial number and title, patent number, and issue date for any subject invention in any country in which the contractor has applied for a patent;

(ii) A report, not more often than annually, summarizing all subject inventions which were disclosed to DOE individually during the reporting period specified; or

(iii) A report, prior to closeout of the contract, listing all subject inventions or stating that there were none.

(End of clause)

[60 FR 11817, Mar. 2, 1995]

952.227–13 Patent rights—acquisition by the Government.

As prescribed at 927.303(a)(1), insert the following clause:

PATENT RIGHTS—ACQUISITION BY THE GOVERNMENT (SEP 1997)

(a) *Definitions.*

Invention, as used in this clause, means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

Practical application, as used in this clause, 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, as used in this clause, means any invention of the Contractor conceived or first actually reduced to practice in the course of or under this contract.

Patent Counsel, as used in this clause, means the Department of Energy Patent Counsel assisting the procuring activity.

DOE patent waiver regulations, as used in this clause, means the Department of Energy patent waiver regulations in effect on the date of award of this contract. See 10 CFR part 784.

Agency licensing regulations and *applicable agency licensing regulations,* as used in this clause, mean the Department of Energy patent licensing regulations at 10 CFR part 781.

(b) *Allocations of principal rights*—(1) *Assignment to the Government.* The Contractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention, except to the extent that rights are retained by the Contractor under subparagraph (b)(2) and paragraph (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 and the foreign patent rights provided in paragraph (d) of this clause on identified inventions in accordance with the DOE patent waiver regulations. A request for a determination of whether the Contractor or the employee-inventor is entitled to acquire such greater rights must be submitted to the Patent Counsel with a copy to the Contracting Officer at the time of the first disclosure of the invention pursuant to subparagraph (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 shall be subject to paragraph (c) of this clause, unless otherwise provided in the greater rights determination, and to the reservations and conditions deemed to be appropriate by the Secretary of Energy or designee.

(ii) Within two (2) months after the filing of a patent application, 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, promptly upon issuance of a patent, provide the patent number and issue date for any subject invention in any country for which the Contractor has been granted title or the right to file and prosecute on behalf of the United States by the Department of Energy.

(iii) Not less than thirty (30) days before the expiration of the response period for any action required by the Patent and Trademark Office, notify the Patent Counsel of any decision not to continue prosecution of the application.

(iv) Upon request, the Contractor shall furnish the Government an irrevocable power to inspect and make copies of the patent application file.

(c) *Minimum rights acquired by the Government.* (1) With respect to each subject invention to which the Department of Energy grants the Contractor principal or exclusive rights, the Contractor agrees as follows:

(i) The Contractor hereby grants to the Government a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced each subject invention throughout the world by or on behalf of the Government of the United States (including any Government agency).

(ii) The Contractor agrees that with respect to any subject invention in which DOE has granted it title, DOE has the right in accordance with the procedures in the DOE patent waiver regulations (10 CFR part 784) to require the Contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Contractor, assignee, or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if it determines that—

(A) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(B) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;

(C) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or

(D) Such action is necessary because the agreement required by paragraph (i) of this clause has neither been obtained nor waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(iii) The Contractor agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and such other data and information as DOE may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceedings undertaken by that agency in accordance with subparagraph (c)(1)(ii) of this clause. To the extent data or information supplied under this section is considered by the Contractor, its licensee, or assignee to be privileged and confidential and is so marked, the Department of Energy agrees that, to the extent permitted by law, it will not disclose such information to persons outside the Government.

(iv) The Contractor agrees, when licensing a subject invention, to arrange to avoid royalty charges on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government, to refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government, and to provide for such refund in any instrument transferring rights in the invention to any party.

(v) The Contractor agrees to provide for the Government's paid-up license pursuant to subparagraph (c)(1)(i) of this clause in any instrument transferring rights in a subject invention and to provide for the granting of licenses as required by subparagraph (c)(1)(ii) of this clause, and for the reporting of utilization information as required by subparagraph (c)(1)(iii) of this clause, whenever the instrument transfers principal or exclusive rights in a subject invention.

(2) Nothing contained in this paragraph (c) shall be deemed to grant to the Government any rights with respect to any invention other than a subject invention.

(d) *Minimum rights to the Contractor.* (1) The Contractor is hereby granted a revocable, nonexclusive, royalty-free 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 subparagraph (e)(2) of this clause. The Contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a part and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(2) The Contractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in 37 CFR part 404 and agency licensing regulations. This license will not be revoked in that field of use or the geographical areas in which the Contractor has achieved practical applications and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, DOE will furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor will be allowed 30 days (or such other time as may be authorized by DOE for good cause shown by the Contractor) 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 agency licensing regulations and 37 CFR part 404 concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of its license.

(4) The Contractor may request the right to acquire patent rights to a subject invention in any foreign country where the Government has elected not to secure such rights, subject to the conditions in subparagraphs (d)(4)(i) through (d)(4)(vii) of this clause. Such request must be made in writing to the Patent Counsel as part of the disclosure required by subparagraph (e)(2) of this clause, with a copy to the DOE Contracting Officer. DOE approval, if given, will be based on a determination that this would best serve the national interest.

(i) The recipient of such rights, when specifically requested by DOE, and three years after issuance of a foreign patent disclosing the subject invention, shall furnish DOE a report stating:

(A) The commercial use that is being made, or is intended to be made, of said invention, and

(B) The steps taken to bring the invention to the point of practical application or to make the invention available for licensing.

(ii) The Government shall retain at least an irrevocable, nonexclusive, paid-up license to make, use, and sell the invention throughout the world by or on behalf of the Government (including any Government agency) and States and domestic municipal governments, unless the Secretary of Energy or designee determines that it would not be in the public interest to acquire the license for the States and domestic municipal governments.

(iii) If noted elsewhere in this contract as a condition of the grant of an advance waiver of the Government's title to inventions under this contract, or, if no advance waiver was granted but a waiver of the Government's title to an identified invention is granted pursuant to subparagraph (b)(2) of this clause upon a determination by the Secretary of Energy that it is in the Government's best interest, this license shall include the right of the Government to sublicense foreign governments pursuant to any existing or future treaty or agreement with such foreign governments.

(iv) Subject to the rights granted in subparagraphs (d)(1), (2), and (3) of this clause, the Secretary of Energy or designee shall have the right to terminate the foreign patent rights granted in this subparagraph (d)(4) in whole or in part unless the recipient of such rights demonstrates to the satisfaction of the Secretary of Energy or designee that effective steps necessary to accomplish substantial utilization of the invention have been taken or within a reasonable time will be taken.

(v) Subject to the rights granted in subparagraphs (d)(1), (2), and (3) of this clause, the Secretary of Energy or designee shall have the right, commencing four years after foreign patent rights are accorded under this subparagraph (d)(4), to require the granting of a nonexclusive or partially exclusive license to a responsible applicant or applicants, upon terms reasonable under the circumstances, and in appropriate circumstances to terminate said foreign patent rights in whole or in part, following a hearing upon notice thereof to the public, upon a petition by an interested person justifying such hearing:

(A) If the Secretary of Energy or designee determines, upon review of such material as he deems relevant, and after the recipient of such rights or other interested person has had the opportunity to provide such relevant and material information as the Secretary or designee may require, that such foreign patent rights have tended substantially to lessen competition or to result in undue market concentration in any section of the United States in any line of commerce to which the technology relates; or

(B) Unless the recipient of such rights demonstrates to the satisfaction of the Secretary of Energy or designee at such hearing that the recipient has taken effective steps, or within a reasonable time thereafter is expected to take such steps, necessary to accomplish substantial utilization of the invention.

(vi) If the contractor is to file a foreign patent application on a subject invention, the Government agrees, upon written request, to use its best efforts to withhold publication of such invention disclosures for such period of time as specified by Patent Counsel, but in no event shall the Government or its employees be liable for any publication thereof.

(vii) Subject to the license specified in subparagraphs (d) (1), (2), and (3) of this clause, the contractor or inventor agrees to convey to the Government, upon request, the entire right, title, and interest in any foreign country in which the contractor or inventor fails to have a patent application filed in a timely manner or decides not to continue prosecution or to pay any maintenance fees covering the invention. To avoid forfeiture of the patent application or patent, the contractor or inventor shall, not less than 60 days before the expiration period for any action required by any patent office, notify the Patent Counsel of such failure or decision, and deliver to the Patent Counsel, the executed instruments necessary for the conveyance specified in this paragraph.

(e) *Invention identification, disclosures, and reports.* (1) The Contractor shall establish and maintain active and effective procedures to assure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters within 6 months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under this contract. These 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 that the procedures for identifying and disclosing the inventions are followed. Upon request, the Contractor shall furnish the Contracting Officer a description of such procedures for evaluation and for determination as to their effectiveness.

(2) The Contractor shall disclose each subject invention to the DOE Patent Counsel with a copy 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, public use, or publication of such invention known to

the Contractor. The disclosure to DOE shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to DOE, the Contractor shall promptly notify Patent Counsel of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Contractor. The report should also include any request for a greater rights determination in accordance with subparagraph (b)(2) of this clause. When an invention is disclosed to DOE under this paragraph, it shall be deemed to have been made in the manner specified in Sections (a)(1) and (a)(2) of 42 U.S.C. 5908, unless the Contractor contends in writing at the time the invention is disclosed that is was not so made.

(3) The Contractor shall furnish the Contracting Officer the following:

(i) Interim reports every 12 months (or such longer period as may be specified by the Contracting Officer) from the date of the contract, listing all subject inventions during that period, and including a statment that all subject inventions have been disclosed (or that there are not such inventions), and that such disclosure has been made in accordance with the procedures required by paragraph (e)(1) of this clause.

(ii) A final report, within 3 months after completion of the contracted work listing all subject inventions or containing a statement that there were no such inventions, and listing all subcontracts at any tier containing a patent right clause or containing a statement that there were no such subcontracts.

(4) The Contractor agrees to 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 a format suggested by the Contractor each subject invention made under contract 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 subparagraph (e)(2) of this clause.

(5) The Contractor agrees, subject to FAR 27.302(j), 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 such inventions are subject inventions;

(ii) The Contractor has established and maintains the procedures required by subparagraphs (e) (1) and (4) of this clause;

(iii) The Contractor and its inventors have complied with the procedures.

(2) If the Contracting Officer learns of an unreported Contractor invention which the Contracting Officer believes may be a subject invention, the Contractor may be required to disclose the invention to DOE for a determination of ownership rights.

(3) Any examination of records under this paragraph 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) Convey to the Government, using a DOE-approved form, the title and/or rights of the Government in each subject invention as required by this clause.

(ii) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to subparagraph (e)(1) of this clause;

(iii) Disclose any subject invention pursuant to subparagraph (e)(2) of this clause;

(iv) Deliver acceptable interim reports pursuant to subparagraph (e)(3)(i) of this clause; or

(v) Provide the information regarding subcontracts pursuant to subparagraph (h)(4) of this clause.

(2) Such reserve or balance shall be withheld until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) Final payment under this contract shall not be made before the Contractor delivers to the Contracting Officer all disclosures of subject inventions required by subparagraph (e)(2) of this clause, and acceptable final report pursuant to subparagraph (e)(3)(ii) of this clause, and the Patent Counsel has issued a patent clearance certification to the Contracting Officer.

(4) The Contracting Officer may decrease or increase the sums withheld up to the maximum authorized above. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or the subsequent payment thereof shall not be construed as a waiver of any Government rights.

(h) *Subcontracts.* (1) The contractor shall include the clause at 48 CFR 952.227–11 (suitably modified to identify the parties) in all subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work to be performed by a small business firm or domestic nonprofit organization, except where the work of the subcontract is subject to an Exceptional Circumstances Determination by DOE. In all other subcontracts, regardless of tier, for experimental, developmental, demonstration, or research work, the contractor shall include this clause (suitably modified to identify the parties). 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 such a 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 the case of subcontracts at any tier, DOE, the subcontractor, and Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and DOE 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.

(5) The contractor shall identify all subject inventions of the subcontractor of which it acquires knowledge in the performance of this contract and shall notify the Patent Counsel, with a copy to the contracting officer, promptly upon identification of the inventions.

(i) *Preference United States industry.* Unless provided otherwise, no Contractor that receives title to any subject invention and no assignee of any such Contractor shall grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement may be waived by the Government 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.

(j) *Atomic energy.* (1) No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, shall be asserted with respect to any invention or discovery made or conceived in the course of or under this contract.

(2) Except as otherwise authorized in writing by the Contracting Officer, the Contractor will obtain patent agreements to effectuate the provisions of subparagraph (e)(1) of this clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

(k) *Background patents.* (1) *Background patent* means a domestic patent covering an invention or discovery which is not a subject invention and which is owned or controlled by the Contractor at any time through the completion of this contract:

(i) Which the contractor, but not the Government, has the right to license to others without obligation to pay royalties thereon, and

(ii) Infringement of which cannot reasonably be avoided upon the practice of any specific process, method, machine, manufacture, or composition of matter (including relatively minor modifications thereof) which is a subject of the research, development, or demonstration work performed under this contract.

(2) The Contractor agrees to and does hereby grant to the Government a royalty-free, nonexclusive license under any background patent for purposes of practicing a subject of this contract by or for the Government in research, development, and demonstration work only.

(3) The Contractor also agrees that upon written application by DOE, it will grant to responsible parties, for purposes of practicing a subject of this contract, nonexclusive licenses under any background patent on terms that are reasonable under the circumstances. If, however, the Contractor believes that exclusive rights are necessary to achieve expeditious commercial development or utilization, then a request may be made to DOE for DOE approval of such licensing by the Contractor.

(4) Notwithstanding subparagraph (k)(3) of this clause, the contractor shall not be obligated to license any background patent if the Contractor demonstrates to the satisfaction of the Secretary of Energy or designee that:

(i) A competitive alternative to the subject matter covered by said background patent is commercially available or readily introducible from one or more other sources; or

(ii) The Contractor or its licensees are supplying the subject matter covered by said background patent in sufficient quantity and at reasonable prices to satisfy market needs, or have taken effective steps or within a reasonable time are expected to take effective steps to so supply the subject matter.

(l) *Publication.* It is recognized that during the course of the work under this contract, the Contractor or its employees may from time to time desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract. In order that public disclosure of such information will not adversely affect the patent interests of DOE or the Contractor, patent approval for release of publication shall be secured from Patent Counsel prior to any such release or publication.

(m) *Forfeiture of rights in unreported subject inventions.* (1) The Contractor shall forfeit and assign to the Government, at the request of the Secretary of Energy or designee, all rights in any subject invention which the Contractor fails to report to Patent Counsel within six months after the time the Contractor:

(i) Files or causes to be filed a United States or foreign patent application thereon; or

(ii) Submits the final report required by subparagraph (e)(2)(ii) of this clause, whichever is later.

(2) However, the Contractor shall not forfeit rights in a subject invention if, within the time specified in subparagraph (m)(1) of this clause, the Contractor:

(i) Prepares a written decision based upon a review of the record that the invention was neither conceived nor first actually reduced to practice in the course of or under the contract and delivers the decision to Patent Counsel, with a copy to the Contracting Officer; or

(ii) Contending that the invention is not a subject invention, the Contractor nevertheless discloses the invention and all facts pertinent to this contention to the Patent Counsel, with a copy to the Contracting Officer; or

(iii) Establishes that the failure to disclose did not result from the Contractor's fault or negligence.

(3) Pending written assignment of the patent application and patents on a subject invention determined by the Secretary of Energy or designee to be forfeited (such determination to be a final decision under the Disputes clause of this contract), the Contractor shall be deemed to hold the invention and the patent applications and patents pertaining thereto in trust for the Government. The forfeiture provision of this paragraph (m) shall be in addition to and shall not supersede other rights and remedies which the Government may have with respect to subject inventions.

(End of clause)

[60 FR 11819, Mar. 2, 1995, as amended at 62 FR 42075, Aug. 5, 1997; 63 FR 10507, Mar. 4, 1998; 67 FR 14872, Mar. 28, 2002]

952.227–14 Rights in data-general. (DOE coverage—alternates VI and VII)

Alternate VI (FEB 1998) As prescribed at 48 CFR 927.404(l) insert Alternate VI to require the contractor to license data regarded as limited rights data or restricted computer software to the Government and third parties at reasonable royalties upon request by the Department of Energy.

(k) *Contractor licensing.* Except as may be otherwise specified in this contract as data not subject to this paragraph, the contractor agrees that upon written application by DOE, it will grant to the Government and responsible third parties, for purposes of practicing a subject of this contract, a nonexclusive license in any limited rights data or restricted computer software on terms and conditions reasonable under the circumstances including appropriate provisions for confidentiality; provided, however, the contractor shall not be obliged to license any such data if the contractor demonstrates to the satisfaction of the Secretary of Energy or designee that:

(1) Such data are not essential to the manufacture or practice of hardware designed or fabricated, or processes developed, under this contract;

(2) Such data, in the form of results obtained by their use, have a commercially

competitive alternate available or readily introducible from one or more other sources;

(3) Such data, in the form of results obtained by their use, are being supplied by the contractor or its licensees in sufficient quantity and at reasonable prices to satisfy market needs, or the contractor or its licensees have taken effective steps or within a reasonable time are expected to take effective steps to so supply such data in the form of results obtained by their use; or

(4) Such data, in the form of results obtained by their use, can be furnished by another firm skilled in the art of manufacturing items or performing processes of the same general type and character necessary to achieve the contract results.

(End of alternate)

Alternate VII (FEB 1998) As prescribed in 48 CFR 927.404(m) make the change described in Alternate VII to limit the contractor's use of DOE restricted data.

Insert the parenthetical phrase ''(except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology).'' after the phrase ''data first produced or specifically used by the Contractor in the performance of this contract'' in paragraph (b)(2)(i) of the clause at FAR 52.227–14.

(End of alternate)

[63 FR 10507, Mar. 4, 1998]

952.227–70—952.227–74 [Reserved]

952.227–82 Rights to proposal data.

Pursuant to 927.7002(d), include this clause in any contract which the decision to make the award included consideration of a technical proposal.

RIGHTS TO PROPOSAL DATA (APR 1994)

Except for technical data contained on pages ____ of the contractor's proposal dated ____ which are asserted by the contractor as being proprietary data, it is agreed that, as a condition of the award of this contract, and notwithstanding the provisions of any notice appearing on the proposal, the Government shall have the right to use, duplicate, disclose and have others do so for any purpose whatsoever, the technical data contained in the proposal upon which this contract is based.

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997]

952.227–84 Notice of right to request patent waiver.

Include this provision in all appropriate solicitations in accordance with 48 CFR 927.409(t).

RIGHT TO REQUEST PATENT WAIVER (FEB 1998)

Offerors have the right to request a waiver of all or any part of the rights of the United States in inventions conceived or first actually reduced to practice in performance of the contract that may be awarded as a result of this solicitation, in advance of or within 30 days after the effective date of contracting. Even where such advance waiver is not requested or the request is denied, the contractor will have a continuing right under the contract to request a waiver of the rights of the United States in identified inventions, i.e., individual inventions conceived or first actually reduced to practice in performance of the contract. Domestic small businesses and domestic nonprofit organizations normally will receive the patent rights clause at DEAR 952.227–11 which permits the contractor to retain title to such inventions, except under contracts for management or operation of a Government-owned research and development facility or under contracts involving exceptional circumstances or intelligence activities. Therefore, small businesses and nonprofit organizations normally need not request a waiver. See the patent rights clause in the draft contract in this solicitation. See DOE's patent waiver regulations at 10 CFR part 784.

(End of provision)

[63 FR 10508, Mar. 4, 1998]

952.231–70 Date of incurrence of cost.

In accordance with 931.205–32, insert the following clause when advance understandings have been negotiated regarding costs incurred prior to the contract effective date:

DATE OF INCURRENCE OF COST (APR 1984)

The Contractor shall be entitled to reimbursement for costs incurred in an amount not to exceed $_____ on or after _____ which, if incurred after this contract has been entered into, would have been reimbursable under the provisions of this contract.

(End of clause)

[49 FR 12042, Mar. 28, 1984; 49 FR 38952, Oct. 2, 1984, as amended at 74 FR 36370, July 22, 2009]

952.231–71 Insurance-litigation and claims.

As prescribed in 931.205–19(f), insert the following clause in applicable non-management and operating contracts:

INSURANCE—LITIGATION AND CLAIMS (JUL 2013)

(a) The contractor must comply with 10 CFR part 719, contractor Legal Management Requirements, if applicable.

(b)(1) Except as provided in paragraph (b)(2) of this clause, the contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.

(2) The contractor may, with the approval of the Contracting Officer, maintain a self-insurance program in accordance with FAR 28.308; provided that, with respect to workers' compensation, the contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.

(c) 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 bonds and insurance that are maintained by the contractor in connection with the performance of this contract and for which the contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.

(d) Except as provided in paragraph (f) of this clause, or specifically disallowed elsewhere in this contract, the contractor shall be reimbursed—

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance without regard to the limitation of cost or limitation of funds clause of this contract.

(e) The Government's liability under paragraph (d) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(f)(1) Notwithstanding any other provision of this contract, the contractor shall not be reimbursed for liabilities to third parties, including contractor employees, and directly associated costs which may include but are not limited to litigation costs, counsel fees, judgment and settlements—

(i) Which are otherwise unallowable by law or the provisions of this contract, including the cost reimbursement limitations contained in 48 CFR part 970.31, as supplemented by 48 CFR part 931;

(ii) For which the contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer; or

(iii) Which were caused by contractor managerial personnel's—

(A) Willful misconduct;

(B) Lack of good faith; or

(C) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.

(2) The term ''contractor's managerial personnel'' is defined in the Property clause in this contract.

(g)(1) All litigation costs, including counsel fees, judgments and settlements shall be segregated and accounted for by the contractor separately. If the Contracting Officer provisionally disallows such costs, then the contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer.

(3) The portion of the cost of insurance obtained by the contractor that is allocable to coverage of liabilities referred to in paragraph (f) of this clause is not allowable.

(h) The contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the contractor for any unallowable or non-reimbursable costs incurred in connection with contract performance.

(End of clause)

[78 FR 25816, May 3, 2013; 78 FR 29247, May 20, 2013]

952.233–2 Service of protest.

As prescribed in 933.106(a), add the following to the end of the provision at 48 CFR 52.233–2:

(c) Another copy of a protest filed with the Government Accountability Office shall be furnished to the following address within the time periods described in paragraph (b) of this clause: U.S. Department of Energy, Assistant General Counsel for Procurement and Financial Assistance (GC–61), 1000 Independence Avenue, SW., Washington, DC 20585, Fax: (202) 586–4546.

(End of provision)

[61 FR 41711, Aug. 9, 1996, as amended at 67 FR 14872, Mar. 28, 2002; 74 FR 36370, July 22, 2009; 75 FR 29459, May 26, 2010]

952.233–4 Notice of protest file availability.

As prescribed in 933.106(b), insert the following provision:

NOTICE OF PROTEST FILE AVAILABILITY (AUG 2009)

(a) If a protest of this procurement is filed with the Government Accountability Office (GAO) in accordance with 4 CFR part 21, any actual or prospective offeror may request the Department of Energy to provide it with reasonable access to the protest file pursuant to 48 CFR 33.104(a)(3)(ii), implementing section 1065 of Public Law 103–355. Such request must be in writing and addressed to the Contracting Officer for this procurement.

(b) Any offeror who submits information or documents to the Department for the purpose of competing in this procurement is hereby notified that information or documents it submits may be included in the protest file that will be available to actual or prospective offerors in accordance with the requirements of 48 CFR 33.104(a)(3)(ii). The Department will be required to make such documents available unless they are exempt from disclosure pursuant to the Freedom of Information Act. Therefore, offerors should mark any documents as to which they would assert that an exemption applies. (See 10 CFR part 1004.)

(End of provision)

[61 FR 41711, Aug. 9, 1996, as amended at 74 FR 36370, 36380, July 22, 2009; 75 FR 29459, May 26, 2010]

952.233–5 Agency protest review.

As prescribed in 933.106(c), insert the following provision:

AGENCY PROTEST REVIEW (SEP 1996)

Protests to the Agency will be decided either at the level of the Head of the Contracting Activity or at the Headquarters level. The Department of Energy's agency protest procedures, set forth in 48 CFR 933.103, elaborate on these options and on the availability of a suspension of a procurement that is protested to the agency. The Department encourages potential protesters to discuss their concerns with the Contracting Officer prior to filing a protest.

(End of provision)

[61 FR 41711, Aug. 9, 1996, as amended at 74 FR 36370, 36380, July 22, 2009]

952.235–71 Research misconduct.

As prescribed in 935.071, insert the following clause:

RESEARCH MISCONDUCT (JUL 2005)

(a) The Contractor is responsible for maintaining the integrity of research performed pursuant to this contract award including the prevention, detection, and remediation of research misconduct as defined by this clause, and the conduct of inquiries, investigations, and adjudication of allegations of research misconduct in accordance with the requirements of this clause.

(b) Unless otherwise instructed by the Contracting Officer, the Contractor must conduct an initial inquiry into any allegation of research misconduct. If the Contractor determines that there is sufficient evidence to proceed to an investigation, it must notify the Contracting Officer and, unless otherwise instructed, the Contractor must:

(1) Conduct an investigation to develop a complete factual record and an examination of such record leading to either a finding of research misconduct and an identification of appropriate remedies or a determination that no further action is warranted.

(2) If the investigation leads to a finding of research misconduct, conduct an adjudication by a responsible official who was not involved in the inquiry or investigation and is separated organizationally from the element which conducted the investigation. The adjudication must include a review of the investigative record and, as warranted, a determination of appropriate corrective actions and sanctions.

(3) Inform the Contracting Officer if an initial inquiry supports a formal investigation and, if requested by the Contracting Officer thereafter, keep the Contracting Officer informed of the results of the investigation

and any subsequent adjudication. When an investigation is complete, the Contractor will forward to the Contracting Officer a copy of the evidentiary record, the investigative report, any recommendations made to the Contractor's adjudicating official, the adjudicating official's decision and notification of any corrective action taken or planned, and the subject's written response (if any).

(c) The Department of Energy (DOE) may elect to act in lieu of the Contractor in conducting an inquiry or investigation into an allegation of research misconduct if the Contracting Officer finds that—

(1) The research organization is not prepared to handle the allegation in a manner consistent with this clause;

(2) The allegation involves an entity of sufficiently small size that it cannot reasonably conduct the inquiry;

(3) DOE involvement is necessary to ensure the public heath, safety, and security, or to prevent harm to the public interest; or

(4) The allegation involves possible criminal misconduct.

(d) In conducting the activities under paragraphs (b) and (c) of this clause, the Contractor and the Department, if it elects to conduct the inquiry or investigation, shall adhere to the following guidelines:

(1) *Safeguards for information and subjects of allegations.* The Contractor shall provide safeguards to ensure that individuals may bring allegations of research misconduct made in good faith to the attention of the Contractor without suffering retribution. Safeguards include: protection against retaliation; fair and objective procedures for examining and resolving allegations; and diligence in protecting positions and reputations. The Contractor shall also provide the subjects of allegations confidence that their rights are protected and that the mere filing of an allegation of research misconduct will not result in an adverse action. Safeguards include timely written notice regarding substantive allegations against them, a description of the allegation and reasonable access to any evidence submitted to support the allegation or developed in response to an allegation and notice of any findings of research misconduct.

(2) *Objectivity and expertise.* The Contractor shall select individual(s) to inquire, investigate, and adjudicate allegations of research misconduct who have appropriate expertise and have no unresolved conflict of interest. The individual(s) who conducts an adjudication must not be the same individual(s) who conducted the inquiry or investigation, and must be separate organizationally from the element that conducted the inquiry or investigation.

(3) *Timeliness.* The Contractor shall coordinate, inquire, investigate and adjudicate allegations of research misconduct promptly, but thoroughly. Generally, an investigation should be completed within 120 days of initiation, and adjudication should be complete within 60 days of receipt of the record of investigation.

(4) *Confidentiality.* To the extent possible, consistent with fair and thorough processing of allegations of research misconduct and applicable law and regulation, knowledge about the identity of the subjects of allegations and informants should be limited to those with a need to know.

(5) *Remediation and sanction.* If the Contractor finds that research misconduct has occurred, it shall assess the seriousness of the misconduct and its impact on the research completed or in process. The Contractor must take all necessary corrective actions. Such action may include but are not limited to, correcting the research record and as appropriate imposing restrictions, controls, or other parameters on research in process or to be conducted in the future. The Contractor must coordinate remedial actions with the Contracting Officer. The Contractor must also consider whether personnel sanctions are appropriate. Any such sanction must be considered and effected consistent with any applicable personnel laws, policies, and procedures, and shall take into account the seriousness of the misconduct and its impact, whether it was done knowingly or intentionally, and whether it was an isolated event or pattern of conduct.

(e) DOE reserves the right to pursue such remedies and other actions as it deems appropriate, consistent with the terms and conditions of the award instrument and applicable laws and regulations. However, the Contractor's good faith administration of this clause and the effectiveness of its remedial actions and sanctions shall be positive considerations and shall be taken into account as mitigating factors in assessing the need for such actions. If DOE pursues any such action, it will inform the subject of the action of the outcome and any applicable appeal procedures.

(f) *Definitions.*

Adjudication means a formal review of a record of investigation of alleged research misconduct to determine whether and what corrective actions and sanctions should be taken.

Fabrication means making up data or results and recording or reporting them.

Falsification means manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

Finding of Research Misconduct means a determination, based on a preponderance of the evidence, that research misconduct has occurred. Such a finding requires a conclusion that there has been a significant departure

from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

Inquiry means information gathering and initial fact-finding to determine whether an allegation or apparent instance of misconduct warrants an investigation.

Investigation means the formal examination and evaluation of the relevant facts.

Plagiarism means the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

Research means all basic, applied, and demonstration research in all fields of science, medicine, engineering, and mathematics, including, but not limited to, research in economics, education, linguistics, medicine, psychology, social sciences statistics, and research involving human subjects or animals.

Research misconduct means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results, but does not include honest error or differences of opinion.

Research record means the record of all data or results that embody the facts resulting from scientists' inquiries, including, but not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles.

(g) By executing this contract, the Contractor provides its assurance that it has established an administrative process for performing an inquiry, mediating if possible, or investigating, and reporting allegations of research misconduct; and that it will comply with its own administrative process and the requirements of 10 CFR part 733 for performing an inquiry, possible mediation, investigation and reporting of research misconduct.

(h) The Contractor must insert or have inserted the substance of this clause, including paragraph (g), in subcontracts at all tiers that involve research.

(End of clause)

[70 FR 37015, June 28, 2005, as amended at 74 FR 36370, 36378, 36380, July 22, 2009; 75 FR 29459, May 26, 2010]

952.236 Construction and architect-engineer contracts.

952.236–71 Inspection in architect-engineer contracts.

As prescribed at 936.609–3 insert the following clause:

INSPECTION (APR 1994)

The Government, through any authorized representatives, has the right at all reasonable times, to inspect, or otherwise evaluate the work performed or being performed hereunder and the premises in which it is being performed. If any inspection, or evaluation is made by the Government on the premises of the Contractor or a subcontractor, the Contractor shall provide and shall require his subcontractors to provide all reasonable facilities and assistance for the safety and convenience of the Government representatives in the performance of their duties. All inspections and evaluations shall be performed in such a manner as will not unduly delay the work.

(End of clause)

[49 FR 12042, Mar. 28, 1984, as amended at 59 FR 9109, Feb. 25, 1994; 62 FR 2312, Jan. 16, 1997; 74 FR 36370, July 22, 2009]

952.236–72 [Reserved]

952.237–70 Collective bargaining agreements—protective services.

As prescribed in 937.7040, insert the following clause:

COLLECTIVE BARGAINING AGREEMENTS—PROTECTIVE SERVICES (AUG 1993)

When negotiating collective bargaining agreements applicable to the work force under this contract, the Contractor shall use its best efforts to ensure such agreements contain provisions designed to assure continuity of services. All such agreements entered into during the contract period of performance should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout, or other interruption of normal operations.

For this purpose, each collective bargaining agreement should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operations. As part of such agreements, management and labor should agree to cooperate fully with the Federal Mediation and Conciliation Service. The Contractor shall include the substance of this clause in any subcontracts for protective services.

(End of clause)

[58 FR 36152, July 6, 1993; 58 FR 43287, Aug. 16, 1993, as amended at 67 FR 14872, Mar. 28, 2002; 74 FR 36370, 36378, July 22, 2009]

952.242–70 Technical direction.

As prescribed in 942.270–2, insert the following clause:

TECHNICAL DIRECTION (DEC 2000)

(a) Performance of the work under this contract shall be subject to the technical direction of the DOE Contracting Officer's Representative (COR). The term ''technical direction'' is defined to include, without limitation:

(1) Providing direction to the Contractor that redirects contract effort, shift work emphasis between work areas or tasks, require pursuit of certain lines of inquiry, fill in details, or otherwise serve to accomplish the contractual Statement of Work.

(2) Providing written information to the Contractor that assists in interpreting drawings, specifications, or technical portions of the work description.

(3) Reviewing and, where required by the contract, approving, technical reports, drawings, specifications, and technical information to be delivered by the Contractor to the Government.

(b) The Contractor will receive a copy of the written COR designation from the Contracting Officer. It will specify the extent of the COR's authority to act on behalf of the Contracting Officer.

(c) Technical direction must be within the scope of work stated in the contract. The COR does not have the authority to, and may not, issue any technical direction that—

(1) Constitutes an assignment of additional work outside the Statement of Work;

(2) Constitutes a change as defined in the contract clause entitled ''Changes;''

(3) In any manner causes an increase or decrease in the total estimated contract cost, the fee (if any), or the time required for contract performance;

(4) Changes any of the expressed terms, conditions or specifications of the contract; or

(5) Interferes with the Contractor's right to perform the terms and conditions of the contract.

(d) All technical direction shall be issued in writing by the COR.

(e) The Contractor must proceed promptly with the performance of technical direction duly issued by the COR in the manner prescribed by this clause and within its authority under the provisions of this clause. If, in the opinion of the Contractor, any instruction or direction by the COR falls within one of the categories defined in (c)(1) through (c)(5) of this clause, the Contractor must not proceed and must notify the Contracting Officer in writing within five (5) working days after receipt of any such instruction or direction and must request the Contracting Officer to modify the contract accordingly. Upon receiving the notification from the Contractor, the Contracting Officer must—

(1) Advise the Contractor in writing within thirty (30) days after receipt of the Contractor's letter that the technical direction is within the scope of the contract effort and does not constitute a change under the Changes clause of the contract;

(2) Advise the Contractor in writing within a reasonable time that the Government will issue a written change order; or

(3) Advise the Contractor in writing within a reasonable time not to proceed with the instruction or direction of the COR.

(f) A failure of the Contractor and Contracting Officer either to agree that the technical direction is within the scope of the contract or to agree upon the contract action to be taken with respect to the technical direction will be subject to the provisions of the clause entitled ''Disputes.''

(End of clause)

[65 FR 81008, Dec. 22, 2000, as amended at 74 FR 36370, 36378, 36380, July 22, 2009]

952.245 Clauses related to government property.

952.245–2 Government property (fixed-price contracts).

Modify FAR 52.245–2 by adding ''and the DOE Acquisition Regulation Subpart 945.5,'' after the reference to FAR Subpart 45.5 in the first sentence of paragraphs (e)(1) and (e)(2) of the clause.

952.245–5 Government property (cost-reimbursement, time-and-materials, or labor-hour contracts.)

Modify FAR 52.245–1 by adding ''and DOE Acquisition Regulation Subpart 945.5'' after the reference to FAR Subpart 45.5 in paragraphs (e)(1) and (e)(2) of the clause.

[49 FR 12042, Mar. 28, 1984, as amended at 77 FR 74389, Dec. 14, 2012]

952.247–70 Foreign travel.

As prescribed in 947.7002, insert the following clause:

FOREIGN TRAVEL (JUN 2010)

Contractor foreign travel shall be conducted pursuant to the requirements contained in Department of Energy (DOE) Order 551.1C, Official Foreign Travel, or its successor in effect at the time of award.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36370, July 22, 2009; 75 FR 29459, May 26, 2010]

952.249 Clauses related to termination.

952.250 Clauses related to indemnification of contractors.

952.250–70 Nuclear hazards indemnity agreement.

Insert the following clause in accordance with section 950.7006:

NUCLEAR HAZARDS INDEMNITY AGREEMENT (AUG 2016)

(a) *Authority.* This clause is incorporated into this contract pursuant to the authority contained in subsection 170d. of the Atomic Energy Act of 1954, as amended (hereinafter called the Act.)

(b) *Definitions.* The definitions set out in the Act shall apply to this clause.

(c) *Financial protection.* Except as hereafter permitted or required in writing by DOE, the Contractor will not be required to provide or maintain, and will not provide or maintain at Government expense, any form of financial protection to cover public liability, as described in paragraph (d)(2) below. DOE may, however, at any time require in writing that the Contractor provide and maintain financial protection of such a type and in such amount as DOE shall determine to be appropriate to cover such public liability, provided that the costs of such financial protection are reimbursed to the Contractor by DOE.

(d)(1) *Indemnification.* To the extent that the Contractor and other persons indemnified are not compensated by any financial protection permitted or required by DOE, DOE will indemnify the Contractor and other persons indemnified against (i) claims for public liability as described in subparagraph (d)(2) of this clause; and (ii) such legal costs of the Contractor and other persons indemnified as are approved by DOE, provided that DOE's liability, including such legal costs, shall not exceed the amount set forth in section 170e.(1)(B) of the Act in the aggregate for each nuclear incident or precautionary evacuation occurring within the United States or $500 million in the aggregate for each nuclear incident occurring outside the United States, irrespective of the number of persons indemnified in connection with this contract.

(2) The public liability referred to in subparagraph (d)(1) of this clause is public liability as defined in the Act which (i) arises out of or in connection with the activities under this contract, including transportation; and (ii) arises out of or results from a nuclear incident or precautionary evacuation, as those terms are defined in the Act.

(e)(1) *Waiver of defenses.* In the event of a nuclear incident, as defined in the Act, arising out of nuclear waste activities, as defined in the Act, the Contractor, on behalf of itself and other persons indemnified, agrees to waive any issue or defense as to charitable or governmental immunity.

(2) In the event of an extraordinary nuclear occurrence which—

(i) Arises out of, results from, or occurs in the course of the construction, possession, or operation of a production or utilization facility; or

(ii) Arises out of, results from, or occurs in the course of transportation of source material, by-product material, or special nuclear material to or from a production or utilization facility; or

(iii) Arises out of or results from the possession, operation, or use by the Contractor or a subcontractor of a device utilizing special nuclear material or by-product material, during the course of the contract activity; or

(iv) Arises out of, results from, or occurs in the course of nuclear waste activities, the Contractor, on behalf of itself and other persons indemnified, agrees to waive—

(A) Any issue or defense as to the conduct of the claimant (including the conduct of persons through whom the claimant derives its cause of action) or fault of persons indemnified, including, but not limited to—

(*1*) Negligence;

(*2*) Contributory negligence;

(*3*) Assumption of risk; or

(*4*) Unforeseeable intervening causes, whether involving the conduct of a third person or an act of God;

(B) Any issue or defense as to charitable or governmental immunity; and

(C) Any issue or defense based on any statute of limitations, if suit is instituted within 3 years from the date on which the claimant first knew, or reasonably could have known, of his injury or change and the cause thereof. The waiver of any such issue or defense shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action. The waiver shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified.

(v) The term *extraordinary nuclear occurrence* means an event which DOE has determined to be an extraordinary nuclear occurrence as defined in the Act. A determination of whether or not there has been an extraordinary nuclear occurrence will be made in accordance with the procedures in 10 CFR part 840.

(vi) For the purposes of that determination, *offsite* as that term is used in 10 CFR part 840 means away from ''the contract location'' which phrase means any DOE facility, installation, or site at which contractual activity under this contract is being carried on, and any contractor-owned or controlled facility, installation, or site at which the Contractor is engaged in the performance of contractual activity under this contract.

(3) The waivers set forth above—

(i) Shall be effective regardless of whether such issue or defense may otherwise be deemed jurisdictional or relating to an element in the cause of action;

(ii) Shall be judicially enforceable in accordance with its terms by the claimant against the person indemnified;

(iii) Shall not preclude a defense based upon a failure to take reasonable steps to mitigate damages;

(iv) Shall not apply to injury or damage to a claimant or to a claimant's property which is intentionally sustained by the claimant or which results from a nuclear incident intentionally and wrongfully caused by the claimant;

(v) Shall not apply to injury to a claimant who is employed at the site of and in connection with the activity where the extraordinary nuclear occurrence takes place, if benefits therefor are either payable or required to be provided under any workmen's compensation or occupational disease law;

(vi) Shall not apply to any claim resulting from a nuclear incident occurring outside the United States;

(vii) Shall be effective only with respect to those obligations set forth in this clause and in insurance policies, contracts or other proof of financial protection; and

(viii) Shall not apply to, or prejudice the prosecution or defense of, any claim or portion of claim which is not within the protection afforded under (A) the limit of liability provisions under subsection 170e. of the Act, and (B) the terms of this agreement and the terms of insurance policies, contracts, or other proof of financial protection.

(f) *Notification and litigation of claims.* The Contractor shall give immediate written notice to DOE of any known action or claim filed or made against the Contractor or other person indemnified for public liability as defined in paragraph (d)(2). Except as otherwise directed by DOE, the Contractor shall furnish promptly to DOE, copies of all pertinent papers received by the Contractor or filed with respect to such actions or claims. DOE shall have the right to, and may collaborate with, the Contractor and any other person indemnified in the settlement or defense of any action or claim and shall have the right to (1) require the prior approval of DOE for the payment of any claim that DOE may be required to indemnify hereunder; and (2) appear through the Attorney General on behalf of the Contractor or other person indemnified in any action brought upon any claim that DOE may be required to indemnify hereunder, take charge of such action, and settle or defend any such action. If the settlement or defense of any such action or claim is undertaken by DOE, the Contractor or other person indemnified shall furnish all reasonable assistance in effecting a settlement or asserting a defense.

(g) *Continuity of DOE obligations.* The obligations of DOE under this clause shall not be affected by any failure on the part of the Contractor to fulfill its obligation under this contract and shall be unaffected by the death, disability, or termination of existence of the Contractor, or by the completion, termination or expiration of this contract.

(h) *Effect of other clauses.* The provisions of this clause shall not be limited in any way by, and shall be interpreted without reference to, any other clause of this contract, including the clause entitled Contract Disputes, provided, however, that this clause shall be subject to the clauses entitled Covenant Against Contingent Fees, and Accounts, records, and inspection, and any provisions that are later added to this contract as required by applicable Federal law, including statutes, executive orders and regulations, to be included in Nuclear Hazards Indemnity Agreements.

(i) *Civil penalties.* The Contractor and its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to civil penalties, pursuant to 234A of the Act, for violations of applicable DOE nuclear-safety related rules, regulations, or orders.

(j) *Criminal penalties.* Any individual director, officer, or employee of the Contractor or of its subcontractors and suppliers who are indemnified under the provisions of this clause are subject to criminal penalties, pursuant to 223(c) of the Act, for knowing and willful violation of the Atomic Energy Act of 1954, as amended, and applicable DOE nuclear safety-related rules, regulations or orders which violation results in, or, if undetected, would have resulted in a nuclear incident.

(k) *Inclusion in subcontracts.* The Contractor shall insert this clause in any subcontract which may involve the risk of public liability, as that term is defined in the Act and further described in paragraph (d)(2) above. However, this clause shall not be included in subcontracts in which the subcontractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170c. or k. of the Act for the activities under the subcontract.

Effective date

( ) See note II below for instructions related to this section on Effective Date.

Relationship to general indemnity

( ) See note III below for instructions related to this section on Relationship to General Indemnity.

(End of clause)

NOTE I

Paragraph (i) of the clause will be replaced with ''Reserved'' in contracts specifically exempted from civil penalties by section 234 of the Act. That subsection provides that the following DOE contractors are not subject to the assessment of civil penalties:

(1) The University of Chicago (and any subcontractors or suppliers thereto) for activities associated with Argonne National Laboratory;

(2) The University of California (and any subcontractors or suppliers thereto) for activities associated with Los Alamos National Laboratory, Lawrence Livermore National Laboratory, and Lawrence Berkeley National Laboratory;

(3) American Telephone and Telegraph Company and its subsidiaries (and any subcontractors or suppliers thereto) for activities associated with Sandia National Laboratories;

(4) Universities Research Association, Inc. (and any subcontractors or suppliers thereto) for activities associated with FERMI National Laboratory:

(5) Princeton University (and any subcontractor or suppliers thereto) for activities associated with Princeton Plasma Physics Laboratory;

(6) The Associated Universities, Inc. (and any subcontractors or suppliers thereto) for activities associated with the Brookhaven National Laboratory; and

(7) Battelle Memorial Institute (and any subcontractors or suppliers thereto) for activities associated with Pacific Northwest Laboratory.

(End of note)

NOTE II

Contracts with an effective date after the date of June 12, 1996, do not require the effective date provision in this clause. Delete the title.

Use the EFFECTIVE DATE title and the following language, for those contracts:

''( ) This indemnity agreement shall be applicable with respect to nuclear incidents occurring on or after ____.''

(1) Those that contained an indemnity pursuant to Public Law 85–840 prior to August 20, 1988, include the effective date provision above, inserting the effective date of the contract modification that replaced the Public Law 85–804 indemnity with an interim Price-Anderson based indemnity. Pursuant to the Price-Anderson Amendments Act, this substitution must have taken place by February 20, 1989.

(2) Those that contained, and continue to contain, either of the previous Nuclear Hazards Indemnity clauses, include the effective date provision above, inserting ''August 20, 1988.''

(3) Those with an effective date between August 20, 1988, and the date of the Final Rule, that (a) had ''interim coverage'' or (b) did not have ''interim coverage'' but have now been determined to be covered under the PAAA, include the effective date provision above, inserting the contract effective date.

NOTE III

The following alternate will be added to the above Nuclear Hazards Indemnity Agreement clause for all contracts that contain a general authority indemnity pursuant to 950.7101. Caution: Be aware that for contracts that will have this provision added which do not contain an effective date provision, this paragraph shall be marked (1). In the event an Effective Date provision has been included, it shall be market (m).

''( ) To the extent that the Contractor is compensated by any financial protection, or is indemnified pursuant to this clause, or is effectively relieved of public liability by an order or orders limiting same, pursuant to 170e of the Act, the provisions of the clause providing general authority indemnity shall not apply.''

(End of note)

[56 FR 57828, Nov. 14, 1991, as amended at 58 FR 32307, June 9, 1993; 61 FR 21977, May 13, 1996; 61 FR 30823, June 18, 1996; 67 FR 14872, Mar. 28, 2002; 74 FR 36370, 36378, July 22, 2009; 75 FR 29459, May 26, 2010; 81 FR 45978, July 15, 2016]

952.250–71—952.250–72 [Reserved]

952.251–70 Contractor employee travel discounts.

As prescribed in 951.7002, insert the following clause:

CONTRACTOR EMPLOYEE TRAVEL DISCOUNTS (AUG 2009)

(a) The Contractor shall take advantage of travel discounts offered to Federal Contractor employee travelers by AMTRAK, hotels, motels, or car rental companies, when use of such discounts would result in lower overall trip costs and the discounted services are reasonably available. Vendors providing these services may require the Contractor employee to furnish them a letter of identification signed by the authorized Contracting Officer.

(b) *Contracted airlines.* Contractors are not eligible for GSA contract city pair fares.

(c) *Discount rail service.* AMTRAK voluntarily offers discounts to Federal travelers on official business and sometimes extends

those discounts to Federal contractor employees.

(d) *Hotels/motels.* Many lodging providers extend their discount rates for Federal employees to Federal contractor employees.

(e) *Car rentals.* The Surface Deployment and Distribution Command (SDDC) of the Department of Defense negotiates rate agreements with car rental companies that are available to Federal travelers on official business. Some car rental companies extend those discounts to Federal contractor employees.

(f) *Obtaining travel discounts.* (1) To determine which vendors offer discounts to Government contractors, the Contractor may review commercial publications such as the Official Airline guides Official Traveler, Innovata, or National Telecommunications. The Contractor may also obtain this information from GSA contract Travel Management Centers or the Department of Defense's Commercial Travel Offices.

(2) The vendor providing the service may require the Government contractor to furnish a letter signed by the Contracting Officer. The following illustrates a standard letter of identification.

OFFICIAL AGENCY LETTERHEAD

TO: Participating Vendor

SUBJECT: OFFICIAL TRAVEL OF GOVERNMENT CONTRACTOR

(FULL NAME OF TRAVELER), the bearer of this letter is an employee of (COMPANY NAME) which has a contract with this agency under Government contract (CONTRACT NUMBER). During the period of the contract (GIVE DATES), AND WITH THE APPROVAL OF THE CONTRACT VENDOR, the employee is eligible and authorized to use available travel discount rates in accordance with Government contracts and/or agreements. Government Contract City Pair fares are not available to Contractors.

SIGNATURE, Title and telephone number of Contracting Officer

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36370, 36378, 36380, July 22, 2009]

SUBCHAPTER I—AGENCY SUPPLEMENTARY REGULATIONS

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AUTHORITY: 42 U.S.C. 2201; 2282a; 2282b; 2282c; 42 U.S.C. 7101 *et seq.;* 50 U.S.C. 2401 *et seq.*

SOURCE: 65 FR 81009, Dec. 22, 2000, unless otherwise noted.

Subpart 970.01—Management and Operating Contract Regulatory System

970.0100 Scope of part.

This part provides Departmental policies, procedures, provisions, and clauses that implement and supplement the Federal Acquisition Regulation (FAR) (Chapter 1 of Title 48 Code of Federal Regulations (CFR)) and other parts of the Department of Energy Acquisition Regulation (DEAR) (Chapter 9 of Title 48 CFR) for the award and administration of the Department's management and operating contracts, as defined at 48 CFR subpart 17.6. The FAR and other parts of the DEAR apply to management and operating contracts. See 970.5200 for guidance regarding which provisions and clauses (from FAR, part 970, or other

parts of the DEAR) to include in management and operating contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36370, July 22, 2009; 75 FR 68219, Nov. 5, 2010]

970.0103 Publication and codification.

(a) *Organization of Part 970.* (1) To the extent possible, the titles and text of the subparts, sections, and subsections of this part are numbered to correspond with related material that is contained in the FAR.

(2) The number to the left of the decimal point represents the DEAR part number (i.e., 970). The numbers to the right of the decimal point and to the left of the dash represent, in order, the DEAR subpart (first two digits), and the DEAR section number (second two digits). The numbers to the right of the dash represent the DEAR subsection. A second dash may follow the DEAR subsection number. As applicable, numbers to the right of the second dash represent subordinate subsections.

(3) To the extent practicable, the subpart number corresponds with the FAR part which contains related coverage, and the section number corresponds with the FAR subpart which contains related coverage (e.g., the coverage contained in 970.0309 corresponds with material contained in 48 CFR subpart 3.9).

(4) Where the FAR does not contain related coverage on a particular subject, the DEAR section number will be numbered using numbers of 70 and up (e.g., 970.0370).

(b) *Special Note Regarding Clause Numbering.* The section number for clauses prescribed in part 970 are numbered to correspond with the subpart in which the clause is prescribed (e.g., 970.5203–1 is prescribed for use at subpart 970.03).

[65 FR 81009, Dec. 22, 2000, as amended at 75 FR 68219, Nov. 5, 2010]

Subpart 970.03—Improper Business Practices and Personal Conflicts of Interest

970.0309 Whistleblower Protection of Contractor Employees.

970.0309–1 Applicability.

The contracting officer shall refer to subpart 903.9 regarding the applicability of the DOE Employee Protection Program to management and operating contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36370, July 22, 2009]

970.0370 Management Controls and Improvements.

970.0370–1 Policy.

(a) Management and operating contractors shall develop and maintain systems of management and quality control to discourage waste, fraud and abuse; and to ensure that components, products, and services that are provided to the Department of Energy (DOE) satisfy the contractor's obligations under the contract.

(b) As a part of the required overall management structure, the contractor must maintain management control systems which, in compliance with the requirements of the clause at 970.5203–1—

(1) Are documented and satisfactory to DOE;

(2) Ensure that all levels of management are accountable for effective management systems and internal controls within their areas of assigned responsibility;

(3) Cover both programmatic and administrative functions;

(4) Provide reasonable assurance that Government resources are safeguarded against theft, fraud, waste, and unauthorized use;

(5) Promote efficient and effective operations;

(6) Ensure that all obligations and costs incurred are in compliance with the intended purposes and the terms and conditions of the contract;

(7) Properly record, manage, and report all revenues, expenditures, transactions and assets;

(8) Maintain financial, statistical and other reports necessary to maintain accurate, reliable, and timely accountability and management controls; and

(9) Are periodically reviewed to ensure that the systems provide reasonable assurance that the objectives of the system are being accomplished and that these controls are working effectively.

(c) Management and operating contractors shall also develop and maintain a baseline program of quality assurance that will implement documented performance and quality standards, and management controls and assessment techniques to ensure components, services, and products meet DOE's, design criteria and other governing and applicable specifications.

(d) DOE expects all its contractors to seek to identify improvements in any aspect of performance. Management and operating contracts are very large and complex; therefore, the opportunities to identify changes in performance that will increase the effectiveness or efficiency of contract performance are more prevalent than under other contracts. The clause at 970.5203–2 requires DOE management and operating contractors to affirmatively seek to identify, evaluate, and institute, where appropriate, processes that will improve the effectiveness or efficiency of any aspect of contract performance. It further requires the contractor to communicate any such improvements to DOE, other management and operating contractors, and DOE major facilities contractors. The contractor is required to participate in efforts by those contractors to address common problems or the institution of improvements. It allows the contractor to enlist the aid of the DOE contracting officer where necessary to institute or communicate the improvements. The obligations under the clause in no way affect the contractor's obligations under other provisions of the contract to notify or acquire the approval of the contracting officer.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36370, July 22, 2009]

970.0370–2 Contract clause.

(a) The contracting officer shall insert the clause at 970.5203–1, Management Controls, in all management and operating contracts.

(b) The contracting officer shall insert the clause at 970.5203–2, Performance Improvement and Collaboration, in all management and operating contracts.

970.0371 Conduct of employees of DOE management and operating contractors.

970.0371–1 Scope of section.

This section establishes the policies for maintaining satisfactory standards of conduct on the part of individuals employed by DOE management and operating contractors.

970.0371–2 Applicability.

The policies in this section are applicable to all DOE management and operating contractors.

970.0371–3 Definition.

Employees, as used in this section, are defined to mean individuals employed by the contractor, both full and part-time, who are assigned to work under a DOE management and operating contract.

970.0371–4 Gratuities.

Employees of a management and operating contractor shall not, under circumstances which might reasonably be interpreted as an attempt to influence the recipients in the conduct of their duties, accept any gratuity or special favor from individuals or organizations with whom the contractor is doing business, or proposing to do business, in accomplishing the work under the contract. Reference is made to the requirements prescribed in 48 CFR 3.502.

970.0371–5 Use of privileged information.

Management and operating contractor employees shall not use privileged information for personal gain, or make other improper use of privileged information which is acquired in connection with their employment on contract work. For the purposes of this subsection, the term ''privileged information'' includes but is not limited to, unpublished information relating to

technological and scientific developments; medical, personnel, or security records of individuals; anticipated materials' requirements or pricing action; possible new sites for DOE program operations; internal DOE decisions; policy development; and knowledge of selections of contractors or subcontractors in advance of official announcement.

970.0371–6 Incompatibility between regular duties and private interests.

(a) Employees of a management and operating contractor shall not be permitted to make or influence any decisions on behalf of the contractor which directly or indirectly affect the interest of the Government, if the employee's personal concern in the matter may be incompatible with the interest of the Government. For example: An employee of a contractor will not negotiate, or influence the award of, a subcontract with a company in which the individual has an employment relationship or significant financial interest; and an employee of a contractor will not be assigned the preparation of an evaluation for DOE or for any DOE contractor of some technical aspect of the work of another organization with which the individual has an employment relationship, or significant financial interest, or which is a competitor of an organization (other than the contractor who is the individual's regular employer) in which the individual has an employment relationship or significant financial interest.

(b) The contractor shall be responsible for informing employees that they are expected to disclose any incompatibilities between duties performed for the contractor and their private interests and to refer undecided questions to the contractor.

970.0371–7 Outside employment of contractor employees.

Employees of a management and operating contractor are entitled to the same rights and privileges with respect to outside employment as other citizens. Therefore, there is no general prohibition against contractor employees having outside employment. However, no employee of a contractor performing work on a full or part-time basis under a DOE management and operating contract may engage in employment outside official hours of duty or while on leave if such employment will:

(a) In any manner interfere with the proper and effective performance of the duties of the position;

(b) Appear to create a conflict-of-interest situation, or

(c) Appear to subject DOE or the contractor to public criticism or embarrassment.

970.0371–8 Employee disclosure concerning other employment services.

(a) Management and operating contractors are responsible for requiring its employees to file with the contractor, a written disclosure statement concerning outside employment services which involve the use of information in the area of the employee's employment with the contractor. The disclosure shall contain such information concerning the outside employment as the contractor may prescribe. As a minimum, the employee's disclosure shall:

(1) Acknowledge that the employee has read and is familiar with:

(i) The requirements and restrictions prescribed in this section,

(ii) DOE publication entitled, ''Reporting Results of Scientific and Technical Work Funded by DOE'', and

(iii) The requirements of the contractor's contract with DOE relating to patents.

(2) Include information concerning any rate of remuneration significantly in excess of the employee's regular rate of remuneration;

(3) Identify any actual or potential conflicts with DOE's policies regarding conduct of employees of DOE's contractors set forth in this section;

(4) Address any potential impacts that such employment may have on the contractor's responsibility to report fully and promptly to DOE all significant research and development information; and

(5) Identify any potential conflicts such employment may have with the patent provisions of the contractor's contract with DOE.

(b) The contractor shall provide a copy of all disclosures to the contracting officer.

970.0371–9 Contract clause.

The contracting officer shall insert the clause at 970.5203–3, Contractor's Organization, in all management and operating contracts. The approval authority of the Secretary of Energy required in paragraph (c) may not be delegated. In paragraph (a) the words ''and managerial personnel (see 970.5245–1(j))'' may be inserted after ''(see 952.215–70)''.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36370, July 22, 2009]

Subpart 970.04—Administrative Matters

970.0404 Safeguarding classified information.

970.0404–1 Definitions.

Access Authorization means an administrative determination that an individual is eligible for access to classified information or is eligible for access to, or control over, special nuclear material.

Classified Information means any information or material that is owned by or produced for, or is under the control of the United States Government, and determined pursuant to provisions of Executive Order 12958, Classified National Security Information, April 17, 1995, as amended, or prior orders, or as authorized under the Atomic Energy Act of 1954, as amended, to require protection against unauthorized disclosure, and is so designated.

Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communication security programs.

Facility Clearance means an administrative determination that a facility is eligible to access, produce, use or store classified information or special nuclear material.

Restricted Data means all data concerning design, manufacture, or utilization of atomic weapons; the production of special nuclear material; or the use of special nuclear material in the production of energy; but shall not include data declassified or removed from the Restricted Data category pursuant to section 142 of the Atomic Energy Act of 1954, as amended, (42 U.S.C. 2162).

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 14878, Mar. 28, 2002; 74 FR 36370, July 22, 2009]

970.0404–2 General.

(a) Guidance regarding the National Industrial Security Program as implemented by the Department of Energy (DOE) may be found at subpart 904.4, Safeguarding Classified Information Within Industry. Additional information concerning contractor ownership when national security or atomic energy information is involved may be found at subpart 904.70. Information regarding contractor ownership involving national security program contracts may be found at subpart 904.71.

(b) Executive Order 12333, United States Intelligence Activities, provides for the organization and control of United States foreign intelligence and counterintelligence activities. DOE has established a counterintelligence program subject to this Executive Order which is described in DOE Order 475.1, Counterintelligence Program, or its successor. All DOE elements, including management and operating contractors and other contractors managing DOE-owned facilities which require access authorizations, should undertake the necessary precautions to ensure that DOE and covered Contractor personnel, programs and resources are properly protected from foreign intelligence threats and activities.

(c) For DOE management and operating contracts and other contracts designated by the Senior Procurement Executive, or designee, the clause entitled, ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts,'' implements the requirements of section 234B of the Atomic Energy Act (see 904.402(c)(1)) for the use of a contract clause that provides for an appropriate reduction

in the fee or amount paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified information. The clause, in part, provides for reductions in the amount of fee, profit, or share of cost savings that is otherwise earned by the contractor for performance failures relating to the safeguarding of Restricted Data and other classified information.

[67 FR 14878, Mar. 28, 2002, as amended at 68 FR 68781, Dec. 10, 2003; 74 FR 36370, 36378, July 22, 2009; 75 FR 68219, Nov. 5, 2010]

970.0404–3 Responsibilities of contracting officers.

(a) Management and operating contracts which may require the processing or storage of Restricted Data or Special Nuclear Material require application of the applicable DOE Directives in the safeguards and security series.

(b) The contracting officer shall refer to subpart 904.71 for guidance concerning the prohibition on award of a DOE contract under a national security program to a company owned by an entity controlled by a foreign government when access to proscribed information is required to perform the contract.

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 14878, Mar. 28, 2002; 74 FR 36371, July 22, 2009]

970.0404–4 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the clause at 970.5204–1, Counterintelligence, into all management and operating contracts and other contracts for the management of DOE-owned facilities which include the security and classification/declassification clauses.

(b) The contracting officer shall refer to 904.404 and 904.7103 for the prescription of solicitation provisions and contract clauses relating to safeguarding classified information and foreign ownership, control, or influence over contractors.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, July 22, 2009]

970.0407 Contractor records retention.

970.0407–1 Applicability.

970.0407–1–1 Alternate retention schedules.

Records produced under the Department's contracts involving management and operation responsibilities relative to DOE-owned or -leased facilities are to be retained and disposed of in accordance with the requirements contained in 36 CFR Chapter XII, Subchapter B, ''Records Management'' and National Archives and Records Administration (NARA)-approved DOE Records Disposition Schedules (consult current schedule), rather than those set forth at 48 CFR subpart 4.7, Contractor Records Retention.

[79 FR 56285, Sept. 19, 2014]

970.0407–1–2 Access to and ownership of records.

Contracting officers may agree to contractor ownership of certain categories of records designated in the instruction contained in paragraph (b) of the clause at 970.5204–3, Access to and Ownership of Records, provided the records do not fall within a DOE Privacy Act system of record and the Government's rights to inspect, copy, and audit these records are not limited. These rights must be retained by the Government in order to carry out the Department's statutory responsibilities required by the Atomic Energy Act and other statutes for oversight of its contractors, including compliance with the Department's health, safety and reporting the Privacy Act requirements, and protection of the public interest.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, July 22, 2009; 79 FR 56285, Sept. 19, 2014]

970.0407–1–3 Contract clause.

The contracting officer shall insert the clause at 48 CFR 970.5204–3, *Access to and Ownership of Records*, in management and operating contracts and other contracts and resulting subcontracts that contain the clause at 48 CFR 970.5223–1, *Integration of Environment, Safety, and Health into Work Planning and Execution* clause, or the clause

at 48 CFR 952.223–72, *Radiation Protection and Nuclear Criticality*.

[79 FR 56285, Sept. 19, 2014]

970.0470 Department of Energy Directives.

970.0470–1 General.

(a) The contractor is required to comply with the requirements of applicable Federal, State and local laws and regulations, unless relief has been granted by the appropriate authority. For informational purposes, the contracting officer may append the contract with a list of applicable laws or regulations (see 970.5204–2, Laws, Regulations, and DOE Directives, paragraph (a)).

(b) The Department of Energy Directives System is a system of instructions, including orders, notices, manuals, guides, and standards, for Departmental elements. In certain circumstances, requirements contained in these directives may apply to a contractor through operation of a contract clause. Program and requirements personnel are responsible for identifying requirements in the Directives Program which are applicable to a contract, and for developing a list of applicable requirements and providing it to the contracting officer for inclusion in the contract.

(c) Where directives requirements are established using either the Standards/Requirements Identification Process or the Work Smart Standards Process, the applicable process should also be used to establish the environment, safety, and health portion of the list identified in paragraph (b) of this section.

(d) Environmental, safety, and health (ES&H) requirements appropriate for work conducted under a management and operating contract may be determined by a DOE approved process to evaluate the work and the associated hazards, and identify an appropriately tailored set of standards, practices, and controls, such as a tailoring process included in a DOE approved Safety Management System implemented under 970.5223–1, Integration of Environment, Safety, and Health into Work Planning and Execution. When such a process is used, the contracting officer shall ensure that the set of tailored requirements, as approved by DOE pursuant to the process, is incorporated into the list identified in paragraph (b) of this section. These requirements shall supersede, in whole or in part, the contractual environmental, safety, and health requirements previously made applicable to the contract by List B. If the tailored set of requirements identifies an alternative requirement which varies from an ES&H requirement of an otherwise applicable law or regulation, the contractor must request an exemption or other appropriate regulatory relief that may be specified in the governing regulation.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 23127, May 18, 2009; 74 FR 36371, July 22, 2009]

970.0470–2 Contract clause.

The contracting officer shall insert the clause at 970.5204–2, Laws, Regulations, and DOE Directives, in management and operating contracts. The contracting officer may modify the clause to indicate the location in the contract of List A, List B, or both.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, July 22, 2009]

Subpart 970.08—Required sources of supplies and services

970.0801 Excess personal property.

970.0801–2 Policy.

The provisions of 48 CFR subpart 8.1, 41 CFR 101–43 (Federal Property Management Regulation), and 41 CFR 109–43, (Department of Energy (DOE) Property Management Regulation) apply to DOE's management and operating contracts.

[74 FR 36371, July 22, 2009]

970.0808 Acquisition of printing and related supplies.

970.0808–00 Scope.

This section prescribes the Department's policy concerning duplicating or printing services which may be required in the performance of management and operating contracts.

[65 FR 81009, Dec. 22, 2000. Redesignated at 74 FR 36371, July 22, 2009]

970.0808–2 Policy.

Management and operating contractors shall provide or secure duplication and printing services in accordance with the Government Printing and Binding Regulations, Title 44 of the U.S. Code, and applicable DOE Directives.

970.0808–3 Contract clause.

The contracting officer shall insert the clause at 970.5208–1, Printing, in all management and operating contracts.

Subpart 970.09—Contractor Qualifications

970.0905 Organizational and consultant conflicts of interest.

Management and operating contracts shall contain an organizational conflict of interest clause substantially similar to the clause at 952.209–72, Organizational Conflicts of Interest, and which is appropriate to the statement of work of the individual contract. In addition, the contracting officer shall assure that the clause contains appropriate restraints on intra-corporate relations between the contractor's organization and personnel operating the Department's facility and its parent corporate body and affiliates. Such restraints shall include personnel access to the facility, technical transfer of information from the facility, and the availability from the facility of other advantages flowing from performance of the contract. The contracting officer is responsible for ensuring that M&O contractors adopt policies and procedures in the award of subcontracts that will meet the Department's need to safeguard against a biased work product and an unfair competitive advantage. To this end, the organizational conflicts of interest clause in management and operating contracts shall include Alternate I.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, July 22, 2009]

970.0970 Performance guarantees.

970.0970–1 Determination of responsibility.

(a) In the award of a management and operating contract, the contracting officer shall determine that the prospective contractor is a responsible contractor and is capable of providing all necessary financial, personnel, and other resources in performance of the contract.

(b) Department of Energy (DOE) contracts with entities that have been created solely for the purpose of performing a specific management and operating contract. Generally, such newly created entities will have very limited financial and other resources. In such instances, when making the determination of responsibility required under this section, the contracting officer may evaluate the financial resources of other entities only to the extent that those entities are legally bound, jointly and severally if more than one, by means of a performance guarantee or other equivalent enforceable commitment to supply the necessary resources to the prospective contractor and to assume all contractual obligations of the prospective contractor. A performance guarantee should be the means used unless an equivalent degree of commitment can be obtained by an alternative means.

(c) The guaranteeing corporate entity(ies) must be found to have sufficient resources in order to satisfy its guarantee.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, July 22, 2009]

970.0970–2 Solicitation provision.

The contracting officer shall insert the provision at 970.5209–1, Requirement for Guarantee of Performance, in solicitations when the awardee will be required to be organized solely for performance of the requirement.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, July 22, 2009]

Subpart 970.11—Describing Agency Needs

970.1100 Policy.

970.1100–1 Performance-based contracting.

(a) It is the policy of the Department of Energy (DOE) to use, to the maximum extent practicable, performance-

based contracting methods in its management and operating contracts. The Office of Federal Procurement Policy's Seven Steps to Performance-Based Acquisition located at Web site *http://www.acquisition.gov/comp/seven_steps/home.html* provides guidance concerning the development and use of performance-based contracting concepts and methodologies that may be generally applied to management and operating contracts. Performance-based contracts: Describe performance requirements in terms of results rather than methods of accomplishing the work; use measurable (i.e., terms of quality, timeliness, quantity) performance standards and objectives and quality assurance surveillance plans; provide performance incentives (positive or negative) where appropriate; and specify procedures for award or incentive fee reduction when work activities are not performed or do not meet contract requirements.

(b) The use of performance-based statements of work, where feasible, is the preferred method for establishing work requirements. Such statements of work and other documents used to establish work requirements (such as work authorization directives) should describe performance requirements and expectations in terms of outcome, results, or final work products, as opposed to methods, processes, or design.

(c) Contract performance requirements and expectations should be consistent with the Department's strategic planning goals and objectives, as made applicable to the site or facility through Departmental programmatic and financial planning processes. Measurable performance criteria, objective measures, and where appropriate, performance incentives, shall be structured to correspond to the performance requirements established in the statement of work and other documents used to establish work requirements.

(d) Quality assurance surveillance plans shall be developed to facilitate the assessment of contractor performance and ensure the appropriateness of any award or incentive fee payment. Such plans shall be tailored to the contract performance objectives, criteria, and measures, and shall, to the maximum extent practicable, focus on the level of performance required by the performance objectives rather than the methodology used by the contractor to achieve that level of performance.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, July 22, 2009]

970.1100–2 Additional considerations.

(a) While it is not feasible to set forth standard language which would apply to every contract situation, language must be designed for inclusion in a management and operating contract to describe clearly the work being undertaken; the controls, as appropriate, to be exercised by DOE over the performance of that work; and the relationship contemplated between the parties.

(b) The language shall also include the following with respect to subcontracting performance of the work described pursuant to paragraph (a) of this section: ''The contractor shall, when directed by DOE and may, but only when authorized by DOE, enter into subcontracts for the performance of any part of the work under this clause.''

(c) The provisions required in paragraphs (a) and (b) of this section shall be set forth in the statement of work of the contract.

970.1103–4 Contract clause.

Insert the clause at 48 CFR 52.211–5, Material Requirements, in solicitations and contracts.

970.1170 Work authorization.

970.1170–1 Policy.

Each contract for the management and operation of a DOE site or facility, and other contracts designated by the DOE or the National Nuclear Security Administration (NNSA) Senior Procurement Executive, must contain a scope of work section that describes, in general terms, work planned and/or required to be performed. Work to be performed under the contract shall be assigned through the use of a work authorization to control individual work activities performed within the scope of work. Work authorizations must be

issued prior to the commencement of the work and incurrence of any costs.

[72 FR 29434, May 29, 2007, as amended at 74 FR 36371, July 22, 2009]

970.1170–2 Contract provision.

The Contracting Officer shall insert the clause at 970.5211–1, Work authorization, in each solicitation and contract for the management and operation of a DOE site or facility and in other contracts designated by the DOE or NNSA Senior Procurement Executive.

[72 FR 49434, May 29, 2007, as amended at 74 FR 36371, 36378, July 22, 2009]

Subpart 970.15—Contracting by Negotiation

970.1504 Contract pricing.

970.1504–1 Price analysis.

970.1504–1–1 Fees for management and operating contracts.

This subsection sets forth the Department's policies on fees for management and operating contracts and may be applied to other contracts as determined by the Senior Procurement Executive, or designee.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36378, July 22, 2009]

970.1504–1–2 Fee policy.

(a) DOE management and operating contractors may be paid a fee in accordance with the requirements of this subsection.

(b) There are three basic principles underlying the Department's fee policy:

(1) The amount of available fee should reflect the financial risk assumed by the contractor.

(2) It is the policy of the Department, when work elements cannot be fixed price, incentive fees (including award fees) tied to objective measures should be used to the maximum extent appropriate.

(3) When work elements cannot be fixed price and award fees are employed, they should be tied to either objective or subjective measures. Each measure should, to the maximum extent appropriate, be directly tied to a specific portion of the fee pool.

(c) Fee objectives and amounts are to be determined for each contract. Standard fees or across-the-board fee agreements will not be used or made. Due to the nature of funding management and operating contracts, it is anticipated that fee shall be established in accordance with the annual funding cycle; however, with the prior approval of the Senior Procurement Executive, or designee, a longer period may be used where necessary to incentivize performance objectives that span funding cycles or to optimize cost reduction efforts.

(d) Annual fee amounts shall be established in accordance with this subsection. Annual amounts shall not exceed maximum amounts derived from the appropriate fee schedule (and Classification Factor, if applicable) unless approved in advance by the Senior Procurement Executive, or designee. In no event shall any fee exceed statutory limits imposed by 41 U.S.C. 254(b).

(e)(1) Contracting Officers shall include negative fee incentives in contracts when appropriate. A negative fee incentive is one in which the contractor will not be paid the full target fee amount when the actual performance level falls below the target level established in the contract.

(2) Negative fee incentives may only be used when—

(i) A target level of performance can be established, which the contractor can reasonably be expected to reach;

(ii) The value of the negative incentive is commensurate with the lower level of performance and any additional administrative costs;

(iii) Factors likely to prevent attainment of the target level of performance are clearly within the control of the contractor; and

(iv) The contract indicates clearly a level below which performance is not acceptable.

(f) Prior to the issuance of a competitive solicitation or the initiation of negotiations for an extension of an existing contract, the HCA shall coordinate the maximum available fee, as allowed by 970.1504–1–1, and the fee amount targeted for negotiation, if less, with the

Senior Procurement Executive, or designee. Solicitations shall identify maximum available fee under the contract and may invite offerors to propose fee less than the maximum available.

(g) When a contract subject to this subsection requires a contractor to use its own facilities or equipment, or other resources to make its own cost investment for contract performance, (e.g., when there is no letter-of-credit financing) consideration may be given, subject to approval by the Senior Procurement Executive, or designee, to increasing the total available fee amount above that otherwise provided by this subsection.

(h) Multiple fee arrangements should be used in accordance with 970.1504–1–4.

(i)(1) In addition to other performance requirements specified in the contract, DOE management and operating contractors and other contractors designated by the Senior Procurement Executive, or designee, are subject to performance requirements relating to: environment, safety, and health (ES&H), including worker safety and health (WS&H); and safeguarding of Restricted Data and other classified information. Performance requirements relating to ES&H will be set forth in the contract's ES&H terms and conditions, including a DOE approved Integrated Safety Management System (ISMS), or similar document. As applicable, performance requirements relating to the safeguarding of Restricted Data and other classified information will be set forth in the clauses of the contract entitled ''Security'' and ''Laws, Regulations, and DOE Directives,'' as well as in other terms and conditions that prescribe requirements for the safeguarding of Restricted Data and other classified information.

(2) If the contractor does not meet the performance requirements of the contract relating to ES&H or to the safeguarding of Restricted Data and other classified information, otherwise earned fee, fixed fee, profit, or share of cost savings may be unilaterally reduced by the contracting officer in accordance with the clause entitled ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts.''

(3) The clause entitled ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts,'' provides for reductions of earned fee, fixed fee, profit, or share of cost savings under the contract depending upon the severity of the contractor's performance failure relating to ES&H requirements and, if applicable, relating to the safeguarding of Restricted Data and other classified information. When reviewing performance failures that would otherwise warrant a potential reduction of earned fee, fixed fee, profit, or share of cost savings, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clause. Some of the mitigating factors that must be considered are included in the clause.

(4) The contracting officer must obtain the concurrence of the cognizant Program Secretarial Officer

(i) Prior to effecting any reduction of fee or profit in accordance with the terms and conditions of the clause entitled, ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts;'' and

(ii) For determinations that no reduction of fee or profit is warranted for a particular performance failure(s) that would otherwise be subject to a reduction.

[65 FR 81009, Dec. 22, 2000, as amended at 68 FR 68781, Dec. 10, 2003; 74 FR 36371, 36378, July 22, 2009]

970.1504–1–3 Special considerations: Laboratory management and operation.

(a) For the management and operation of a laboratory, the contracting officer shall consider whether any fee is appropriate. Considerations should include:

(1) The nature and extent of financial or other liability or risk assumed or to be assumed under the contract;

(2) The proportion of retained earnings (as established under generally accepted accounting methods) that are utilized to fund the performance of work related to the DOE contracted effort;

(3) Facilities capital or capital equipment acquisition plans;

(4) Other funding needs, to include contingency funding, working capital funding, and provision for funding unreimbursed costs deemed ordinary and necessary;

(5) The utility of fee as a performance incentive; and

(6) The need for fee to attract qualified contractors, organizations, and institutions.

(b) In the event fee is considered appropriate, the contracting officer shall determine the amount of fee in accordance with this subsection.

(1) Costs incurred in the operation of a laboratory that are allowable and allocable under the cost principles (i.e., commercial using 48 CFR 31.2, nonprofit using OMB Circular A–122, or university-affiliated using OMB Circular A–21), regulations (including subpart 970.31), or statutes applicable to the operating contractor should be classified as direct or indirect (overhead or G&A) charges to the contract and not included as proposed fee. Exceptions must be approved by the Senior Procurement Executive, or designee.

(2) Except as specified in 970.1504–1–3(c)(3), the maximum total amount of fee shall be calculated in accordance with 970.1504–1–5 or 970.1504–1–9, as appropriate. The total amount of fee under any laboratory management and operating contract or other designated contract shall not exceed, and may be significantly less than, the result of that calculation. In determining the total amount of fee, the contracting officer shall consider the evaluation of the factors in paragraph (a) of this subsection as well as any benefits the laboratory operator will receive due to its tax status.

(c) In the event fee is considered appropriate, the contracting officer shall establish the type of fee arrangement in accordance with this subsection.

(1) The amount of fee may be established as total available fee with a base fee portion and a performance fee portion. Base fee, if any, shall be an amount in recognition of the risk of financial liability assumed by the contractor and shall not exceed the cost risk associated with those liabilities or the amount calculated in accordance with 970.1504–1–5, whichever is less. The total available fee, excepting any base fee, shall normally be associated with performance at or above the target level of performance as defined by the contract. If performance in either of the two general work categories appropriate for laboratories (science/technology and support) is rated at less than the target level of performance, the total amount of the available fee shall be subject to downward adjustment. Such downward adjustment shall be subject to the terms of the clause at 970.5215–3, Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts, if contained in the contract.

(2) The amount of fee may be established as a fixed fee in recognition of the risk of financial liability to be assumed by the contractor, with such fixed fee amount not exceeding the cost risk associated with the liabilities assumed or the amount of fee calculated in accordance with 970.1504–1–5, whichever is less.

(3) If the fixed fee or total available fee exceeds 75% of the fee that would be calculated per 970.1504–1–5 or 970.1504–1–9; or if a fee arrangement other than one of those set forth in paragraphs (c)(1) or (2) of this subsection is considered appropriate, the approval of the Senior Procurement Executive, or designee, shall be obtained prior to its use.

(4) Fee, if any, as well as the type of fee arrangement, will normally be established for the life of the contract. It will be established at time of award, as part of the extend/compete decision, at the time of option exercise, or at such other time as the parties can mutually reach agreement, e.g., negotiations. Such agreement shall require the approval of the Senior Procurement Executive, or designee.

(5) Fee established for longer than one year shall be subject to adjustment in the event of a significant change (greater than ±10% or a lessor amount if appropriate) to the budget or work scope.

(6) Retained earnings (reserves) shall be identified and a plan for their use and disposition developed.

(7) The use of retained earnings as a result of performance of laboratory

management and operation may be restricted if the operator is an educational institution.

[65 FR 81009, Dec. 22, 2000, as amended at 68 FR 68781, Dec. 10, 2003; 74 FR 36371, 36378, July 22, 2009]

970.1504–1–4 Types of contracts and fee arrangements.

(a) Contract types and fee arrangements suitable for management and operating contracts may include cost, cost-plus-fixed-fee, cost-plus-award-fee, cost-plus-incentive-fee, fixed-price incentive, firm-fixed-price or any combination thereof (see 48 CFR subpart 16.1). In accordance with 48 CFR 970.1504–1–2(b)(1), the fee arrangement chosen for each work element should reflect the financial risk for project failure that contractors are willing to accept. Contracting officials shall structure each contract and the elements of the work in such a manner that the risk is manageable and, therefore, assumable by the contractor.

(b) Consistent with the concept of a performance-based management contract, those contract types which incentivize performance and cost control are preferred over a cost-plus-fixed-fee arrangement. Accordingly, a cost-plus-fixed-fee contract in instances other than those set forth in 970.1504–1–3(c)(2) may only be used when approved in advance by the Senior Procurement Executive, or designee.

(c) A cost-plus-award-fee contract is generally the appropriate contract type for a management and operating contract.

(1) Where work cannot be adequately defined to the point that a fixed price contract is acceptable, the attainment of acquisition objectives generally will be enhanced by using a cost-plus-award-fee contract or other incentive fee arrangement to effectively motivate the contractor to superior performance and to provide the Department with flexibility to evaluate actual performance and the conditions under which it was achieved.

(2) The construct of fee for a cost-plus-award-fee management and operating contract is that total available fee will equal a base fee amount and a performance fee amount. The total available fee amount including the performance fee amount the contractor may earn, in whole or in part during performance, shall be established annually (or as otherwise agreed to by the parties and approved by the Senior Procurement Executive, or designee), in an amount sufficient to motivate performance excellence.

(3) However, consistent with concepts of performance-based contracting, it is Departmental policy to place fee at risk based on performance. Accordingly, a base fee amount will be available only when approved in advance by the Senior Procurement Executive, or designee, except as permitted in 970.1504–1–3(c)(1). Any base fee amount shall be fixed, expressed as a percent of the total available fee at inception of the contract, and shall not exceed that percent during the life of the contract.

(4) The performance fee amount may consist of an objective fee component and a subjective fee component. Objective performance measures, when appropriately applied, provide greater incentives for superior performance than do subjective performance measures and should be used to the maximum extent appropriate. Subjective measures should be used when it is not feasible to devise effective predetermined objective measures applicable to cost, technical performance, or schedule for particular work elements.

(d) Consistent with performance-based contracting concepts, performance objectives and measures related to performance fee should be as clearly defined as possible and, where feasible, expressed in terms of desired performance results or outcomes. Specific measures for determining performance achievement should be used. The contract should identify the amount and allocation of fee to each performance result or outcome.

(e) Because the nature and complexity of the work performed under a management and operating contract may be varied, opportunities may exist to utilize multiple contract types and fee arrangements. Consistent with paragraph (a) of this subsection and 48 CFR subpart 16.1, the contracting officer should apply that contract type or fee arrangement most appropriate to

the work component. However, multiple contract types or fee arrangements—

(1) Must conform to the requirements of 48 CFR part 915 and 48 CFR parts 15 and 16, and

(2) Where appropriate to the type, must be supported by—

(i) Negotiated costs subject to the requirements of the Truth in Negotiations Act,

(ii) A pre-negotiation memorandum, and

(iii) A plan describing how each contract type or fee arrangement will be administered.

(f) Cost reduction incentives are addressed in the clause at 970.5215–4, Cost Reduction. This clause provides for incentives for quantifiable cost reductions associated with contractor proposed changes to a design, process, or method that has an established cost, technical, and schedule baseline, is defined, and is subject to a formal control procedure. The clause is to be included in management and operating contracts as appropriate. Proposed changes must be: Initiated by the contractor, innovative, applied to a specific project or program, and not otherwise included in an incentive under the contract. Such cost reduction incentives do not constitute fee and are not subject to statutory or regulatory fee limitations; however, they are subject to all appropriate requirements set forth in this subpart.

(g) Operations and field offices shall take the lead in developing and implementing the most appropriate pricing arrangement or cost reduction incentive for the requirements. Pricing arrangements which provide incentives for performance and cost control are preferred over those that do not. The operations and field offices are to ensure that the necessary resources and infrastructure exist within both the contractor's and government's organizations to prepare, evaluate, and administer the pricing arrangement or cost reduction incentive prior to its implementation.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, 36378, July 22, 2009; 75 FR 68220, Nov. 5, 2010]

970.1504–1–5 General considerations and techniques for determining fixed fees.

(a) The Department's fee policy recognizes that fee is remuneration to contractors for the entrepreneurial function of organizing and managing resources, the use of their resources (including capital resources), and, as appropriate, their assumption of the risk that some incurred costs (operating and capital) may not be reimbursed.

(b) Use of a purely cost-based structured approach for determining fee objectives and amounts for DOE management and operating contracts is inappropriate considering the limited level of contractor cost, capital goods, and operating capital outlays for performance of such contracts. Instead of being solely cost-based, the desirable approach calls for a structure that allows evaluation of the following eight significant factors, as outlined in order of importance, and the assignment of appropriate fee values (subject to the limitations on fixed fee in 970.1504–1–6)—

(1) The presence or absence of financial risk, including the type and terms of the contract;

(2) The relative difficulty of work, including specific performance objectives, environment, safety and health concerns, and the technical and administrative knowledge, and skill necessary for work accomplishment and experience;

(3) Management risk relating to performance, including—

(i) Composite risk and complexity of principal work tasks required to do the job;

(ii) Labor intensity of the job;

(iii) Special control problems; and

(iv) Advance planning, forecasting and other such requirements;

(4) Degree and amount of contract work required to be performed by and with the contractor's own resources, as compared to the nature and degree of subcontracting and the relative complexity of subcontracted efforts, subcontractor management and integration;

(5) Size and operation (number of locations, plants, differing operations, etc.);

(6) Influence of alternative investment opportunities available to the contractor (i.e., the extent to which undertaking a task for the Government displaces a contractor's opportunity to make a profit with the same staff and equipment in some other field of activity);

(7) Benefits which may accrue to the contractor from gaining experience and knowledge of how to do something, from establishing or enhancing a reputation, or from having the opportunity to hold or expand a staff whose loyalties are primarily to the contractor; and

(8) Other special considerations, including support of Government programs such as those relating to small and minority business subcontracting, energy conservation, etc.

(c) The total fee objective for a particular annual fixed fee negotiation is established by evaluating the factors in this subsection, assigning fee values to them, and totaling the resulting amounts (subject to limitations on total fixed fee in 48 CFR 970.1504–1–6).

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, July 22, 2009]

970.1504–1–6 Calculating fixed fee.

(a) In recognition of the complexities of the fee determination process, and to assist in promoting a reasonable degree of consistency and uniformity in its application, the following fee schedules set forth the maximum amounts of fee that contracting activities are allowed to award for a particular fixed fee transaction calculated annually.

(b) Fee schedules representing the maximum allowable annual fixed fee available under management and operating contracts have been established for the following management and operating contract efforts—

(1) Production;

(2) Research and Development; and

(3) Environmental Management.

(c) The schedules are:

PRODUCTION EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
Up to $1 Million	.....	.....	7.66
1,000,000	$76,580	7.66	6.78
3,000,000	212,236	7.07	6.07
5,000,000	333,670	6.67	4.90

PRODUCTION EFFORTS—Continued

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
10,000,000	578,726	5.79	4.24
15,000,000	790,962	5.27	3.71
25,000,000	1,161,828	4.65	3.35
40,000,000	1,663,974	4.16	2.92
60,000,000	2,247,076	3.75	2.57
80,000,000	2,761,256	3.45	2.34
100,000,000	3,229,488	3.23	1.45
150,000,000	3,952,622	2.64	1.12
200,000,000	4,510,562	2.26	0.61
300,000,000	5,117,732	1.71	0.53
400,000,000	5,647,228	1.41	0.45
500,000,000	6,097,956	1.22	.....
Over $500 Million	6,097,956	.....	0.45

RESEARCH AND DEVELOPMENT EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
Up to $1 Million	.....	.....	8.42
1,000,000	84,238	8.42	7.00
3,000,000	224,270	7.48	6.84
5,000,000	361,020	7.22	6.21
10,000,000	671,716	6.72	5.71
15,000,000	957,250	6.38	4.85
25,000,000	1,441,892	5.77	4.22
40,000,000	2,075,318	5.19	3.69
60,000,000	2,813,768	4.69	3.27
80,000,000	3,467,980	4.33	2.69
100,000,000	4,006,228	4.01	1.69
150,000,000	4,850,796	3.23	1.14
200,000,000	5,420,770	2.71	0.66
300,000,000	6,083,734	2.03	0.58
400,000,000	6,667,930	1.67	0.50
500,000,000	7,172,264	1.43	.....
Over $500 Million	7,172,264	.....	0.50

ENVIRONMENTAL MANAGEMENT EFFORTS

Fee base (dollars)	Fee (dollars)	Fee (percent)	Incr. (percent)
Up to $1 Million	.....	.....	7.33
$1,000,000	73,298	7.33	6.49
3,000,000	203,120	6.77	5.95
5,000,000	322,118	6.44	5.40
10,000,000	592,348	5.92	4.83
15,000,000	833,654	5.56	4.03
25,000,000	1,236,340	4.95	3.44
40,000,000	1,752,960	4.38	3.29
60,000,000	2,411,890	4.02	3.10
80,000,000	3,032,844	3.79	2.49
100,000,000	3,530,679	3.53	1.90
150,000,000	4,479,366	2.99	1.48
200,000,000	5,219,924	2.61	1.12
300,000,000	6,337,250	2.11	0.88
400,000,000	7,219,046	1.80	0.75
500,000,000	7,972,396	1.59	0.58
750,000,000	9,423,463	1.26	0.55
1,000,000,000	10,786,788	1.08	.....
Over $1.0 billion	10,786,788	.....	0.55

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, July 22, 2009]

970.1504–1–7 Fee base.

(a) The fee base is an estimate of necessary allowable costs, with some exclusions. It is used in the fee schedules to determine the maximum annual fee for a fixed fee contract. That portion of the fee base that represents the cost of the Production, Research and Development, or Environmental Management work to be performed, shall be exclusive of the cost of source and special nuclear materials; estimated costs of land, buildings and facilities whether to be leased, purchased or constructed; depreciation of Government facilities; and any estimate of effort for which a separate fee is to be negotiated.

(b) Such portion of the fee base, in addition to the adjustments in paragraph (a) of this subsection, shall exclude—

(1) Any part of the estimated cost of capital equipment (other than special equipment) which the contractor procures by subcontract or other similar costs which is of such magnitude or nature as to distort the technical and management effort actually required of the contractor;

(2) At least 20% of the estimated cost or price of subcontracts and other major contractor procurements;

(3) Up to 100% of the estimated cost or price of subcontracts and other major contractor procurements if they are of a magnitude or nature as to distort the technical and management effort actually required of the contractor;

(4) Special equipment as defined in 970.1504–1–8;

(5) Estimated cost of Government-furnished property, services and equipment;

(6) All estimates of costs not directly incurred by or reimbursed to the operating contractor;

(7) Estimates of home office or corporate general and administrative expenses that shall be reimbursed through the contract;

(8) Estimates of any independent research and development cost or bid and proposal expenses that may be approved under the contract;

(9) Any cost of work funded with uncosted balances previously included in a fee base of this or any other contract performed by the contractor;

(10) Cost of rework attributable to the contractor; and

(11) State taxes.

(c) In calculating the annual fee amounts associated with the Production, Research and Development, or Environmental Management work to be performed, the fee base is to be allocated to the category reflecting the work to be performed and the appropriate fee schedule utilized.

(d) The portion of the fee base associated with the Production, Research and Development, or Environmental Management work to be performed and the associated schedules in this part are not intended to reflect the portion of the fee base or related compensation for unusual architect-engineer, construction services, or special equipment provided by the management and operating contractor. Architect-engineer and construction services are normally covered by special agreements based on the policies applying to architect-engineer or construction contracts. Fees paid for such services shall be calculated using the provisions of 915.404–4–71–5 relating to architect-engineer or construction fees and shall be in addition to the operating fees calculated for the Production, Research and Development, or Environmental Management work to be performed. Special equipment purchases shall be addressed in accordance with the provisions of 970.1504–1–8 relating to special equipment.

(e) No schedule set forth in 915.404–4–71–5 or 970.1504–1–6 shall be used more than once in the determination of the fee amount for an annual period, unless prior approval of the Senior Procurement Executive, or designee, is obtained.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, 36378, July 22, 2009]

970.1504–1–8 Special equipment purchases.

(a) Special equipment is sometimes procured in conjunction with management and operating contracts. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the equipment which shall not exceed the maximum fee allowable as established using the schedule in 915.404–4–71–5(h).

(b) In determining appropriate fees, factors such as complexity of equipment, ratio of procurement transactions to volume of equipment to be purchased and completeness of services should be considered. Where possible, the reasonableness of the fees should be checked by their relationship to actual costs of comparable procurement services.

(c) For purposes of this subsection, special equipment is equipment for which the purchase price is of such a magnitude compared to the cost of installation as to distort the amount of technical direction and management effort required of the contractor. Special equipment is of a nature that requires less management attention. When a contractor procures special equipment, the DOE negotiating official shall determine separate fees for the equipment using the schedule in 915.404–4–71–5(h). The determination of specific items of equipment in this category requires application of judgment and careful study of the circumstances involved in each project. This category of equipment would generally include:

(1) Major items of prefabricated process or research equipment; and

(2) Major items of preassembled equipment such as packaged boilers, generators, machine tools, and large electrical equipment. In some cases, it would also include special apparatus or devices such as reactor vessels and reactor charging machines.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, July 22, 2009]

970.1504–1–9 Special considerations: Cost-plus-award-fee.

(a) When a management and operating contract is to be awarded on a cost-plus-award-fee basis, several special considerations are appropriate.

(b) All annual performance incentives identified under these contracts are funded from the annual total available fee, which consists of a base fee amount (which may be zero) and a performance fee amount (which typically will consist of an incentive fee component for objective performance requirements, an award fee component for subjective performance requirements, or both).

(c) The annual total available fee for the contract shall equal the product of the fee(s) that would have been calculated for an annual fixed fee contract and the classification factor(s) most appropriate for the facility/task. If more than one fee schedule is applicable to the contract, the annual total available fee shall be the sum of the available fees derived proportionately from each fee schedule; consideration of significant factors applicable to each fee schedule; and application of a Classification Factor(s) most appropriate for the work.

(d) Classification Factors applied to each Facility/Task Category are:

Facility/task category	Classification factor
A	3.0
B	2.5
C	2.0
D	1.25

(e) The contracting officer shall select the Facility/Task Category after considering the following:

(1) *Facility/Task Category A.* The main focus of effort performed is related to—

(i) The manufacture, assembly, retrieval, disassembly, or disposal of nuclear weapons with explosive potential;

(ii) The physical cleanup, processing, handling, or storage of nuclear radioactive or toxic chemicals with consideration given to the degree the nature of the work advances state of the art technologies in cleanup, processing or storage operations and/or the inherent difficulty or risk of the work is significantly demanding when compared to similar industrial/DOE settings (i.e., nuclear energy processing, industrial environmental cleanup);

(iii) Construction of facilities such as nuclear reactors, atomic particle accelerators, or complex laboratories or industrial units especially designed for handling radioactive materials;

(iv) Research and development directly supporting paragraphs (e)(1)(i), (ii), or (iii) of this subsection and not conducted in a laboratory, or

(v) As designated by the Senior Procurement Executive, or designee. (Classification factor 3.0)

(2) *Facility/Task Category B.* The main focus of effort performed is related to—

(i) The safeguarding and maintenance of nuclear weapons or nuclear material;

(ii) The manufacture or assembly of nuclear components;

(iii) The physical cleanup, processing, handling, or storage of nuclear radioactive or toxic chemicals, or other substances which pose a significant threat to the environment or the health and safety of workers or the public, if the nature of the work uses state of the art technologies or applications in such operations and/or the inherent difficulty or risk of the work is more demanding than that found in similar industrial/DOE settings (i.e., nuclear energy, chemical or petroleum processing, industrial environmental cleanup);

(iv) The detailed planning necessary for the assembly/disassembly of nuclear weapons/components;

(v) Construction of facilities involving operations requiring a high degree of design layout or process control;

(vi) Research and development directly supporting paragraphs (e)(2)(i), (ii), (iii), (iv) or (v) of this subsection and not conducted in a laboratory; or

(vii) As designated by the Senior Procurement Executive, or designee. (Classification factor 2.5)

(3) *Facility/Task Category C.* The main focus of effort performed is related to—

(i) The physical cleanup, processing, or storage of nuclear radioactive or toxic chemicals if the nature of the work uses routine technologies in cleanup, processing or storage operations and/or the inherent difficulty or risk of the work is similar to that found in similar industrial/DOE settings (i.e., nuclear energy, chemical processing, industrial environmental cleanup);

(ii) Plant and facility maintenance;

(iii) Plant and facility security (other than the safeguarding of nuclear weapons and material);

(iv) Construction of facilities involving operations requiring normal processes and operations; general or administrative service buildings; or routine infrastructure requirements;

(v) Research and development directly supporting paragraphs (e)(3)(i), (ii), (iii) or (iv) of this subsection and not conducted in a laboratory; or

(vi) As designated by the Senior Procurement Executive, or designee. (Classification factor 2.0)

(4) *Facility/Task Category D.* The main focus of the effort performed is research and development conducted at a laboratory. (Classification factor 1.25)

(f) Where the Senior Procurement Executive, or designee, has approved a base fee, the Classification Factors shall be reduced, as approved by the Senior Procurement Executive, or designee.

(g) Any risks which are indemnified by the Government (for example, by the Price-Anderson Act) will not be considered as risk to the contractor.

(h) All management and operating contracts awarded on a cost-plus-award-fee basis shall set forth in the contract, or the Performance Evaluation and Measurement Plan(s) required by the contract clause at 970.5215–1, Total Available Fee: Base Fee Amount and Performance Fee Amount, a site specific method of rating the contractor's performance of the contract requirements and a method of fee determination tied to the method of rating.

(i) Prior approval of the Senior Procurement Executive, or designee, is required for an annual total available fee amount exceeding the guidelines in paragraph (c) of this subsection.

(j) DOE Operations/Field Office Managers must ensure that all important areas of contract performance are specified in the contract or Performance Evaluation and Measurement Plan(s), even if such areas are not assigned specific weights or percentages of available fee.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36371, 36378, July 22, 2009]

970.1504–1–10 Special considerations: Fee limitations.

In situations where the objective performance incentives are of unusual difficulty or where the successful completion of the performance incentives would provide extraordinary value to the Government, fees in excess of those allowed under 970.1504–1–5 and 970.1504–1–9 may be allowed with the approval of the Senior Procurement Executive, or designee. Requests to allow fees in excess of those provided under other

provisions of this fee policy must be accompanied by a written justification with detailed supporting rationale as to how the specific circumstances satisfy the two criteria listed in this subsection.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36372, 36378, July 22, 2009]

970.1504–1–11 Documentation.

The contracting officer shall tailor the documentation of the determination of fee prenegotiation objective based on 48 CFR 15.406–1, Prenegotiation objectives, and the determination of the negotiated fee in accordance with 48 CFR 15.406–3, Documenting the negotiation. The contracting officer shall include as part of the documentation: the rationale for the allocation of cost and the assignment of Facility/Task Categories; a discussion of the calculations described in 970.1504–1–5; and discussion of any other relevant provision of this subsection.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36372, July 22, 2009]

970.1504–2 Price negotiation.

(a) Management and operating contract prices (fee) and DOE obligations to support contract performance shall be governed by:

(1) The level of activity authorized and the amount of funds appropriated for DOE approved programs by specific program legislation;

(2) Congressional budget and reporting limitations;

(3) The amount of funds apportioned to DOE;

(4) The amount of obligation authority allotted to program officials and Approved Funding Program limitations; and

(5) The amount of funds actually available to the DOE operating activity as determined in accordance with applicable financial regulations and directives.

(b) Funds shall be obligated and made available by contract provision or modification after the funds become available for obligation for payment to support performance of DOE approved projects, tasks, work authorizations, or services.

(c) Contractor expenditures shall be limited to the overall amount of funds available and obligated on the contract. As prescribed at 970.3270(b), the clause at 970.5232–4, Obligation of Funds, is used for this purpose.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36372, July 22, 2009]

970.1504–3 Documentation.

970.1504–3–1 Cost or pricing data.

(a) The certification requirements of 48 CFR 15.406–2 are not applied to DOE cost-reimbursement management and operating contracts.

(b) The contracting officer shall ensure that management and operating contractors and their subcontractors obtain cost or pricing data prior to the award of a negotiated subcontract or modification of a subcontract in accordance with 48 CFR 15.406–2, and incorporate appropriate contract provisions similar to those set forth at 48 CFR 52.215–10 and 48 CFR 52.215–11 that provide for the reduction of a negotiated subcontract price by any significant amount that the subcontract price was increased because of the submission of defective cost or pricing data by a subcontractor at any tier.

(c) The clauses at 48 CFR 52.215–12 and 48 CFR 52.215–13 shall be included in management and operating contracts.

970.1504–4 Special cost or pricing areas.

970.1504–4–1—970.1504–4–3 [Reserved]

970.1504–5 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the clause at 970.5215–1, Total Available Fee: Base Fee Amount and Performance Fee Amount, in management and operating contracts, and other contracts determined by the Senior Procurement Executive, or designee, that include cost-plus-award-fee arrangements.

(1) The contracting officer shall include the clause with its Alternate I when the award fee cycle consists of two or more evaluation periods.

(2) The contracting officer shall include the clause with its Alternate II

when the award fee cycle consists of one evaluation period.

(3) The contracting officer shall include the clause with its Alternate III when the DOE Operations/Field Office Manager, or designee, requires the contractor to submit a self-assessment.

(4) The contracting officer shall include the clause with its Alternate IV when the DOE Operations/Field Office Manager, or designee, permits the contractor to submit a self-assessment at the contractor's option.

(b)(1) The contracting officer shall insert the clause at 970.5215–3, Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts, in all DOE management and operating contracts and other contracts determined by the Senior Procurement Executive, or designee.

(2) The contracting officer shall include the clause with its Alternate I in contracts that do not contain the clause at 952.204–2, Security.

(3) The contracting officer shall include the clause with its Alternate II in contracts that are awarded on a cost-plus-award-fee basis. The contracting officer should consider including the clause with its Alternate II in contracts that are awarded on a multiple fee basis if the cost-plus-award-fee portion of the contract is significant.

(c) The contracting officer shall insert the clause at 970.5215–4, Cost Reduction, in management and operating contracts, and other contracts determined by the Senior Procurement Executive, or designee, if cost savings programs are contemplated.

(d) The Contracting officer shall insert the provision at 970.5215–5, Limitation on Fee, in solicitations for management and operating contracts, and other contracts determined by the Senior Procurement Executive, or designee.

[65 FR 81009, Dec. 22, 2000, as amended at 69 FR 68781, Dec. 10, 2003; 71 FR 16243, Mar. 31, 2006; 74 FR 36372, 36378, July 22, 2009]

Subpart 970.17—Special Contracting Methods

970.1706 Management and operating contracts.

970.1706–1 Award, renewal, and extension.

(a) *Contract term.* Effective work performance under a management and operating contract is facilitated by the use of a relatively long contract term of up to ten (10) years. Accordingly, management and operating contracts shall provide for a basic contract term not to exceed five (5) years and may include an option(s) to extend the term for additional periods; provided, that no one option period exceeds five (5) years in duration and the total term of the contract, including any options exercised, does not exceed ten (10) years. The specific term of the base period and of any options periods shall be determined at the time of the authorization to compete or extend the contract. The term ''option'' as used in this subpart means a unilateral right in the contract by which the Government can extend the term of the contract. Accordingly, except as may be provided for through the inclusion of an option(s) in the contract to extend the term, any extension to continue the contract with the incumbent contractor beyond its term shall only occur when such extension can be justified under one of the statutory authorities identified in 48 CFR 6.302 and when authorized by the Head of the Agency.

(b) *Exercise of option.* As part of the review required by 48 CFR 17.605(b), the contracting officer shall assess whether competing the contract will produce a more advantageous offer than exercising the option. The incumbent contractor's past performance under the contract, the extent to which performance-based management contract provisions are present, or can be negotiated into, the contract, and the impact of a change in a contractor on the Department's discharge of its programs are considerations that shall be addressed in the contracting officer's decision that the exercise of the option is in the Government's best interest. The contracting officer's decision shall be approved by the Senior Procurement

Executive and the cognizant Assistant Secretary(s).

(c) *Conditional Authorization of Non-competitive Extension Made Pursuant to Authority Under CICA.* Authorization to extend a management and operating contract by the Head of the Agency shall be considered conditional upon the successful negotiation of the contract to be extended in accordance with the Department's negotiation objectives. The Head of the Contracting Activity shall advise the Senior Procurement Executive no later than 6 months after receipt of the conditional authorization as to whether the Department's objectives will be met and, if not, the contracting activity's plans for competing the requirement.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36378, July 22, 2009]

970.1706–2 Contract clause.

The contracting officer shall insert the clause at 48 CFR 52.217–9, Option to Extend the Term of the Contract, in all management and operating contracts when the inclusion of an option is appropriate.

970.1707 Strategic Partnership Projects.

970.1707–1 Scope.

Pursuant to Section 33 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2053), DOE is authorized to make its facilities available to other Federal and non-Federal entities (sponsors) for the conduct of certain research and development and training activities. Pursuant to the Economy Act of 1932, as amended (31 U.S.C. 1535), or other applicable authority, other Federal entities may request DOE to conduct work. DOE has implemented these and other statutory authorities and requirements in its Strategic Partnership Projects Program. DOE's internal procedures governing the Strategic Partnership Projects Program are described in DOE Order 481.1C, DOE Order 481.1C, Strategic Partnership Projects (Formerly Known as Work for Others (Non-Department of Energy Funded Work)), or successor version.

[69 FR 75003, Dec. 15, 2004, as amended at 80 FR 15519, Mar. 24, 2015]

970.1707–2 Purpose.

The purpose of DOE's Strategic Partnership Projects Program is to—

(a) Provide access for non-DOE entities to highly specialized or unique DOE facilities, services, or technical expertise, when private facilities are inadequate;

(b) Increase research and development interactions among DOE's management and operating contractors and industry in order to transfer DOE technologies to industry for further development or commercialization;

(c) Maintain facility core competencies;

(d) Enhance the science and technology capabilities at DOE facilities; and

(e) Provide assistance to other Federal agencies and non-Federal entities in accomplishing goals that may otherwise be unattainable and to avoid the possible duplication of effort at Federal facilities.

[69 FR 75003, Dec. 15, 2004, as amended at 74 FR 36372, July 22, 2009; 80 FR 15519, Mar. 24, 2015]

970.1707–3 Terms governing Strategic Partnership Projects.

(a) DOE's internal review and approval procedural requirements for individual strategic partnership projects agreements are set forth in DOE Order 481.1C (as supplemented by DOE Manual 481.1–1A for agreements with non-Federal entities), which may be amended from time to time, and such other guidance as may be issued by DOE. Contracting officers must ensure that the contractor's procedures for its operations are consistent with DOE's procedural requirements.

(b) A contractor may perform work for other Federal or non-Federal sponsors only if—

(1) The contractor is authorized by contract clause to perform such work;

(2) The work is not directly funded by DOE appropriations and is fully reimbursed by the sponsor;

(3) The DOE Contracting Officer or authorized designee approves the work in advance; and

(4) The work is performed in accordance with DOE policies, procedures and directives applicable to the contract.

(c) Contracting officers must ensure that the requesting Federal entity certifies that—

(1) The interagency agreement with DOE complies with the Economy Act of 1932 (31 U.S.C. 1535) and other applicable statutory authorities and 48 CFR 6.002, which prohibits the use of an Interagency Agreement for the purpose of avoiding the competition requirements of the Federal Acquisition Regulation; and

(2) The work to be performed will not place the DOE contractor in direct competition with the domestic private sector.

[69 FR 75003, Dec. 15, 2004, as amended at 74 FR 36372, July 22, 2009; 80 FR 15519, Mar. 24, 2015]

970.1707–4 Contract clause.

Insert the clause at 970.5217–1, Strategic Partnership Projects Program (Non-DOE Funded Work), in any contract that may involve work under the Strategic Partnership Projects Program, pursuant to 970.1707–3(b).

[69 FR 75003, Dec. 15, 2004, as amended at 80 FR 15519, Mar. 24, 2015]

Subpart 970.19—Small Business Programs

970.1907 The Small Business Subcontracting Program.

970.1907–4 Subcontracting plan requirements.

Pursuant to the clause at 48 CFR 52.219–9, Small Business Subcontracting Plan, which is required for all management and operating contracts, each management and operating contract shall include a subcontracting plan which is effective for the term of the contract. Goals for the contract shall be negotiated annually when revised funding levels are determined. The plan should include provisions for revising the goals or any other sections of the plan. Such revisions shall be in writing, approved by the contracting officer, and shall be specifically made a material part of the contract.

[65 FR 81009, Dec. 22, 2000. Redesignated at 75 FR 68219, Nov. 5, 2010]

Subpart 970.22—Application of Labor Policies

970.2200 Scope of subpart.

This subpart prescribes Department of Energy (DOE) labor policies pertaining to the award and administration of management and operating contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36372, July 22, 2009]

970.2201 Basic labor policies.

970.2201–1 Labor relations.

970.2201–1–1 General.

Contracting officers shall, in appropriate circumstances, follow the requirements in 48 CFR subpart 22.1, as supplemented in this section, in the award and administration of management and operating contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 23126, May 18, 2009; 75 FR 68220, Nov. 5, 2010]

970.2201–1–2 Policies.

(a) The extent of Government ownership of the nation's energy plant and materials, and the overriding concerns of national defense and security, impose special conditions on personnel and labor relations in the energy program. Such special conditions include the need for continuity of vital operations at DOE installations; retention by DOE of absolute authority on all questions of security; and DOE review of labor expenses under management and operating contracts as a part of its responsibility for assuring judicious expenditure of public funds. It is the intent of DOE that personnel and labor policies throughout the energy program reflect the best experience of American industry in aiming to achieve the type of stable labor-management relations that are essential to the proper development of the energy program. The following enunciates the principles upon which the DOE policy is based:

(1) *Employment standards.* (i) Management and operating contractors are expected to bring experienced, proven personnel from their private operations to staff key positions on the contract

and to recruit other well-qualified personnel as needed. Such personnel should be employed and treated during employment without discrimination by reason of race, color, religion, sex, age, disability, or national origin. Contractors shall be required to take affirmative action to achieve these objectives.

(ii) The Contractor must conduct a thorough review, as defined at 904.401, of an uncleared applicant's or uncleared employee's background, and test the individual for illegal drugs, as part of its determination to select that individual for a position requiring a DOE access authorization.

(A) A review must— Verify an uncleared applicant's or uncleared employee's educational background, including any high school diploma obtained within the past five years, and degrees or diplomas granted by an institution of higher learning; contact listed employers for the last three years and listed personal references; conduct local law enforcement checks when such checks are not prohibited by state or local law or regulation and when the uncleared applicant or uncleared employee resides in the jurisdiction where the contractor is located; and conduct a credit check and other checks as appropriate.

(B) Contractor reviews are not required for an applicant for DOE access authorization who possesses a current access authorization from DOE or another federal agency, or whose access authorization may be reapproved without a federal background investigation pursuant to Executive Order 12968, Access to Classified Information (August 4, 1995), Sections 3.3(c) and (d).

(C) In collecting and using this information to make a determination as to whether it is appropriate to select an uncleared applicant or uncleared employee for a position requiring an access authorization, the contractor must comply with all applicable laws, regulations, and Executive Orders, including those—

(*1*) Governing the processing and privacy of an individual's information by employers, such as the Fair Credit Reporting Act, Americans with Disabilities Act (ADA), and Health Insurance Portability and Accountability Act; and

(*2*) Prohibiting discrimination in employment, such as under the ADA, Title VII and the Age Discrimination in Employment Act, including with respect to pre- and post-offer of employment disability related questioning.

(iii) In addition to a review, each candidate for a DOE access authorization must be tested to demonstrate the absence of any illegal drug, as defined in 10 CFR 707.4. All positions requiring access authorizations are deemed *testing designated positions* in accordance with 10 CFR part 707. All employees possessing access authorizations are subject to applicant, random or for cause testing for use of illegal drugs. DOE will not process candidates for a DOE access authorization unless their tests confirm the absence of any illegal drug.

(iv) When an uncleared applicant or uncleared employee is hired specifically for a position that requires a DOE access authorization, the contractor shall not place that individual in that position prior to the access authorization being granted by DOE, unless an approval has been obtained from the contracting officer, acting in consultation for these purposes with the head of the cognizant local security office. If an uncleared employee is placed in that position prior to an access authorization being granted by the contracting officer, the uncleared employee may not be afforded access to classified information or matter or special nuclear material (in categories requiring access authorization) until the contracting officer notifies the employer that an access authorization has been granted.

(v)(A) The contractor must furnish to the head of the cognizant local DOE Security Office, in writing, the following information concerning each uncleared applicant or uncleared employee who is selected for a position requiring an access authorization—

(*1*) The date(s) each review was conducted;

(*2*) Each entity contacted that provided information concerning the individual;

(*3*) A certification that the review was conducted in accordance with all applicable laws, regulations, and Executive Orders, including those governing

the processing and privacy of an individual's information collected during the review;

(*4*) A certification that all information collected during the review was reviewed and evaluated in accordance with the contractor's personnel policies; and

(*5*) The results of the test for illegal drugs.

When a DOE access authorization will be required, the aforementioned review must be conducted and the required information forwarded to DOE before a request is made to DOE to process the individual for an access authorization.

(vi) Management and operating contractors and other contractors operating DOE facilities shall include the requirements set forth in this subsection in subcontracts (appropriately modified to identify the parties) wherein subcontract employees will be required to hold DOE access authorizations in order to perform on-site duties, such as protective force operations.

(2) *Security*. On all matters of security at its facilities, DOE retains absolute authority and neither the regulations and policies pertaining to security, nor their administration, are matters for collective bargaining between the contractor's management and labor. Insofar as DOE security regulations affect the collective bargaining process, the security policies and regulations will be made known to both parties. To the fullest extent feasible, DOE will consult with representatives of the contractor's management and labor when formulating security regulations and policies that may affect the collective bargaining process.

(3) *Wages, salaries, and employee benefits*. (i) Wages, salaries, and employee benefits shall be administered in a manner designated to adapt the normal practices and conditions of industry or institutions of higher education to the contract work, and to provide for appropriate review by DOE. Area practices, valid patterns, and well-established commercial or academic practices of the contractors, as appropriate, form the criteria for the establishment and adjustment of compensation schedules.

(ii) The aspects of wages, hours, and working conditions which are the substance of collective bargaining in normal organized industries will be left to the orderly processes of negotiation and agreement between DOE contractor management and employee representatives with maximum possible freedom from Government interference.

(4) *Employee relations*. The handling of employee relations on contract work, including such matters as the conduct and discipline of the work force and the handling of employee grievances, is part of the normal management responsibility of the contractor.

(5) *Collective bargaining*. (i) DOE review of collective bargaining practices will be premised on the view that management's trusteeship for the operation of the Government facilities includes the duty to adopt practices which are fundamental to the friendly adjustment of disputes, and which experience has shown, promote orderly collective bargaining relationships. Practices inconsistent with this view may be objected to if not found to be otherwise clearly warranted.

(ii) Consistent with the policy of assuring continuity of operation of vital facilities, all collective bargaining agreements at DOE-owned facilities should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout, or other interruption of normal operations. For this purpose, each collective bargaining agreement entered into during the period of performance of this contract should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operation for the term of the collective bargaining agreement.

(iii) DOE expects its management and operating contractors and the unions representing the contractor's employees to cooperate fully with the Federal Mediation and Conciliation Service.

(6) *Personnel training*. DOE encourages and supports personnel training

programs aimed at improving work efficiency or developing needed skills which are not otherwise obtainable.

(7) *Working conditions.* Accident, fire, health, and occupational hazards associated with DOE activities will be held to a practical minimum level and controlled in the interest of maintenance of health and prevention of accidents. Subject to DOE control, contractors shall be required to maintain comprehensive continuous preventive and protective programs appropriate to the particular activities throughout all operations. Appropriate financial protection in case of occupational disability must be provided to employees on DOE projects.

(b) Title to payroll and associated records under certain contracts for the management and operation of DOE facilities, and for necessary miscellaneous construction incidental to the function of these facilities, shall vest in the Government. Such records are to be disposed of in accordance with DOE directions. For such contracts, the Solicitor of Labor has granted a tolerance from the Department of Labor Regulations to omit from the prescribed labor clauses the requirement for the retention of payrolls and associated records for a period of three years after completion of the contract. Under this tolerance, the records retention requirements for all labor clauses in the contract and the Fair Labor Standards Act are satisfied by disposal of such records in accordance with applicable DOE directives.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 23126, May 18, 2009; 75 FR 68221, Nov. 5, 2010]

970.2201–1–3 Contract clause.

In addition to the clause at 48 CFR 52.222–1, Notice to the Government of Labor Disputes, the contracting officer shall insert the clause at 970.5222–1, Collective Bargaining Agreements—Management and Operating Contracts, in all management and operating contracts.

970.2201–2 Overtime management.

970.2201–2–1 Policy.

Contracting officers shall ensure that management and operating contractors manage overtime cost effectively and use overtime only when necessary to ensure performance of work under the contract.

970.2201–2–2 Contract clause.

The contracting officer shall insert the clause at 970.5222–2, Overtime Management, in management and operating contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36372, July 22, 2009]

970.2204 Labor standards for contracts involving construction.

970.2204–1 Statutory and regulatory requirements.

970.2204–1–1 Administrative controls and criteria for application of the Davis-Bacon Act in operational or maintenance activities.

(a) Particular work items falling within one or more of the following criteria normally will be classified as non-covered by the Davis-Bacon Act, hereinafter referred to in this section as the ''Act.''

(1) Individual work items estimated to cost $2,000 or less. The total dollar amount of the management and operating contract is not a factor to be considered and bears no relation to individual work items classified as construction, alteration and/or repair, including painting and decorating. However, no item of work, the cost of which is estimated to be in excess of $2,000, shall be artificially divided into portions less than $2,000 for the purpose of avoiding the application of the Act.

(2) Work and services that are a part of operational and maintenance activities or which, being very closely and directly involved therewith, are more in the nature of operational activities than construction, alteration, and/or repair work. This includes work and services which would involve a material risk to continuity of operations, to life or property, or to DOE operating requirements, if performed by persons other than the contractor's regular production and maintenance forces. However, any decision that contracts or work items are non-covered for these reasons must be made by the Head of the Contracting Activity without power of delegation.

(3) Assembly, modification, setup, installation, replacement, removal, rearrangement, connection, testing, adjustment, and calibration of machinery and equipment. However, it is noted that these activities are covered if they are part of, or would be a logical part of, the construction of a facility, or if construction-type work which is not ''incidental'' to the overall effort is involved.

(4) Experimental development of equipment, processes, or devices, including assembly, fitting, installation, testing, reworking, and disassembly. This refers to equipment, processes, and devices which are assembled for the purpose of conducting a test or experiment. The design may be only conceptual in character, and professional personnel who are responsible for the experiment participate in the assembly. Specifically excluded from the category of experimental development are buildings and building utility services, as distinguished from temporary connections thereto. Also specifically excluded from this category is equipment to be used for continuous testing (e.g., a machine to be continuously used for testing the tensile strength of structural members).

(5) Experimental work in connection with peaceful uses of nuclear energy. This refers to equipment, processes and devices which are assembled and/or set in place and interconnected for the purpose of conducting a test or experiment. The nature of the test or experiment is such that professional personnel who are responsible for the test or experiment and/or data to be derived therefrom must, by necessity, participate in the assembly and interconnections. Specifically excluded from experimental work are buildings, building utility services, structural changes, drilling, tunneling, excavation, and back-filling work which can be performed according to customary drawings and specifications, and utility services of modifications to utility services, as distinguished from temporary connections thereto. Work in this category may be performed in mines or in other locations specifically constructed for tests or experiments.

(6) Emergency work to combat the effects of fire, flood, earthquake, equipment failure, accident, or other casualties, and to restart the operational activity following the casualty. Work which is not directly related to restarting the activity or which involves rebuilding or replacement of a structure, structural components, or equipment is excluded from this category.

(7) Decontamination, including washing, scrubbing, and scraping to remove contamination; removal of contaminated soil or other material; and painting or other resurfacing, provided that such painting or resurfacing is an integral part of the decontamination activity and performed by the employees of the contractors performing the decontamination.

(8) Burial of contaminated soil waste or contained liquid; however, initial preparatory work readying the burial ground for use (e.g., any grading or excavating that is a part of initial site preparation, fencing, drilling wells for continued monitoring of contamination, construction of guard or other office space) is covered. Work performed subsequent to burial which involves the placement of concrete or other like activity is also covered.

(b) The classification of a contract as a contract for operational or maintenance activities does not necessarily mean that all work and activities at the contract location are classifiable as outside coverage of the Act since it may be necessary to separate work which should be classified as covered. Therefore, the Heads of Contracting Activities shall establish and maintain controls for the careful scrutiny of proposed work assignments under such contracts to assure that:

(1) Contractors whose contracts do not contemplate the performance of work covered by the Act with the contractor's own forces are neither asked nor authorized to perform work within the scope of the Act. If the actual work assignments do involve covered work, the contract should be modified to include applicable provisions of the Act.

(2) Where covered work is performed by a contractor whose contract contains provisions required by the Act, such work is performed as required by law and the contract. After the contractor has been informed, as provided in paragraph (b)(3) of this subsection,

that certain work is covered, the responsibilities of the Head of the Contracting Activity to assure compliance is the same as it would be if the work were being performed under a separate construction contract.

(3) Controls provided for above include consideration by the Head of the Contracting Activity and the contractor, before work is begun or contracted out, of the relation of the Act to the annual programming of work; the contractor's work orders; and work contracted out in excess of $2,000. The Head of the Contracting Activity may, if consistent with DOE's responsibilities as described in this subsection, prescribe from time to time classes of work as to which applicability or nonapplicability of the Act is clear, for which the Head of the Contracting Activity will require no further DOE determination on coverage in advance of the work. For all work, controls to be established by the Head of the Contracting Activity should provide for notification to the contractor before work is begun as to whether such work is covered. The Head of the Contracting Activity is responsible for submitting to the Wage and Hours Division, Employment Standards Administration, Department of Labor, Washington, D.C. 20210, all DOE requests for project area or installation wage determinations, or individual determinations, or extensions or modification thereto. Requests for such determinations shall be made on Standard Form 308, at least 30 calendar days before they are required for use in advertising for bids or requests for proposals.

(c) *Experimental installations.* Within DOE programs, a variety of experiments are conducted involving materials, fuels, coolants, and processing equipment. Certain types of situations where tests and experiments have presented coverage questions are described as follows:

(1) *Set-ups of device and/or processes.* The proving out of investigative findings and theories of a scientific and technical nature may require the set-up of various devices and/or processes at an early, pre-prototype stage of development. These may range from laboratory bench size to much larger set-ups. As a rule, these set-ups are made within established facilities (normally laboratories), required utility connections are made to services provided as a part of the basic facilities, and the activity as a whole falls within the functional purpose of the facility. Such set-ups are generally not covered. However, the erection of structures which are public works is covered if construction type work, other than incidental work, is involved. Preparatory work for the set-up requiring structural changes or modifications of basic utility services, as distinguished from connections thereto, is covered. The following are illustrations of non-covered set-ups of devices and/or processes:

(i) Assembly of piping and equipment within existing ''hot cell'' facilities for proving out a conceptual design of a chemical processing unit.

(ii) Assembly of equipment, including adaptation and modification thereof, in existing ''hot cell'' facilities to prove out a conceptual design for remotely controlled machining equipment.

(iii) Assembly of the first graphite pile in a stadium at Stagg Field in Chicago.

(iv) Assembly of materials and equipment for particular aspects of the direct current thermonuclear experiments to explore feasibility and to study other ramifications of the concept of high energy injection and to collect data thereon.

(2) *Loops.* Many experiments are carried on in equipment assemblies, called loops, in which liquids or gases are circulated under monitored and controlled conditions. For purposes of determining coverage under the Act, loops may be classed as loop facilities or as loop set-ups. Both of these classes of loops can include in-reactor loops and out-of-reactor loops. In differentiating between clearly identified loop set-ups and loop facilities, an area exists in which there have been some questions of coverage, such as certain loops at the Material Test Reactor and at Engineering Test Reactor and the Idaho National Engineering and Environmental Laboratory site. Upon clarification of this area, further illustrations will be added. In the meantime, the differentiation between loop set-ups and loop facilities must be made on

a case-by-case basis, taking into account the total criteria set forth in this subpart.

(i) *Loop set-ups.* The assembly, erection, modification, and disassembly of a loop set-up is non-covered. A noncontroversial example of a loop set-up is one which is assembled in a laboratory, e.g., Oak Ridge National Laboratory, Argonne National Laboratory, or Lawrence Livermore National Laboratory, for a particular test and thereafter disassembled. However, preparatory work for a loop set-up requiring structural changes or modifications of basic utility services as distinguished from connections thereto is covered, as are material and equipment that are installed for a loop set-up which is a permanent part of the facility or which is use for a succession of experimental programs.

(ii) *Loop facilities.* A loop facility differs from a loop set-up in that it is of a more permanent character. It is usually, but not always, of greater size. It normally involves the building or modification of a structure. Sometimes it is installed as a part of construction of the facility. It may be designed for use in a succession of experimental programs over a longer period of time. Examples of loop facilities are the in-reactor ''K'' loops at Hanford and the large Aircraft Nuclear Propulsion loop at the Idaho National Engineering and Environmental Laboratory site. The on-site assembly and erection of such loop facilities are covered. However, once a loop facility is completed and becomes operational, the criteria set forth in this paragraph for operational and maintenance activities apply.

(3) *Reactor component experiments.* Other experiments are carried on by insertion of experimental components within reactor systems without the use of a loop assembly. An example of reactor facilities erected for such experimental purposes are the special power excursion test reactors (SPETRs) at the National Reactor Test Site which are designed for studying reactor behavior and performance characteristics of certain reactor components. Such a facility may consist of a reactor vessel, pressurizing tank, coolant loops, pumps, heat exchangers, and other auxiliary equipment as needed. The facility also may include sufficient shielding to permit work on the reactor to proceed following a short period of power interruption, and buildings as needed to house the reactor and its auxiliary equipment. The erection and on-site assembly of such a reactor facility is covered, but the components whose characteristics are under study are excluded from coverage. To illustrate, one of the SPETRs planned for studies of nuclear reactor safety is designed to accommodate various internal fuel and control assemblies. The internal structure of the pressure vessel is designed so that cores of different shapes and sizes may be placed in the vessel for investigation, or the entire internal structure may be easily removed and replaced by a structure which will accept a different core design. Similarly, the control rod assembly is arranged to provide for flexibility in the removal of instrument leads and experimental assemblies from within the core.

(4) *Tests or experiments in peaceful uses of nuclear energy.* These tests or experiments are varied in nature and some are only in a planning stage. They consist of one or more nuclear or nonnuclear detonations for the purposes of acquiring data. The data can include seismic effects, radiation effects, amount of heat generated, amount of material moved and so forth. Some of these tests are conducted in existing mines, while others are conducted in facilities specifically constructed for the tests or experiments. In general, all work which can be performed in accordance with customary drawings and specifications, as well as other work in connection with preparation of facilities is treated as covered work. Such work includes tunneling, drilling, excavation and back-filling, erection of buildings or other structures, and installation of utilities. The installation of the nonnuclear material or nuclear device to be detonated, and the instrumentation and connection between such material or device and the instrumentation are treated as non-covered work.

(5) *Tests or experiments in military uses of nuclear energy.* As in 970.2204–1–1(c)(4), these tests or experiments can be varied in nature. However, under

this category it is intended to include only detonation of nonnuclear material or nuclear devices. The material or devices can be detonated either underground, at ground level, or above the ground. These tests or experiments have been conducted in, on, or in connection with facilities specifically constructed for such tests or experiments. As in tests or experiments in peaceful uses of nuclear energy, all work which can be performed in accord with customary drawings and specifications, as well as other work in connection with preparation of facilities are treated as covered work. Such work includes building towers or similar structures, tunneling, drilling, excavation and backfilling, erection of buildings or other structures, and installation of utilities. The installation of the nonnuclear material or nuclear devices and instrumentation are treated as non-covered work.

(d) *Construction site contiguous to an established manufacturing facility.* As DOE-owned property sometimes encompasses several thousand acres of real estate, a number of separate facilities may be located in areas contiguous to each other on the same property. These facilities may be built over a period of years, and established manufacturing activities may be regularly carried on at one site at the same time that construction of another facility is underway at another site. On occasion, the regular manufacturing activities of the operating contractor at the first site may include the manufacture, assembly, and reconditioning of components and equipment which in other industries would normally be done in established commercial plants. While the manufacture of components and equipment in the manufacturing plant is non-covered, the installation of any such manufactured items on a construction job is covered.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36372, July 22, 2009]

970.2208 Equal employment opportunity.

The equal employment opportunity provisions of 48 CFR subpart 22.8 and subpart 922.8 of this chapter, including Executive Order 11246 and 41 CFR part 60, are applicable to DOE management and operating contracts.

970.2210 Service Contract Act.

The Service Contract Act of 1965 is not applicable to contracts for the management and operation of DOE facilities, but it is applicable to subcontracts under such contracts (see 970.5244–1(x)).

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36372, July 22, 2009]

970.2270 Unemployment compensation.

(a) Each state has its own unemployment compensation system to provide payments to workers who become unemployed involuntarily and through no fault of their own. Funds are provided for unemployment compensation benefits through a payroll tax on employers. Most DOE contractors are subject to the unemployment compensation tax laws of the states in which they are located. It is the policy to assure, both in the negotiation and administration of cost-reimbursement type contracts, that economical and practical arrangements are made and practiced with respect to unemployment compensation.

(b) *Contract exempt from state laws.* (1) Some contractors are exempt from state unemployment compensation laws, usually on grounds that they are nonprofit organizations or subdivisions of State governments. Most states, however, permit such employers to elect unemployment compensation coverage on a voluntary basis. Under such circumstances, all existing or prospective cost-reimbursement contractors shall be encouraged to provide unemployment compensation coverage or equivalent substitutes.

(2) It is also DOE policy that, prior to the award or extension of a management and operating contract, exempt contractors or prospective contractors shall be required to submit to the contracting officer a statement that they will either elect coverage or provide

equivalent substitutes for unemployment compensation, or in the alternative, submit evidence that it is impractical to do so. If any exempt contractor or prospective contractor submits that it is impractical to elect coverage or to provide an equivalent substitute, appropriate Office of Contract and Resource Management, within the Headquarters procurement organization, staff shall review that position prior to recommending an award or extension of the contract. If there are substantial reasons for not electing coverage or for not providing equivalent substitutes, a contract may be awarded or extended. Headquarters' staff review and recommendation shall be based on such factors as—

(i) The specific provisions of the unemployment compensation law of the State;

(ii) The extent to which the establishment of special conditions on DOE work may have an adverse effect on the contractor's general policies and operating costs in its private operations;

(iii) The numerical relationship between the contractor's private work force and its employees performing only work for DOE;

(iv) The contractor's record with respect to work force stability and the general outlook with respect to future work force stability;

(v) In a replacement contractor situation, whether or not the prior contractor had coverage or suitable substitutes; and

(vi) The particular labor relations implications involved.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36372, July 22, 2009]

Subpart 970.23—Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety and Drug-Free Work Place

970.2301 Sustainable acquisition.

970.2301–1 Policy.

There are many environmentally beneficial and resource efficient programs described in various subparts of FAR Part 23. For ease of use, DOE refers to all of these as the DOE Sustainable Acquisition Program with guidance for the many products at *http://www.hss.energy.gov/pp/epp*. Contractors operating DOE facilities shall comply with the requirements of Executive Order 13423, Strengthening Federal Environmental, Energy and Transportation Management, and Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance. The contractor shall also consider the best practices within the DOE Acquisition Guide, Chapter 23, *Acquisition Considerations Regarding Federal Leadership in Environmental, Energy, and Economic Performance*.

[75 FR 57695, Sept. 22, 2010]

970.2301–2 Contract clauses.

(a) Section 3(f) of Executive Order 13423 requires contractors to comply with the provisions of the Order to the same extent as the Federal agency would be required to comply if it operated the facility or fleet. Insert the clause at 970.5223–6, Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management, in such contracts.

(b) Insert the clause at 970.5223–6, Sustainable and Environmentally Preferable Purchasing Practices, or its Alternate I in contracts for the management and operation of DOE facilities, or other contracts under which the contractor manages Government facilities or fleets, or conducts mission operations at Government facilities, or performs construction at DOE facilities. Inclusion of this contract clause applies to contractors that are responsible for the management and operation of the DOE's facilities or the conduct of mission operations at the Department's facilities, including elements of the National Nuclear Security Administration (NNSA), the Power Marketing Administrations, and the National Laboratories. All such contracts should also include the following clauses: FAR 52.223–2, Affirmative Procurement of Biobased Products under Service and Construction Contracts; FAR 52.223–10, Waste Reduction Program; FAR 52.223–XX, Compliance with Environmental Management Systems (see 923.903 regarding the applicability

of this clause to specific DOE contracts); FAR 52.223–15, Energy Efficiency in Energy Consuming Products; and FAR 52.223–17, Affirmative Procurement of EPA-designated Items in Service and Construction Contracts.

[75 FR 57695, Sept. 22, 2010]

970.2303 Hazardous materials identification and material safety.

970.2303–2–70 General.

(a) The Department of Energy regulates the nuclear safety of its major facilities under its own statutory authority derived from the Atomic Energy Act and other legislation. The Department also regulates, under certain specific conditions, the use by its contractors of radioactive materials and ionizing radiation producing machines.

(b) The inclusion of environmental, safety and health clauses in DOE contracts shall be made by the contracting officer in accordance with this subpart and in consultation with appropriate environmental, safety and health program management personnel.

(c)(1) For DOE management and operating contracts and other contracts designated by the Senior Procurement Executive, or designee, the clause entitled ''970.5215–3 Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts'' implements the requirements of section 234C of the Atomic Energy Act for the use of a contract clause that provides for an appropriate reduction in the fee or amount paid to the contractor under the contract in the event of a violation by the contractor or any contractor employee of any Departmental regulation relating to the enforcement of worker safety and health concerns. The clause, in part, provides for reductions in the amount of fee, profit, or share of cost savings that is otherwise earned by the contractor for performance failures relating to worker safety and health violations under the Department's regulations.

(2)(i) Section 234C of the Atomic Energy Act states that DOE shall either pursue civil penalties (implemented at 10 CFR part 851) for a violation under section 234C of the Atomic Energy Act (42 U.S.C. 2282c) or a contract fee reduction, but not both.

(ii) The contracting officer must coordinate with the Office of Price Anderson Enforcement within the Office of the Assistant Secretary for Health, Safety and Security (or with any designated successor office) before pursuing contract fee reduction in the event of a violation by the contractor or any contractor employee of any Departmental regulation relating to the enforcement of worker safety and health concerns.

[65 FR 81009, Dec. 22, 2000, as amended at 68 FR 68782, Dec. 10, 2003. Redesignated and amended at 74 FR 36372, 36378, July 22, 2009]

970.2303–3 Contract clauses.

(a) When work under management and operating contracts and subcontracts thereunder is to be performed at a facility where DOE will exercise its statutory authority to enforce occupational safety and health standards applicable to the working conditions of the contractor and subcontractor employees at such facility, the clause at 48 CFR 970.5223–1, Integration of Environment, Safety and Health into Work Planning and Execution, shall be used in such contract or subcontract and made applicable to the work if conditions in paragraphs (a)(1) through (3) of this section, are satisfied—

(1) DOE work is segregated from the contractor's or subcontractor's other work;

(2) The operation is of sufficient size to support its own safety and health services; and

(3) The facility is government-owned, or leased by or for the account of the government.

(b) The clause set forth in 952.223–72, Radiation Protection and Nuclear Criticality, shall be included in those contracts or subcontracts for, and be made applicable to, work to be performed at a facility where DOE does not elect to assert its statutory authority to enforce occupational safety and health standards applicable to the working conditions of contractor and subcontractor employees, but does need to enforce radiological safety and health standards pursuant to provisions of the contract or subcontract rather than by reliance upon Nuclear

Regulatory Commission licensing requirements (including agreements with States under section 274 of the Atomic Energy Act).

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36372, July 22, 2009]

970.2305 Workplace substance abuse programs—management and operating contracts.

970.2305–1 General.

(a) The Department of Energy (DOE), as part of its overall responsibilities to protect the environment, maintain public health and safety, and safeguard the national security, has established policies, criteria, and procedures for management and operating contractors to develop and implement programs that help maintain a workplace free from the use of illegal drugs.

(b) Regulations concerning DOE's management and operating contractor workplace substance abuse programs are promulgated at 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

970.2305–2 Applicability.

(a) All management and operating contracts awarded under the authority of the Atomic Energy Act of 1954, as amended, are required to implement the policies, criteria, and procedures of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

(b) Except as otherwise provided for in this subpart, management and operating contracts subject to the requirements of 10 CFR part 707 and this subpart shall not be subject to 48 CFR subpart 23.5, Drug Free Workplace.

[65 FR 81009, Dec. 22, 2000, as amended at 75 FR 68221, Nov. 5, 2010]

970.2305–3 Definitions.

Terms and words relating to DOE's Workplace Substance Abuse Programs, as used in this section, have the same meanings assigned to such terms and words in 10 CFR part 707.

970.2305–4 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 970.5223–3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites, in solicitations for the management and operation of DOE-owned or -controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended.

(b) The contracting officer shall insert the clause at 970.5223–4, Workplace Substance Abuse Programs at DOE Sites, in contracts for the management and operation of DOE-owned or -controlled sites operated under the authority of the Atomic Energy Act of 1954, as amended.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36372, July 22, 2009]

970.2306 Suspension of payments, termination of contract, and debarment and suspension actions.

(a) The contracting officer shall comply with the procedures of 48 CFR 23.506 regarding the suspension of contract payments, the termination of the contract for default, and the debarment and suspension of a contractor relative to failure to comply with the clause at 970.5223–4, Workplace Substance Abuse Programs at DOE Sites.

(b) For purposes of 10 CFR part 707, the specific causes for suspension of contract payments, termination of the contract for default, and debarment and suspension of the contractor are:

(1) The contractor fails to either comply with the requirements of 10 CFR part 707 or perform in a manner consistent with its approved program;

(2) The contractor has failed to comply with the terms of the provision at 970.5223–3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites;

(3) Such a number of contractor employees having been convicted of violations of criminal drug statutes for violations occurring on the DOE-owned or -controlled site, as to indicate that the contractor has failed to make a good faith effort to provide a drug free workplace; or,

(4) The offeror has submitted a false certification in response to the provision at 970.5223–3, Agreement Regarding Workplace Substance Abuse Programs at DOE Sites.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36372, July 22, 2009; 75 FR 68221, Nov. 5, 2010]

Subpart 970.25—Foreign Acquisition

SOURCE: 80 FR 64368, Oct. 23, 2015, unless otherwise noted.

970.2570 Buy American Act.

970.2570–1 Contract clause.

Contracting officers shall insert the clauses at 48 CFR 52.225–1, Buy American Act—Supplies, and 48 CFR 52.225–9, Buy American Act—Construction Materials, in management and operating contracts. The clause at 48 CFR 52.225–1 shall be modified in paragraph (d) of this section by substituting the word ''use'' for the word ''deliver.''

970.2571 Export control.

970.2571–1 Scope of subpart.

This subpart implements DOE requirements for DOE management and operating contractors concerning compliance with U.S. export control laws and regulations.

970.2571–2 Policy.

(a) DOE and its contractors must comply with all applicable export control laws and regulations.

(b) Export control laws and regulations include, but are not limited to, the Atomic Energy Act of 1954, as amended; the Arms Export Control Act (22 U.S.C. 2751 *et seq.*); the Export Administration Act of 1979 (50 U.S.C. app. 2401 *et seq.*), as continued under the International Emergency Economic Powers Act (Title II of Pub. L. 95–223, 91 Stat. 1626, October 28, 1977; 50 U.S.C. 1701 *et seq.*); Trading with the Enemy Act (50 U.S.C. App. 5(b), as amended by the Foreign Assistance Act of 1961); Assistance to Foreign Atomic Energy Activities (Title 10 of the Code of Federal Regulations (CFR) Part 810); Export Administration Regulations (15 CFR parts 730 through 774); International Traffic in Arms Regulations (22 CFR parts 120 through 130); Export and Import of Nuclear Equipment and Material (10 CFR part 110); and regulations administered by the Office of Foreign Assets Control of the Department of the Treasury (31 CFR parts 500 through 598).

(c) Contractors seeking guidance on how to comply with export control requirements should review the illustrative list of laws and regulations applicable to the export of unclassified information, materials, technology, equipment or software set forth in clause 970.5225–1. Contractors also may contact the agencies responsible for administration of export laws and regulations applicable to a particular export (*e.g.*, Departments of State, Commerce, Treasury and Energy, or the Nuclear Regulatory Commission).

(d) The contracting officer will not answer any questions a contractor may ask regarding how to comply with export regulations. If asked, the contracting officer should direct the contractor to export regulations and agencies cited in the Export Clause at 970.5225–1.

(e) It is the contractor's responsibility to comply with all applicable U.S. export control laws and regulations. This responsibility exists independent of, and is not established or limited by, this subpart.

970.2571–3 Contract clause.

The Contracting Officer shall insert the clause at 970.5225–1, Compliance with Export Control Laws and Regulations (Export Clause), in all solicitations and contracts.

Subpart 970.26—Other Socioeconomic Programs

970.2670 Implementation of Section 3021 of the Energy Policy Act of 1992.

970.2670–1 Requirements.

The goal requirements of section 3021 of the Energy Policy Act of 1992, and the attendant reporting requirements shall be included in the subcontracting plan for the management and operating contract and shall apply to the annual dollar obligations specifically provided to the contractor for competitively awarded subcontracts that fulfill Energy Policy Act requirements.

970.2671 Diversity.

970.2671–1 Policy.

Department of Energy policy recognizes that full utilization of the talents and capabilities of a diverse work force is critical to the achievement of its mission. The principal goals of this policy are to foster and enhance partnerships with small, small disadvantaged, women-owned small businesses, and educational institutions; to match capabilities with existing opportunities; to track small, small disadvantaged, women-owned small business, and educational activity; and to develop innovative strategies to increase opportunities.

970.2671–2 Contract clause.

The contracting officer shall insert the clause at 970.5226–1, Diversity Plan, in all management and operating contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 75 FR 68221, Nov. 5, 2010]

970.2672 Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.

970.2672–1 Policy.

Consistent with the objectives of section 3161 of the National Defense Authorization Act for Fiscal Year 1993, 42 U.S.C. 7274h, in instances where the Department of Energy has determined that a change in work force at a DOE Defense Nuclear Facility is necessary, DOE contractors and subcontractors at DOE Defense Nuclear Facilities shall accomplish work force restructuring or displacement so as to mitigate social and economic impacts and in a manner consistent with any DOE work force restructuring plan in effect for the facility or site. In all cases, mitigation shall include the requirement for hiring preferences for employees whose positions have been terminated (except for termination for cause) as a result of changes to the work force at the facility due to restructuring accomplished under the requirements of section 3161. Where applicable, contractors may take additional actions to mitigate consistent with the Department's Workforce Restructuring Plan for the facility or site.

970.2672–2 Requirements.

The requirements set forth in subpart 926.71, Implementation of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, for contractors and subcontractors to provide a hiring preference for employees under Department of Energy contracts whose employment in positions at a Department of Energy Defense Nuclear Facility is terminated (except for a termination for cause) applies to management and operating contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 75 FR 68221, Nov. 5, 2010]

970.2672–3 Contract clause.

The contracting officer shall insert the clause at 970.5226–2, Workforce Restructuring Under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, in contracts for the management and operation of Department of Energy Defense Nuclear Facilities and, as appropriate, in other contracts that include site management responsibilities at a Department of Energy Defense Nuclear Facility.

[65 FR 81009, Dec. 22, 2000, as amended at 75 FR 68221, Nov. 5, 2010]

970.2673 Regional partnerships.

970.2673–1 Policy.

It is the policy of the DOE to be a constructive partner in the geographic region in which DOE conducts its business. The basic elements of this policy include—

(a) Recognizing the diverse interests of the region and its stakeholders;

(b) Engaging regional stakeholders in issues and concerns of mutual interest; and

(c) Recognizing that giving back to the community is a worthwhile business practice.

[65 FR 81009, Dec. 22, 2000, as amended at 75 FR 68219, Nov. 5, 2010]

970.2673–2 Contract clause.

The contracting officer shall insert the clause at 970.5226–3, Community Commitment, in all management and operating contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 75 FR 68221, Nov. 5, 2010]

Subpart 970.27—Patents, Data, and Copyrights

970.2701 General.

970.2701–1 Applicability.

This subpart applies to negotiation of patent rights, rights in technical data provisions and other related provisions for the Department of Energy contracts for the management and operation of DOE's major sites or facilities, including the conduct of research and development and nuclear weapons production, and contracts which involve major, long-term or continuing activities conducted at a DOE site.

970.2702 Patent related clauses.

970.2702–1 Authorization and consent.

Contracting officers must use the clause at 970.5227–4, Authorization and Consent, instead of the clause at 48 CFR 52.227–1.

970.2702–2 Notice and assistance regarding patent and copyright infringement.

Contracting officers must use the clause at 970.5227–5, Notice and Assistance Regarding Patent and Copyright Infringement, instead of the clause at 48 CFR 52.227–2.

970.2702–3 Patent indemnity.

(a) Contracting officers must use the clause at 970.5227–6, Patent Indemnity—Subcontracts to assure that subcontracts appropriately address patent indemnity.

(b) Normally, the clause at 48 CFR 52.227–3 would not be appropriate for an M&O contract; however, if there is a question, such as when the mission of the contractor involves production, the contracting officer must consult with local patent counsel and use the clause where appropriate.

970.2702–4 Royalties.

Contracting officers must use the solicitation provision at 970.5227–7, Royalty Information, and the clause at 970.5227–8, Refund of Royalties instead of the provision at 48 CFR 52.227–8 and the clause at 48 CFR 52.227–9, respectively.

970.2702–5 Rights to proposal data.

Contracting officers must include the clause at 48 CFR 52.227–23, Rights to Proposal Data, in all solicitations and contracts for the management and operation of DOE sites and facilities.

970.2702–6 Notice of right to request patent waiver.

Contracting officers must include the provision at 970.5227–9 in all solicitations for contracts for the management and operation of DOE sites or facilities.

970.2703 Patent rights.

970.2703–1 Purposes of patent rights clauses.

(a) DOE sites and facilities are managed and operated on behalf of the Department of Energy by a contractor, pursuant to management and operating contracts that are generally awarded for a five (5) year term, with the possibility for renewal. Special provisions relating to patent rights are appropriately incorporated into an M&O contract because of the unique circumstances and responsibilities of managing and operating a Government-owned facility, as compared to other federally funded research and development contracts.

(b)(1) *Technology transfer mission clause.* In accordance with Public Law 101–189, section 3133(d), DOE may grant technology transfer authority to M&O contractors operating a DOE facility. Generally, M&O contractors have the right to elect to retain title to inventions made under the contract, whether a nonprofit or educational organizations, as a result of 35 U.S.C. 200 *et seq.* (Bayh-Dole Act), or a large business, as a result of a class patent waiver issued pursuant to 10 CFR part 784. Under such contracts, the M&O contractor assumes responsibilities for commercializing retained inventions, in accordance with the Technology Transfer Mission clause provided at 970.5227–3. That clause also governs such activities as the distribution of royalties earned from inventions made under the contract and the transfer of patent rights in inventions made under the contract to successor contractors.

(2) If the M&O contractor is a nonprofit organization or small business

firm having technology transfer authority, the following clauses are inserted into the M&O contract: 970.5227–3 and 970.5227–10.

(3) If the M&O contract has technology transfer as a mission and is to be performed by a for-profit, large business firm that has been granted an advance class waiver, the following clauses are inserted into the M&O contract: 970.5227–3 and 970.5227–12. The terms of the clause at 970.5227–12 are subject to modification to conform to the terms of the class waiver.

(4) If the M&O contract does not have a technology transfer mission and is to be performed by a for-profit, large business firm and does not have advance class waiver under 10 CFR part 784, the patent rights clause at 970.5227–11 is inserted into the M&O contract, and the Technology Transfer Mission clause is inapplicable.

(5) If the contractor is an educational institution, a non-profit organization or a small business firm and is conducting privately funded technology transfer activities, involving the use of private funds to conduct licensing and marketing activities related to inventions made under the contract in accordance with the Bayh-Dole Act, DOE may modify the patent rights clause (970.5227–10) to address issues such as the disposition of royalties earned under the privately funded technology transfer program, the transfer of patent rights to a successor contractor, allowable cost restrictions concerning privately funded technology transfer activities, and the Government's freedom from any liability related to licensing under the contractor's privately funded technology transfer program.

(c) Contracting officers must consult with DOE patent counsel assisting the contracting activity or the Assistant General Counsel for Technology Transfer and Intellectual Property for assistance in selecting for use in the solicitation, negotiating, or approving appropriate patent rights clauses for a M&O contract. It may be appropriate to include more than one patent rights clause in a solicitation if the successful contractor could, for instance, be either an educational or a large business. If a large business may be selected for performance of a contract that will include a technology transfer clause, the solicitation must include the clause at 970.5227–12 to reflect the waiver that will likely be granted. If the solicitation includes more than one patent clause, it must include an explanation of the circumstances under which the appropriate clause will be used. The final award must contain only one patent rights clause.

970.2703–2 Patent rights clause provisions for management and operating contractors.

(a) *Allocation of Principal Rights: Bayh-Dole provisions.* If the management and operating contractor is an educational institution or nonprofit organization, the patent rights clause provided at 970.5227–10 must be inserted into the M&O contract. Such entities are beneficiaries of Bayh-Dole Act, including the paramount right of the contractor to elect to retain title to inventions conceived or first actually reduced to practice in performance of work under the contract, except in DOE-exempted areas of technology or in operation of DOE facilities primarily dedicated to naval nuclear propulsion or weapons related programs.

(b) *Allocation of Principal Rights: Government title.* (1) The patent rights clause provided at 970.5227–11 must be incorporated into the M&O contract if the contractor is a for-profit, large business firm and the contract does not have a technology transfer mission or if, without regard to the type of contractor, the contract is for the operation of a DOE facility primarily dedicated to naval nuclear propulsion or weapons related programs. That clause provides for DOE's statutory obligation to take title to inventions conceived or first actually reduced to practice in the course of or under an M&O contract, and does not contemplate an advance class waiver of Government rights in inventions, or participation by the contractor in technology transfer activities.

(2) While only in rare circumstances does a for-profit large business contractor whose contract contains no technology transfer mission receive rights in or title to inventions made under the contract, the contractor does

have the right to request a license or foreign patent rights in inventions made under the contract, and may petition for a waiver of Government rights in identified inventions. The patent rights clause 970.5227–11 does not include many of the provisions of patent rights clauses 970.5227–10 and 970.5227–12, related to the filing of patent applications by the contractor, the granting of rights in inventions by the contractor to third parties (preference for United States industry), and conditions allowing the Government to grant licenses to third parties in inventions retained by the contractor (march-in rights). Any instrument granting rights in inventions made under a contract governed by patent rights clause 970.5227–11 must include these additional provisions within its terms and conditions.

(c) *Allocation of Principal Rights: Contractor right to elect title under an advance class waiver.* If the M&O contractor is a for-profit, large business firm and the Government has granted an advance class waiver of Government rights in inventions made in the course of or under the M&O contract, under the authority of the Atomic Energy Act of 1954 (42 U.S.C. 2182) and the Federal Nonnuclear Energy Act of 1974 (42 U.S.C. 5908(c)), the patent rights clause provided at 970.5227–12 must be inserted into the M&O contract, unless the terms and conditions of such an approved waiver alter or replace the patent rights clause provisions pursuant to 10 CFR part 784.

(d) *Extensions of time—DOE discretion.* The patent rights clauses for M&O contracts require the contractor to take certain actions within prescribed time periods to comply with the contract and preserve its rights in inventions. The M&O contractor may request extensions of time in which to take such actions by submitting written justification to DOE, and DOE may grant the contractor's requests, on a case-by-case basis. If the time period expired due to negligence by the contractor, DOE may grant a request for an extension of time upon a showing by the contractor that corrective procedures are in place to avoid such negligence in the future. If a contractor is requesting an extension of time in which to elect to retain title to an invention, DOE may grant the request if the extension allows the contractor to conduct further experimentation, market research, or other analysis helpful to determine contractor interest in electing title to the invention, among other considerations. Generally, the extensions of time are for periods of between six (6) months to one (1) year.

(e) *Facilities license.* These include the rights to make, use, transfer, or otherwise dispose of all articles, materials, products, or processes embodying inventions or discoveries used or embodied in the facility regardless of whether or not conceived or first actually reduced to practice under or in the course of such a contract. The patent rights clauses, 970.5227–10, 970.5227–11, 970.5227–12, each contain a provision granting the Government this facilities license.

(f) *Deletion of classified inventions provision.* If DOE determines that the research, development, demonstration or production work to be performed during the course of a management and operating contract most probably will not involve classified subject matter or result in any inventions that require security classification, DOE patent counsel may advise the contracting officer to delete the patent rights clause provision entitled, ''Classified Inventions'' from the M&O contract.

(g) *Alternate 1—Weapons Related Research or Production.* If DOE grants technology transfer authority to a DOE facility, pursuant to Public Law 101–189, section 3133(d), and the DOE owned facility is involved in weapons related research and development, or production, then Alternate 1 of the patent rights clauses must be inserted into the M&O contract. Alternate 1 defines weapons related subject inventions and restricts the contractor's rights with respect to such inventions.

970.2704 Rights in data.

970.2704–1 General.

(a) Rights in data relating to the performance of the contract and to all facilities are significant in assuring continuity of the management and operation of DOE facilities. It is crucial in assuring DOE's continuing ability to

perform its statutory missions that DOE obtain rights to all data produced or specifically used by its management and operating contractors and appropriate subcontractors. In order to obtain the necessary rights in technical data, DOE contracting officers shall assure that management and operating contracts contain either the Rights in Data clause at 48 CFR 970.5227–1, Rights in Data—Facilities, or the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer. Selection of the appropriate clause is dependent upon whether technology transfer is a mission of the management and operating contract pursuant to the National Competitiveness Technology Transfer Act of 1989, Public Law 101–189, (15 U.S.C. 3711 *et seq.*, as amended). If technology transfer is not a mission of the management and operating contract, the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, shall be used. In those instances in which technology transfer is a mission of the contract, the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer, shall be used.

(b) Employees of the management and operating contractor may not be used to assist in the preparation of a proposal or bid for services which are similar or related to those being performed under the contract, which are to be performed by the contractor or its parent or affiliate organization for commercial customers unless the employee has been separated from work under the DOE contract for such period as the Head of the Contracting Activity or designee shall have directed.

970.2704–2 Procedures.

(a) The clauses at 48 CFR 970.5227–1, Rights in Data-Facilities, and 48 CFR 970.5227–2, Rights in Data—Technology Transfer, both provide generally for Government ownership and for unlimited rights in the Government for all data first produced in the performance of the contract and unlimited rights in data specifically used in the performance of the contract. Both clauses provide that, subject to patent, security, and other provisions of the contract, the contractor may use contract data for its private purposes. The contractor, under either clause, must treat any data furnished by DOE or acquired from other Government agencies or private entities in the performance of their contracts in accordance with any restrictive legends contained therein.

(b) Since both clauses secure access to and, if requested, delivery of technical data used in the performance of the contract, there is generally no need to use the Additional Technical Data Requirements clause at 48 CFR 52.227–16 in the management and operating contract.

(c)(1) Paragraph (d) of the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, and paragraph (f) of the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer, provide for the inclusion in subcontracts of the Rights in Technical Data—General clause at 48 CFR 52.227–14, with Alternate V, and modified in accordance with DEAR 927.409. Those clauses also provide for the inclusion in appropriate subcontracts Alternates II, III, and IV to the clause at 48 CFR 52.227–14 with DOE's prior approval and the inclusion of the Additional Technical Data Requirements clause at 48 CFR 52.227–16 in all subcontracts for research, development, or demonstration and all other subcontracts having special requirements for the production or delivery of data. In subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated by the contractor under its contract with DOE, the management and operating contractor shall use the Rights in Data—Facilities clause at 48 CFR 970.5227–1.

(2) Where, however, a subcontract is to be awarded by the management and operating contractor in connection with a program, as discussed at 927.404–70, which provides statutory authority to protect from public disclosure, data first produced under contracts awarded pursuant to the program, contracting officers shall ensure that the management and operating contractor includes in that subcontract the rights in data clause provided by DOE Patent Counsel, consistent with any accompanying guidance.

(3) Management and operating contractors and higher-tier subcontractors shall not use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data or restricted computer software for their private use, nor may they acquire rights in a subcontractor's limited rights data or restricted computer software except through the use of Alternate II or III to the clause at 48 CFR 52.227–14, respectively, without the prior approval of DOE Patent Counsel.

(d)(1) Paragraphs (e) and (f) of the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, and paragraphs (g) and (h) of the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer, provide for the contractor's granting a nonexclusive license in any limited rights data and restricted computer software specifically used in performance of the contract.

(2) In certain instances the objectives of DOE would be frustrated if the Government did not obtain, at the time of contracting, limited license rights on behalf of responsible third parties and the Government, and to limited rights data or restricted computer software or both necessary for the practice of subject inventions or data first produced or delivered in the performance of the contract. This situation may arise in the performance of management and operating contracts and contracts for the management or operation of a DOE facility or site. Contracting officers should consult with program officials and Patent Counsel. No such rights should be obtained from a small business or non-profit organization, unless similar rights in background inventions of the small business or non-profit organization have been authorized in accordance with 35 U.S.C. 202(f). Where such a background license is in DOE's interest, a provision that provides substantially as Alternate VI at 48 CFR 952.227–14 should be added to the appropriate clause, 48 CFR 970.5227–1, Rights in Data—Facilities, or 48 CFR 970.5227–2, Rights in Data—Technology Transfer.

(e) The Rights in Data—Technology Transfer clause at 48 CFR 970.5227–2 differs from the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, in the context of its more detailed treatment of copyright. In management and operating contracts that have technology transfer as a mission, the right to assert copyright in data first produced under the contract will be a valuable right, and commercialization of such data, including computer software, will assist the management and operating contractor in advancing the technology transfer mission of the contract. The clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer, provides for DOE approval of DOE's taking a limited copyright license for a period of five years, and, in certain rare cases, specified longer periods in order to contribute to commercialization of the data.

(f) Contracting officers should consult with Patent Counsel to assure that requirements regarding royalties and conflicts of interest associated with asserting copyright in data first produced under the contract are appropriately addressed in the Technology Transfer Mission clause (48 CFR 970.5227–3) of the management and operating contract. Where it is not otherwise clear which DOE program funded the development of a computer software package, such as where the development was funded out of a contractor's overhead account, the DOE program which was the primary source of funding for the entire contract is deemed to have administrative responsibility. This issue may arise, among others, in the decision whether to grant the contractor permission to assert copyright. See paragraph (e) of the Rights in Data—Technology Transfer clause at 970.5227–2.

(g) In management and operating contracts involving access to DOE-owned Category C–24 restricted data, as set forth in 10 CFR part 725, DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including its related restricted data and technology. Alternate I to each clause shall be used where access to Category C–24 restricted data is contemplated in the performance of a contract.

970.2704–3 Contract clauses.

(a) The contracting officer shall insert the clause at 48 CFR 970.5227–1,

Rights in Data—Facilities, in management and operating contracts which do not contain the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer. The contracting officer shall include the clause with its Alternate I in contracts where access to Category C–24 restricted data, as set forth in 10 CFR part 725, is to be provided to contractors.

(b) The contracting officer shall insert the clause at 970.5227–2, Rights in Data—Technology Transfer, in management and operating contracts which contain the clause at 970.5227–3, Technology Transfer Mission. The contracting officer shall include the clause with its Alternate I in contracts where access to Category C–24 restricted data, as set forth in 10 CFR part 725, is to be provided to contractors.

970.2770 Technology Transfer.

970.2770–1 General.

This subpart prescribes policies and procedures for implementing the National Competitiveness Technology Transfer Act of 1989, Public Law 101–189, (15 U.S.C. 3711 *et seq.*, as amended). The Act requires that technology transfer be established as a mission of each Government-owned laboratory operated under contract by a non-Federal entity. The National Defense Authorization Act for Fiscal Year 1994 expanded the definition of ''laboratory'' to include weapon production facilities that are operated for national security purposes and are engaged in the production, maintenance, testing, or dismantlement of a nuclear weapon or its components.

970.2770–2 Policy.

All new awards for or extensions of existing DOE laboratory or weapon production facility management and operating contracts shall have technology transfer, including authorization to award Cooperative Research and Development Agreements (CRADAs), as a laboratory or facility mission under Section 11(a)(1) of the Stevenson-Wydler Technology Innovation Act of 1980, Public Law 96–480 (15 U.S.C. 3701 *et seq.*, as amended). A management and operating contractor for a facility not deemed to be a laboratory or weapon production facility may be authorized on a case-by-case basis to support the DOE technology transfer mission including, but not limited to, participating in CRADAs awarded by DOE laboratories and weapon production facilities.

970.2770–3 Technology transfer and patent rights.

The National Competitiveness Technology Transfer Act of 1989 (NCTTA) established technology transfer as a mission for Government-owned, contractor-operated laboratories, including weapons production facilities, and authorizes those laboratories to negotiate and award cooperative research and development agreements with public and private entities for purposes of conducting research and development and transferring technology to the private sector. In implementing the NCTTA, DOE has negotiated technology transfer clauses with the contractors managing and operating its laboratories. Those technology transfer clauses must be read in concert with the patent rights clause required by this subpart. Thus, each management and operating contractor holds title to subject inventions for the benefit of the laboratory or facility being managed and operated by that contractor.

970.2770–4 Contract clause.

(a) The contracting officer shall insert the clause at 970.5227–3, Technology Transfer Mission, in each solicitation for a new or an extension of an existing laboratory or weapon production facility management and operating contract.

(b) If the contractor is a nonprofit organization or small business eligible under 35 U.S.C. 200 *et seq.*, to receive title to any inventions under the contract and proposes to fund at private expense the maintaining, licensing, and marketing of the inventions, the contracting officer shall use the basic clause with its Alternate I.

(c) If the facility is operated for national security purposes and engaged in the production, maintenance, testing, or dismantlement of a nuclear weapon or its components, the contracting officer shall use the basic clause with its Alternate II.

Subpart 970.28—Bonds and Insurance

970.2803 Insurance.

970.2803–1 Workers' Compensation Insurance.

(a) *Policies and requirements.* (1) Workers' compensation insurance protects employers against liability imposed by workers' compensation laws for injury or death to employees arising out of, or in the course of, their employment. This type of insurance is required by state laws unless employers have acceptable programs of self-insurance.

(2) *Special requirements.* Certain workers' compensation laws contain provisions which result in limiting the protection afforded persons subject to such laws. The policy with respect to these limitations as they affect persons employed by management and operating contractors is set forth as follows:

(i) *Elective provisions.* Some worker's compensation laws permit an employer to elect not to be subject to its provisions. It is DOE policy to require these contractors to be subject to workers' compensation laws in jurisdictions permitting election.

(ii) *Statutory immunity.* Under the provisions of some workers' compensation laws, certain types of employers; e.g., nonprofit educational institutions, are relieved from liability. If a contractor has a statutory option to accept liability, it is DOE policy to require the contractor to do so.

(iii) *Limited medical benefits.* Some workers' compensation laws limit the liability of the employer for medical care to a maximum dollar amount or to a specified period of time. In such cases, a contractor's workers' compensation insurance policy should contain a standard extra-statutory medical coverage endorsement.

(iv) *Limits on occupational disease coverage and employers' liability.* Some workers' compensation laws do not provide coverage for all occupational diseases. In such situations, a contractor's workers' compensation insurance policy should contain voluntary coverage for all occupational diseases.

(3) *Contractor ''employees' benefit plan''—self-insurers.* The policies and requirements set forth in paragraph (a)(2) of this section apply where management and operating contractors purchase workers' compensation insurance. With respect to self-insured contractors, the objectives specified in paragraph (a)(2) also shall be met through primary or excess workers' compensation and employers' liability insurance policy(ies) or an approved combination thereof. ''Employees'' benefit plans'' which were established in prior years may be continued to contrast termination at existing benefit levels.

(b) *Assignment of responsibilities.* (1) Office of Resource Management, within the Headquarters procurement organization, other officials, and the Heads of Contracting Activities, consistent with their delegations of responsibility, shall assure management and operating contracts are consistent with the policies and requirements of paragraph (a) of this section.

(2) In discharging assigned responsibility, the Heads of Contracting Activities shall—

(i) Periodically review workers' compensation insurance programs of management and operating contractors in the light of applicable workers' compensation statutes to assure conformance with the requirements of paragraph (a) of this section.

(ii) Evaluate the adequacy of coverage of ''self-insured'' workers'' compensation programs;

(iii) Provide arrangements for the administration of any existing ''employees'' benefit plans until such plans'' are terminated; and

(iv) Submit to the Office of Resource Management, within the Headquarters procurement organization, all proposals for the modification of existing ''employees' benefit plans.''

(3) The Office of Resource Management, within the Headquarters procurement organization, is responsible for approving management and operating contractor ''employees' benefit plans.''

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36372, July 22, 2009]

970.2803–2 Contract clause.

The contracting officer shall insert the clause at 970.5228–1, Insurance—

Litigation and Claims, instead of the clause at 48 CFR 52.228–7, in all management and operating contracts. Paragraphs (f)(3)(C) and (g)(2) of that clause apply to a nonprofit contractor only to the extent specifically provided in the individual contract.

[78 FR 25817, May 3, 2013]

Subpart 970.29—Taxes

970.2902 Federal excise taxes.

970.2902–3 Other Federal tax exemptions.

(a) The exemption respecting taxes on communication services or facilities has been held to extend to such services when furnished to Department of Energy (DOE) management and operating contractors who pay for such services or facilities from advances made to them by DOE under their contracts.

(c) Where it is considered that a request for an additional exemption in the performance of a management and operating contract would be justified, a recommendation that such a request be made should be forwarded to the Chief Financial Officer, Headquarters.

(d) Where tax exemption certificates are required in connection with the taxes cited in this section, the Head of the Contracting Activity will supply standard Government forms (SF 1094, U.S. Tax Exemption Certificate) on request.

[65 FR 81009, Dec. 22, 2000. Redesignated and amended at 74 FR 36372, July 22, 2009]

970.2903 State and local taxes.

970.2903–2 Application of State and local taxes to the Government.

It is DOE policy to secure those immunities or exemptions from state and local taxes to which it is entitled under the Federal Constitution or state laws. In carrying out this policy, the Heads of Contracting Activities shall—

(a) Take all necessary steps to preclude payment of any taxes for which any of the immunities or exemptions cited in this subpart are available. Advice of Counsel should be sought as to the availability of such immunities or exemptions; and

(b) Acquire directly and furnish to contractors as Government furnished property, equipment, material, or services when, in the opinion of the Head of the Contracting Activity—

(1) Such direct acquisition will result in substantial savings to the Government, taking into consideration any additional administrative costs;

(2) Such direct acquisition will not have a substantial adverse effect on the relationship between DOE and its contractor; and

(3) Such direct acquisition will not have a substantial adverse effect on the DOE program or schedules.

[65 FR 81009, Dec. 22, 2000. Redesignated and amended at 74 FR 36372, July 22, 2009]

970.2904 Contract clauses.

970.2904–1 Management and operating contracts.

(a) Pursuant to 48 CFR 29.401–4(b), the clause at 48 CFR 52.229–10, State of New Mexico Gross Receipts and Compensating Tax, is applicable to management and operating contracts that meet the three conditions stated. The contracting officer shall modify paragraph (b) of the clause to replace the phrase ''Allowable Cost and Payment'' with the phrase ''Payments and Advances.''

(b) Contracting officers shall include the clause at 970.5229–1, State and Local Taxes, in management and operating contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009]

Subpart 970.30—Cost Accounting Standards Administration

970.3002 CAS program requirements.

970.3002–1 CAS applicability.

The provisions of 48 CFR part 30 and 48 CFR chapter 99 (FAR Appendix) shall be followed for management and operating contracts.

Subpart 970.31—Contract Cost Principles and Procedures

970.3101–00–70 Scope of subpart.

(a) The Senior Procurement Executive is responsible for developing and

revising the policy and procedures for the determination of allowable costs reimbursable under a management and operating contract, and for coordination with other Headquarters' offices having joint interests.

(b) The Head of the Contracting Activity is responsible for following the policy, principles and standards set forth in this subpart in establishing the compensation and reimbursement provisions of contracts and subcontracts and for submission of deviations for Headquarters consideration and approval.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36378, July 22, 2009]

970.3101–9 Advance agreements.

(i) At any time, in accordance with the contract terms and conditions, the contracting officer may pursue an advance agreement in connection with any cost item under a contract.

970.3101–10 Indirect cost rate certification and penalties on unallowable costs.

(a) Certain contracts require certification of the costs proposed for final payment purposes. Section 970.4207–03–02 states the administrative procedures for the certification provisions and the related contract clause prescription.

(b) If unallowable costs are included in final cost settlement proposals, penalties may be assessed. Section 970.4207–03–02 states the administrative procedures for penalty assessment provisions and the related clause prescription.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009]

970.3102–3–70 Home office expenses.

(a) For on-site work, DOE's fee for management and operating contracts, determined under the policy of and calculated per the procedures in 970.1504–1–3, generally provides adequate compensation for home or corporate office general and administrative expenses incurred in the general management of the contractor's business as a whole.

(1) DOE recognizes that some Home Office Expenses are incurred for the benefit of a management and operating contract. DOE has elected to recognize that benefit through fee due to the difficulty of determining the dollar value applicable to any management and operating contract. The difficulty arises because:

(i) The general construct of a management and operating contract results in minimal Home Office involvement in the contract work, and

(ii) Conventional Home Office Expense allocation techniques that use bases such as total operating costs, labor dollars, hours etc., are not appropriate because they inherently assume significant contractor investment (in terms of its own resources, such as, labor, material, overhead, etc.). Contractor investments are minimal under DOE's operating and management contracts. The contracts are totally financed by DOE advance payments, and DOE provides government-owned facilities, property, and other needed resources.

(2) From time to time, the fee for a management and operating contract may not be adequate compensation for Home Office Expenses incurred for the benefit of the contract. An indication that such a case exists is the need for significant home office support to deal with issues at the site that occur without the fault or negligence of the contractor, for example, the need for home office legal support to deal with third party, environmental, safety, or health issues.

(3) In such a case, the contracting officer, after obtaining the HCA's approval, may consider a contractor request for additional compensation. The contractor may request—

(i) Fee in addition to its normal fee (but see 970.1504–1–3(b)(1) if the contract is for the management and operation of a laboratory); or

(ii) Compensation on the basis of actual cost.

(4) Because the contract's fee provides some compensation for Home Office Expenses, the contractor's request for additional compensation must always be for an amount less than the Home Office Expenses that are incurred for the benefit of the management and operating contract.

(b) For off-site work, the DOE allows Home Office Expenses under architect-

engineer, supply and research contracts with commercial contractors performing the work in their own facilities. Home Office Expenses may, however, be included for reimbursement under such DOE off-site architect-engineer, supply and research contracts, only to the extent that they are determined, after careful examination, to be allowable, reasonable, and properly allocable to the work. Work performed in a contractor's own facilities under a management and operating or construction contract may likewise be allowed to bear the properly allocable portion of allowable Home Office Expenses.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009]

970.3102–05 Selected costs.

970.3102–05–4 Bonding costs.

(d) The allowability of bonding costs shall be determined pursuant to 970.5228–1, Insurance-litigation and claims.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009]

970.3102–05–6 Compensation for personal services.

(a)(6) In determining the reasonableness of compensation, the compensation of each individual contractor employee normally need not be subjected to review and approval. Generally, the compensation paid individual employees should be left to the judgment of contractors subject to the limitations of DOE-approved compensation policies, programs, classification systems, and schedules, and amounts of money authorized for wage and salary increases for groups of employees. However, the contracting officer shall designate a compensation threshold appropriate for the particular situation. The contract shall specifically provide that contracting officer approval is required for compensating an individual contractor employee above the threshold if a total of 50 percent or more of such compensation is reimbursed under DOE cost-type contracts. For purposes of designating the threshold, total compensation includes only the employee's salary and cash bonus or incentive compensation.

(7)(i) Reimbursable costs for compensation for personal services are to be set forth in the contract. This compensation shall be set forth using the principles and policies of 48 CFR 31.205–6, Compensation, as supplemented by this section, 970.3102–05–6, and other pertinent parts of the DEAR. Costs that are unallowable under other contract terms shall not be allowable as compensation for personnel services.

(ii) The contract sets forth, in detail, personnel costs and related expenses allowable under the contract and documents personnel policies, practices and plans which have been found acceptable by the contracting officer. The contractor will advise DOE of any proposed changes in any matters covered by these policies, practices, or plans which relate to personnel costs. Types of personnel costs and related expenses addressed in the contract are as follows: Salaries and wages; bonuses and incentive compensation; overtime, shift differential, holiday, and other premium pay for time worked; welfare benefits and retirement programs; paid time off, and salaries and wages to employees in their capacity as union stewards and committeemen for time spent in handling grievances, or serving on labor management (contractor) committees provided, however, that the contracting officer's approval is required in each instance of total compensation to an individual employee above an annual rate as specified in the contract.

(p)(1) Notwithstanding the costs cited in this subsection, incurred for 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, are unallowable. Allowable costs of executive compensation shall be determined pursuant to 48 CFR 31.205–6(p).

[65 FR 81009, Dec. 22, 2000, as amended at 75 FR 68219, Nov. 5, 2010]

970.3102–05–18 Independent research and development and bid and proposal costs.

(c) Independent Research and Development and Bid and Proposal costs are

unallowable. However, contracting officer approved Laboratory Directed Research and Development costs and those costs incurred in support of the Department's various reimbursable programs are allowable.

970.3102–05–19 Insurance and indemnification.

The supplemental material on the costs of insurance and indemnification is found in 970.5228–1, Insurance-Litigation and Claims.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009]

970.3102–05–22 Lobbying and political activity costs.

(b) Costs of the following activities are excepted from 48 CFR 31.205–22, Lobbying and political activity costs, coverage, provided that the resultant costs are reasonable and otherwise fall into the following exceptions:

(1) Providing Members of Congress, their staff members or staff of cognizant legislative committees, in response to a request (written or oral, prior or contemporaneous) from Members of Congress, their staff members or staff of cognizant legislative committees, or as otherwise directed by the Contracting Officer, information or expert advice of a factual, technical, or scientific nature, with respect to topics directly related to the performance of the contract or proposed legislation. In providing this information or expert advice, the contractor shall indicate to the recipient that it is not presenting the views of DOE. Reasonable costs for transportation, lodging or meals incurred by contractor employees for the purpose of providing such information or expert advice shall also be reimbursable, provided the request for such information or expert advice is a prior written request signed by a Member of Congress.

(2) Providing State legislatures or subdivisions thereof, their staff members, or staff of cognizant legislative committees, in response to a prior written request from a State legislator, or as otherwise directed by the Contracting Officer, information or expert advice of a factual, technical, or scientific nature, with respect to topics directly related to the performance of the contract or proposed legislation. In providing this information or expert advice, the contractor shall indicate to the recipient that it is not presenting the views of DOE. Reasonable costs for transportation, lodging, or meals incurred by contractor employees shall be reimbursable.

970.3102–05–28 Other business expenses.

(i) Reasonable costs associated with the establishment and maintenance of financial institution accounts in connection with the work hereunder are allowable, including, but not limited to, service charges, the cost of disbursing cash, necessary guards, cashiers, and paymasters. If payments to employees are made by check, facilities and arrangements for cashing checks may be provided without expense to the employees, subject to the approval of the contracting officer.

970.3102–05–30 Patent costs.

970.3102–05–30–70 Patent costs and technology transfer costs.

(a) For management and operating contracts that do not include the clause at 970.5227–3, Technology Transfer Mission, the cost principle at 48 CFR 31.205–30 applies.

(b) For management and operating contracts that do include the clause at 970.5227–3, Technology Transfer Mission, the following patent and technology transfer costs are allowable—

(1) Costs of preparing invention disclosures, reports, and other patent related documents required by the contract;

(2) Costs of searching the art relating to invention disclosures;

(3) Costs incurred in connection with the filing and prosecution of patent applications for subject inventions, except where those costs are incurred as part of a privately funded technology transfer program recognized under the contract; and

(4) Other costs incurred in accordance with the patent rights clause and the Technology Transfer Mission clause included in the contract.

[65 FR 81009, Dec. 22, 2000. Redesignated and amended at 74 FR 36373, July 22, 2009]

970.3102–05–33 Professional and consultant service costs.

(g) Section 931.205–33 is applicable to management and operating contracts under this part.

[66 FR 4627, Jan. 18, 2001]

970.3102–05–46 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 subsection. 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. 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 subsection, costs incurred for lodging, meals, and incidental expenses (as defined in the regulations cited in paragraphs (a)(2)(i) through (iii) of this subsection) shall 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, prescribed by the General Services Administration (41 CFR chapters 300 through 304), for travel in the conterminous 48 United States, available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 922–002–00000–2;

(ii) Joint Travel Regulations, DoD Civilian Personnel, Appendix A, prescribed by the Department of Defense, for travel in Alaska, Hawaii, The Commonwealth of Puerto Rico, and territories and possessions of the United States, available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 908–010–00000–1; or

(iii) Standardized Regulations (Government Civilians, Foreign Areas), section 925, ''Maximum Travel Per Diem Allowances for Foreign Areas,'' prescribed by the Department of State, for travel in areas not covered in paragraphs (a)(2)(i) and (ii) of this subsection, available on a subscription basis from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402, Stock No. 744–008–00000–0.

(3) In special or 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 paragraphs (a)(2)(i), (ii), or (iii) of this subsection. For such higher amounts to be allowable, all of 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 to in paragraphs (a)(2)(i), (ii), or (iii) of this subsection, must exist.

(ii) A written justification for use of the higher amounts must be approved by an officer of the contractor's organization or designee to ensure that the authority is properly administered and controlled to prevent abuse.

(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 shall be in accordance with the contractor's established practices, subject to paragraph (a)(7) of this subsection, and provided that a receipt is required for each expenditure of $75.00 or more. The approved justification required by paragraph (a)(3)(ii) and, if applicable, paragraph (a)(3)(iii) of this subsection must be retained.

(4) Paragraphs (a)(2) and (a)(3) of this subsection do not incorporate the regulations cited in paragraphs (a)(2)(i), (ii), and (iii) of this subsection in their entirety. Only the maximum per diem rates, the definitions of lodging, meals, and incidental expenses, and the regulatory coverage dealing with special or unusual situations are incorporated in this subsection.

(5) An advance agreement (see 48 CFR 31.109 and 970.3101–9) with respect to compliance with paragraphs (a)(2) and

(a)(3) of this subsection may be useful and desirable.

(6)(i) The maximum per diem rates referenced in paragraph (a)(2) of this subsection 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) Appropriate downward adjustments from the maximum per diem rates would normally be required under these circumstances. While these adjustments need not be calculated in accordance with the Federal Travel Regulation or Joint Travel Regulations, they must result in a reasonable charge.

(7) Costs shall 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) Travel costs incurred in the normal course of overall administration of the business are allowable and shall be treated as indirect costs.

(c) Travel costs directly attributable to specific contract performance are allowable and may be charged to the contract under 48 CFR 31.202.

(d) Airfare costs in excess of the lowest customary standard, coach, or equivalent airfare offered during normal business hours are unallowable except when such accommodations require circuitous routing, require travel during unreasonable hours, excessively prolong travel, result in increased cost that would offset transportation savings, are not reasonably adequate for the physical or medical needs of the traveler, or are not reasonably available to meet mission requirements. However, in order for airfare costs in excess of the standard airfare to be allowable, the applicable condition(s) must be documented and justified.

(e)(1) ''Cost of travel by contractor-owned, -leased, or -chartered aircraft,'' as used in this paragraph, includes the cost of lease, charter, operation (including personnel), maintenance, depreciation, insurance, and other related costs.

(2) The costs of travel by contractor-owned, -leased, or -chartered aircraft are limited to the standard airfare described in paragraph (d) of this subsection for the flight destination unless travel by such aircraft is specifically required by contract specification, term, or condition, or a higher amount is approved by the contracting officer. A higher amount may be agreed to when one or more of the circumstances for justifying higher than standard airfare listed in paragraph (d) of this subsection are applicable, or when an advance agreement under paragraph (e)(3) of this subsection has been executed. In all cases, travel by contractor-owned, -leased, or -chartered aircraft must be fully documented and justified. 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 shall 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.

(3) Where an advance agreement is proposed (see 48 CFR 31.109), consideration may be given to the following:

(i) Whether scheduled commercial airlines or other suitable, less costly, travel facilities 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.

(f) Costs of contractor-owned or -leased automobiles, as used in this paragraph, include the costs of lease, operation (including personnel), maintenance, depreciation, insurance, etc. These costs are allowable, if reasonable, to the extent that the automobiles are used for company business.

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 as stated in 48 CFR 31.205–6(m)(2).

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009; 75 FR 68220, Nov. 5, 2010]

970.3102–05–47 Costs related to legal and other proceedings.

(h) *Costs associated with whistleblower actions.* Section 931.205–47(h) of this chapter is applicable to management and operating contracts under this part and must be included in the contract's cost reimbursement subcontracts.

970.3102–05–70 Preexisting conditions.

Clause 970.5231–4, Preexisting conditions, provides guidance on situations where this category of costs may be allowable.

[65 FR 81009, Dec. 22, 2000. Redesignated at 67 FR 14873, Mar. 28, 2002; 74 FR 36373, July 22, 2009]

970.3170 Contract clause.

The contracting officer shall insert the clause at 970.5231–4, Preexisting Conditions, in all management and operating contracts.

(a) The contracting officer shall include the clause with its Alternate I in contracts with incumbent management and operating contractors.

(b) The contracting officer shall include the clause with its Alternate II in contracts with management and operating contractors not previously working at that particular site or facility.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009]

Subpart 970.32—Contract Financing

970.3200 Policy.

It is the policy of the Department of Energy (DOE) to finance management and operating contracts through advance payments and the use of special financial institution accounts.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009]

970.3200–1 Reduction or suspension of advance, partial, or progress payments.

(a) The procedures prescribed at 48 CFR 32.006 shall be followed regarding the reduction or suspension of payments under management and operating contracts.

(b) Agency head responsibilities under 48 CFR 32.006 have been delegated to the Senior Procurement Executive.

(c) The remedy coordination official is responsible for receiving, assessing, and making recommendations to the Senior Procurement Executive.

970.3200–1–1 Contract clause.

The contracting officer shall insert the clause at 970.5232–1, Reduction or suspension of contract payments, in management and operating contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009]

970.3204 Advance payments.

970.3204–1 Applicability.

(a) The Head of the Contracting Activity shall authorize advance payments without interest, and approve the findings, determinations and the contract terms and conditions concerning advance payments in accordance with the procedures set forth in 48 CFR subpart 32.4, Advance Payments for Non-Commercial Items, as supplemented by subpart 932.4.

(b) Advance payments shall be made under a payments cleared financing arrangement for deposit in a special financial institution account or, at the option of the Government, by direct payment or other payment mechanism to the contractor.

(c) Prior to providing any advance payments, the contracting officer shall enter into an agreement with the contractor and a financial institution regarding a special financial institution account where the advanced funds will be deposited by the Government. Such agreement shall—

(1) Provide that DOE shall retain title to the unexpended balance of funds in the special financial institution account including collections, if any, deposited by the contractor;

(2) Provide that the title in paragraph (c)(1) of this subsection shall be superior to any claim or lien of the financial institution of deposit or others; and

(3) Incorporate all applicable requirements, as determined by the Office of Chief Financial Officer.

(d) Deviations from the requirements cited in paragraph (c) of this subsection shall be considered a deviation requiring approval of the Head of the Contracting Activity.

(e) Letter-of-credit arrangements shall be prepared in accordance with 48 CFR 32.406, Letters of Credit, and shall be coordinated between the procurement and finance organizations.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009; 75 FR 68221, Nov. 5, 2010]

970.3270 Standard financial management clauses.

(a) The following DEAR and FAR clauses are standard financial management clauses. The contracting officer shall insert them in all management and operating contracts:

(1) *970.5232–2, Payments and Advances.* (i) The contracting officer shall insert the basic clause with its Alternate I if a separate fixed-fee is provided for a separate item of work.

(ii) The contracting officer shall insert the basic clause with its Alternate II when total available fee provisions in the basic clause are used.

(iii) The contracting officer shall insert the basic clause with its Alternate III in management and operating contracts with integrated accounting systems.

(iv) The contracting officer shall insert the basic clause with its Alternate IV in management and operating contracts without integrated accounting systems.

(2) *970.5232–3, Accounts, records, and inspection.* If the contract includes the clause at 48 CFR 52.215–11, Price Reduction for Defective Cost or Pricing Data—Modifications, the contracting officer shall use the clause with its Alternate I.

(3) *970.5232–4, Obligation of funds.* The contracting officer may use the clause with its Alternate I in contracts which, expressly or otherwise, provide a contractual basis for equivalent controls in a separate clause.

(4) 970.5203–1, Management controls.

(5) 970.5232–5, Liability with respect to Cost Accounting Standards.

(6) 970.5232–6, Strategic Partnership Projects funding authorization.

(7) 48 CFR 52.230–2, Cost Accounting Standards.

(8) 48 CFR 52.230–6, Administration of Cost Accounting Standards.

(b) The following DEAR clauses are standard financial management clauses. The contracting officer shall insert them in all management and operating contracts with integrated accounting systems:

(1) 970.5232–7, Financial management system.

(2) 970.5232–8, Integrated accounting.

(c) Any deviations from the standard financial management clauses specified in paragraphs (a) and (b) of this section require the approval of the Head of the Contracting Activity and the written concurrence of the Department's Chief Financial Officer.

[65 FR 81009, Dec. 22, 2000, as amended at 72 FR 29081, May 24, 2007; 74 FR 36373, July 22, 2009; 80 FR 15519, Mar. 24, 2015]

Subpart 970.34—Major System Acquisition

970.3405 General requirements.

970.3405–2 Mission-oriented solicitation.

Contractors shall be required to promptly advise the Department of Energy (DOE) contracting officer of any advance notices of, or solicitations for, requirements which would logically involve DOE facilities or resources operated or managed by the contractor, which are received from another agency pursuant to 48 CFR 34.005. Management and operating contracts shall provide that the contractor shall not respond or otherwise propose to participate in response to the requirements of such solicitations unless the

contractor has obtained the prior written approval of the DOE manager of the field activity having cognizance over the contract. Such approval shall not be given except in compliance with applicable DOE directives, and with the concurrence of the cognizant Senior Program Official.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009. Redesignated at 75 FR 68220, Nov. 5, 2010]

970.35 Research and development contracting.

Subpart 970.35—Research and Development Contracting

970.3500 Scope of subpart.

This subpart implements 48 CFR 35.017 regarding the establishment, use, review, and termination of Federally Funded Research and Development Centers (FFRDCs) sponsored by the Department of Energy (DOE).

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009]

970.3501 Federally funded research and development centers.

970.3501–1 Sponsoring agreements.

(a) The contract award document constitutes the sponsoring agreement between the Department of Energy and the contractor operating an FFRDC.

(b) The contract statement of work shall define the purpose and mission of the FFRDC.

(c) Other elements of the sponsoring agreement which shall be incorporated into the contract include:

(1) The appropriate termination clause of the contract (as prescribed in 48 CFR subpart 49.5).

(2) The plan for the identification, use, and disposition of retained earnings developed pursuant to 970.1504–1–3(c)(6), if applicable;

(3) The clause entitled ''Federally Funded Research and Development Center Sponsoring Agreement,'' which, in part, prescribes limitations on the FFRDC competing with the private sector, and requirements for the FFRDC's acceptance of work from a nonsponsor; and

(4) Other terms and conditions considered necessary for the particular circumstances of the FFRDC (e.g., advance understandings on particular cost items).

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009]

970.3501–2 Using an FFRDC.

The contractor may only accept work from a non-sponsor (as defined in 48 CFR 35.017) in accordance with the requirements of DOE Order 481.1C, Strategic Partnership Projects (Formerly Known as Work for Others (Non-Department of Energy Funded Work)), or successor version.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009; 80 FR 15519, Mar. 24, 2015]

970.3501–3 Reviewing FFRDC's.

(a) All Department of Energy sponsored FFRDC's are operated by management and operating contractors.

(b) Coincident with the review required by 48 CFR 17.605(b) and 970.1706–1(b) regarding the decision to extend or compete a management and operating contract, the contracting officer shall, in accordance with internal Departmental procedures:

(1) Conduct the review required by 48 CFR 35.017–4 concerning the use and need for the FFRDC; and

(2) Recommend for Secretarial approval, the continuation or termination of the Department's sponsorship of an FFRDC at the time authorization is required to extend or compete a management and operating contract.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009]

970.3501–4 Contract clause.

The contracting officer shall insert the clause at 970.5235–1, Federally Funded Research and Development Center Sponsoring Agreement, in all solicitations and contracts for the management and operation of an FFRDC sponsored by the Department of Energy.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36373, July 22, 2009]

Subpart 970.36—Construction and Architect-Engineer Contracts

970.3605 Contract clauses.

970.3605–1 Other contracts.

The clause at 48 CFR 52.236–8, Other Contracts, shall be used in all management and operating contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.3605–2 Special construction clause for operating contracts.

The clause at 48 CFR 970.5236–1, Government Facility Subcontract Approval, shall be used in management and operating contracts when the contractor will not perform covered work with its own forces but may procure construction by subcontract.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

Subpart 970.37—Facilities Management Contracting

970.3706 Performance-based acquisition.

970.3706–1 General.

For policy and guidance on performance-based contracting for management and operating (M&O) contracts, see 970.1100.

[75 FR 68220, Nov. 5, 2010]

970.3770 Facilities management.

970.3770–1 Policy.

Contractors managing the Department of Energy (DOE) facilities shall be required to comply with the DOE Directives applicable to facilities management. The use of the DOE Directives is prescribed in 970.0470.

[75 FR 68220, Nov. 5, 2010]

970.3770–2 [Reserved]

Subpart 970.41—Acquisition of Utility Services

970.4102 Acquiring utility services.

970.4102–1 Policy.

(a) Utility services defined at 48 CFR 41.101 for the furnishing of electricity, gas (natural or manufactured), steam, water, and/or sewerage to facilities owned or leased by Department of Energy (DOE) shall be acquired directly by DOE and not by a contractor using a subcontractor arrangement, except as provided in paragraph (b) of this subsection.

(b) Where it is determined to be in the best interest of the Government, a DOE contracting activity may authorize a management and operating contractor for a facility to acquire such utility service for the facility, after requesting and receiving concurrence to make such an authorization from the Director, Public Utilities Branch, Headquarters. Any request for such concurrence should be included in the Utility Service Requirements and Options Studies required by DOE Order 430.2, or its successor. Alternatively, it may be made in a separate document submitted to the Director of that office early in the acquisition cycle. Any request shall set forth why it is in the best interest of the DOE to acquire utility service(s) by subcontract, i.e., what the benefits are, such as economic advantage.

(c) The requirements of 48 CFR part 41, this section, and DOE Order 430.2, or its successor, shall be applied to a subcontract level acquisition for furnishing utility services to a facility owned or leased by DOE.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

Subpart 970.42—Contract Administration

970.4207–03–02 Certificate of costs.

(a) The contracting officer shall require that management and operating contractors provide a submission, pursuant to 970.5232–2–(j), for settlement of

costs incurred during the period stipulated on the submission and a certification that the costs included in the submission are allowable. The contracting officer shall assess a penalty pursuant to 970.5242–1 if unallowable costs are included in the submission. Unallowable costs are either expressly unallowable or determined unallowable.

(1) An expressly unallowable cost is a particular item or type of cost which, under the express provisions of an applicable law, regulation, or this contract, is specifically named and stated to be unallowable.

(2) A cost determined unallowable is one which, for that contractor—

(i) Was subject to a contracting officer's final decision and not appealed;

(ii) The Civilian Board of Contract Appeals or a court has previously ruled as unallowable; or

(iii) Was mutually agreed to be unallowable.

(b) If, during the review of the submission, the contracting officer determines that the submission contains an expressly unallowable cost or a cost determined to be unallowable prior to the submission, the contracting officer shall assess a penalty.

(c) If the contracting officer determines that a cost submitted by the contractor in its submission for settlement is:

(1) Expressly unallowable, then the contracting officer shall assess a penalty in an amount equal to the disallowed cost allocated to the contract plus interest on the paid portion of the disallowed cost. Interest shall be computed from the date of overpayment to the date of repayment using the interest rate specified by the Secretary of the Treasury pursuant to Public Law 92–41 (85 Stat. 97).

(2) Determined unallowable, then the contracting officer shall assess a penalty in an amount equal to two times the amount of the disallowed cost allocated to the contract.

(d) The contracting officer may waive the penalty provisions when:

(1) The contractor withdraws the submission before the formal initiation of an audit of the submission and submits a revised submission;

(2) The amount of the unallowable costs allocated to covered contracts is $10,000 or less; or

(3) The contractor demonstrates to the contracting officer's satisfaction that:

(i) It has established appropriate policies, personnel training, and an internal control and review system that provides assurances that unallowable costs subject to penalties are precluded from the contractor's submission for settlement of costs; and

(ii) The unallowable costs subject to the penalty were inadvertently incorporated into the submission.

(e) The Head of the Contracting Activity may waive the certification when—

(1) It determines that it would be in the best interest of the United States to waive such certification; and

(2) It states in writing the reasons for that determination and makes such determination available to the public.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.4207–03–70 Contract clause.

The contracting officer shall insert the clause at 970.5242–1, Penalties for unallowable costs, in all management and operating solicitations and contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.4207–05–01 Contracting officer determination procedure.

(b)(4) A contracting officer shall not resolve any questioned costs until the contracting officer has obtained—

(i) Adequate documentation with respect to such costs; and

(ii) The opinion of the Department of Energy's auditor on the allowability of such costs.

(5) The contracting officer shall ensure that the documentation supporting the final settlement addresses the amount of the questioned costs and the subsequent disposition of such questioned costs.

(6) The contracting officer shall ensure, to the maximum extent practicable, that the Department of Energy's auditor is afforded an opportunity to attend any negotiation or meeting

with the contractor regarding a determination of allowability.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

Subpart 970.43—Contract Modifications

970.4302 Changes.

970.4302–1 Contract clause.

The contracting officer shall insert the clause at 970.5243–1, Changes, in all management and operating contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

Subpart 970.44—Management and Operating Contractor Purchasing

970.4400 Scope.

This subpart prescribes policies and procedures concerning the purchasing systems and activities of management and operating contractors.

970.4401 Responsibilities.

970.4401–1 General.

(a) In the Department of Energy (DOE), overall responsibility for the oversight of the performance of management and operating contractors, including their purchasing activities, rests with the cognizant DOE contracting activity and, in particular, the Head of the Contracting Activity (HCA). Contracting officers are responsible for the management and operating contractors' conformance with this subpart and the applicable terms and conditions of their contracts, and for determining whether those purchasing activities provide timely and effective support to DOE programs.

(b) In carrying out their overall responsibilities, HCAs shall—

(1) Require management and operating contractors to maintain written descriptions of their individual purchasing systems and methods and further require that, upon award or extension of the contract, the entire written description be submitted to the contracting officer for review and acceptance;

(2) Require that any changes to the management and operating contractor's written description having any substantive impact upon the contractor's purchasing system and methods be submitted to the contracting officer for review and acceptance prior to issuance;

(3) Ensure the review of individual purchasing actions of certain types, or above stated dollar levels, by the contracting officer pursuant to 48 CFR subpart 44.2 or as set forth in the contractor's approved system and methods; and

(4) Ensure that periodic appraisals of the contractor's management of all facets of the purchasing function, including compliance with the contractor's approved system and methods, are performed by the contracting officer. Such appraisals shall be performed through either of the following methodologies—

(i) Contractor Purchasing System Reviews, conducted in accordance with 48 CFR subpart 44.3; or

(ii) When approved by the contracting officer, contractor participation in the conduct of the Balanced Scorecard performance measurement and performance management system.

(c) In performing the reviews required by paragraphs (b)(1) and (2), and the appraisals required by paragraph (b)(4) of this subsection, HCAs shall assure that contracting officers determine that the contractors' written systems and methods are consistent with this subpart and the applicable terms and conditions of their contracts.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.4401–2 Review and approval.

(a) The Heads of the Contracting Activities shall establish thresholds, by subcontract type and dollar level, for the review and approval of proposed subcontracting actions by each management and operating contractor under their cognizance. Such thresholds may not exceed the authority delegated to the Head of the Contracting Activity by the Senior Procurement Executive. In establishing these thresholds, the Heads of the Contracting Activities should consider such factors as the following—

(1) The nature of work to be performed under the management and operating contract;

(2) The size, experience, ability, reliability, and organization of the management and operating contractor's purchasing function;

(3) The internal controls, procedures, and organizational stature of the management and operating contractor's purchasing function; and

(4) Policies with respect to such reviews and approvals established by the Senior Procurement Executive.

(b) Prior approval shall be required for the subcontracting of any work a contractor is obligated to perform under a contract entered into under section 41, entitled Production of Special Nuclear Material, of the Atomic Energy Act of 1954, as amended.

(c) The Heads of the Contracting Activities shall take such action as may be required to insure compliance with the procedure for purchasing from contractor-affiliated sources or the purchase of specific items, or classes of items, which by the terms of the contract may require DOE approval.

(d) The Heads of the Contracting Activities may raise or lower the review and approval thresholds established pursuant to paragraph (a) of this subsection at any time. Such action may be considered upon the periodic review of the contractor's purchasing system, but in any case those adjusted thresholds may not exceed the approval authority delegated to the Head of the Contracting Activity by the Senior Procurement Executive.

(e) DOE approvals of specific proposed purchases pursuant to this subpart shall communicate that such approval does not relieve the management and operating contractor of any obligation under its prime contract with DOE; is given without prejudice to any rights or claims of the Government thereunder; creates no obligation on the part of the Government to the subcontractor, and is not a predetermination of the allowability of costs to be incurred under the subcontract.

(f) Contracting officers shall assure that management and operating contractors establish and maintain subcontract files which contain those documents essential to present an accurate and adequate record of all purchasing transactions.

(g) Contracting officers shall assure that management and operating contractors document purchases in writing, setting forth the information and data used in determining that the purchases are in the best interest of the Government. The scope and detail of this documentation shall be consistent with the nature, dollar value, and complexity of the purchase.

(h) The Heads of the Contracting Activities shall assure that the contracting activity establishes and maintains files of the documents associated with the review and approval of subcontract actions subject to DOE review and approval. Those files shall include, among other necessary documentation, an appraisal of the proposed action by the contracting activity and a copy of the approving or disapproving document forwarded to the management and operating contractor, including a listing of any deficiencies, a listing of any required corrective actions, any suggestions, or other relevant comments.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.4401–3 Advance notification.

(a) Contracting officers shall assure that the written description of the management and operating contractor's purchasing system and methods provides for advance notice to the DOE contracting officer of the proposed award of the following specified types of subcontracts, except as stated in paragraph (b) of this subsection—

(1) Pursuant to section 304(b) of the Federal Property and Administrative Service Act of 1949, as amended (41 U.S.C. 254(b)):

(i) Cost reimbursement-type subcontracts of any award value; and

(ii) Fixed price-type subcontracts which exceed the simplified acquisition threshold, or 5 percent of the total estimated cost of the prime contract.

(2) Purchases from contractor-affiliated sources over a value established by the HCA.

(b) Pursuant to section 602(d)13 of the Act (40 U.S.C. 474(13)) referred to in

paragraph (a) of this section, the advance notification requirement for the types of purchases listed in paragraphs (a) (1) and (2) of this subsection shall not apply to subcontracts relating to functions derived from the Atomic Energy Commission.

(c) The advance notice shall contain, at a minimum, a description of work, estimated cost, type of contract or reimbursement provisions, and extent of competition, or justification for a noncompetitive purchase procurement. The contracting officer may at any time request additional information that must be furnished promptly and prior to award of the subcontract.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.4402 Contractor purchasing system.

970.4402–1 Policy.

(a) DOE contracts for the management and operation of its facilities, the design and production of nuclear weapons, energy research and development, and the performance of other services. These management and operating (M&O) contractors have been selected for their technical and managerial expertise and are expected to bring to bear these technical and managerial skills to accomplish the significant Federal mission(s) described in their contracts with, and work plans approved by, DOE.

(b) Purchasing done by management and operating contractors is one area in which the particular skills of the contractors will be brought to bear in order to more readily accomplish the contractors' assigned missions. The contracting procedures of the contractor's organization, therefore, form the basis for the development of a purchasing system and methods that will comply with its contract with DOE and this subpart.

970.4402–2 General requirements.

The following shall apply to the purchasing systems of management and operating contractors:

(a) The objective of a management and operating contractor's purchasing system is to deliver to its customers on a timely basis those best value products and services necessary to accomplish the purposes of the Government's contract. To achieve this objective, contractors are expected to use their experience, expertise and initiative consistent with this subpart.

(b) The purchasing systems and methods used by management and operating contractors shall be well-defined, consistently applied, and shall follow purchasing practices appropriate for the requirement and dollar value of the purchase. It is anticipated that purchasing practices and procedures will vary among contractors and according to the type and kinds of purchases to be made.

(c) Contractor purchases are not Federal procurements, and are not directly subject to the Federal Acquisition Regulations in 48 CFR. Nonetheless, certain Federal laws, Executive Orders, and regulations may affect contractor purchasing, as required by statute, regulation, or contract terms and conditions.

(d) Contractor purchasing systems shall identify and apply the best in commercial purchasing practices and procedures (although nothing precludes the adoption of Federal procurement practices and procedures) to achieve system objectives. Where specific requirements do not otherwise apply, the contractor purchasing system shall provide for appropriate measures to ensure the—

(1) Acquisition of quality products and services at fair and reasonable prices;

(2) Use of capable and reliable subcontractors who either—

(i) Have track records of successful past performance, or

(ii) Can demonstrate a current superior ability to perform;

(3) Minimization of acquisition leadtime and administrative costs of purchasing;

(4) Use of effective competitive techniques;

(5) Reduction of performance risks associated with subcontractors, and facilitation of quality relationships which can include techniques such as partnering agreements, ombudsmen, and alternative disputes procedures;

(6) Use of self-assessment and benchmarking techniques to support

continuous improvement in purchasing;

(7) Maintenance of the highest professional and ethical standards;

(8) Maintenance of file documentation appropriate to the value of the purchase and which is adequate to establish the propriety of the transaction and the price paid; and

(9) Maximization of opportunities for small business, HUBZone small business, small disadvantaged business, and woman-owned small business concerns to participate in contract performance.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.4402–3 Purchasing from contractor-affiliated sources.

(a) A management and operating contractor may purchase from sources affiliated with the contractor (any division, subsidiary, or affiliate of the contractor or its parent company) in the same manner as from other sources, provided—

(1) The management and operating contractor's purchasing function is independent of the proposed contractor-affiliated source;

(2) The same terms and conditions would apply if the purchase were from a third party;

(3) Award is made in accordance with policies and procedures designed to permit effective competition which have been approved by the contracting officer. (This requirement for competition shall not preclude acquisition of technical services from contractor-affiliated entities where those entities have a special expertise, and the basis therefore is documented.); and

(4) The award is legally enforceable where the entities are separately incorporated.

(b) Subcontracts for performance of contract work itself (as distinguished from the purchase of supplies and services needed in connection with the performance of work) require DOE authorization and may involve an adjustment of the contractor's fee, if any. If the management and operating contractor seeks authorization to have some part of the contract work performed by a contractor-affiliated source, and that contractor's performance of that work was a factor in the negotiated fee, DOE approval would normally require—

(1) That the contractor-affiliated source perform such work without fee or profit; or

(2) An equitable downward adjustment to the management and operating contractor's fee, if any.

(c) Determination on cost of money allowance as prescribed at 48 CFR 31.225–10 shall be treated as follows:

(1) When a purchase from a contractor-affiliated source results from competition and is in accord with provisions and conditions of paragraphs (a)(1) through (a)(4) of this subsection, the contractor-affiliated source may include cost of money as an allowable element of the costs of its goods or services supplied to the contractor; provided—

(i) The purchase is based on cost as set forth in 48 CFR 31.205–26(e); and

(ii) The cost of money amount is computed in accordance with 48 CFR 31.205–10 and related procedures (see 970.30).

(2) When a purchase from a contractor-affiliated source is made noncompetitively, cost of money shall not be considered an allowable element of the cost of the contractor-affiliated source purchase.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.4402–4 Nuclear material transfers.

(a) Management and operating contractors, in preparing subcontracts or other agreements in which monetary payments or credits depend on the quantity and quality of nuclear material, shall be required to assure that each such subcontract or agreement contains a—

(1) Description of the material to be transferred;

(2) Provision specifying the method by which the quantities are to be measured and reported;

(3) Provision specifying the procedures to be used in resolving any differences arising as a result of such measurements;

(4) Provision for the use of an independent third party as an umpire to settle unresolved differences in the analytical samples; and

(5) Provision specifying in detail which party shall bear the costs of resolving a difference and what constitutes such costs.

(b) The provisions providing for resolution of measurement differences must be such that resolution is always accomplished, while at the same time minimizing any advantage one party may have over the other.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.4403 Contract clause.

The contracting officer shall insert the clause at 970.5244–1, Contractor Purchasing System, in all management and operating contracts.

Subpart 970.45—Government Property

970.4501 General.

970.4501–1 Contract clause.

(a) The contracting officer shall insert the clause at 970.5245–1, Property, in management and operating contracts. Paragraph (f)(1)(i)(c) of the clause applies to a non-profit contractor only to the extent specifically provided in the individual contract. Specific managerial personnel may be listed in paragraph (j), provided their listing is consistent with the clause and the DEAR.

(b) The contracting officer shall insert the basic clause with its Alternate I in contracts with nonprofit contractors.

Subpart 970.49—Termination of Contracts

970.4905 Contract termination clause.

970.4905–1 Termination for convenience of the government and default.

(a) The contracting officer shall include the clause at 48 CFR 52.249–6, Termination (Cost Reimbursement), as modified pursuant to paragraph (b) of this subsection, in all cost-reimbursement management and operating contracts, regardless of whether the contract is for production, or research and development with an educational or nonprofit institution.

(b) The contracting officer shall modify paragraph (i) of the clause to insert ''as supplemented in subpart 970.31 of the Department of Energy Acquisition Regulation,'' after the phrase, ''part 31 of the Federal Acquisition Regulation.''

Subpart 970.50—Extraordinary Contractual Actions and the Safety Act

970.5001 Residual powers.

970.5001–4 Contract clause.

When use of the clause at 48 CFR 52.250–1, Indemnification Under Public Law 85–804, Alternate 1 is appropriate, the contracting officer may substitute the words ''Obligation of funds'' for the words ''Limitation of Cost or Limitation of Funds.''

[65 FR 81009, Dec. 22, 2000. Redesignated and amended at 74 FR 36374, July 22, 2009]

970.5070 Indemnification.

970.5070–1 Scope and applicability.

(a) Section 170d. of the Atomic Energy Act of 1954, as amended, requires Department of Energy (DOE) to enter into agreements of indemnity with contractors whose work involves the risk of public liability for the occurrence of a nuclear incident or precautionary evacuation.

(b) Details of such indemnification are discussed at subpart 950.70.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.5070–2 General.

DOE contractors with whom statutory nuclear hazards indemnity agreements under the authority of section 170d. of the Atomic Energy Act of 1954, as amended, are executed will not normally be required or permitted to furnish financial protection by purchase of insurance to cover public liability for nuclear incidents. However, if authorized by the DOE Headquarters office having responsibility for contractor casualty insurance programs, DOE contractors may be—

(a) Permitted to furnish financial protection to themselves; or

(b) Permitted to continue to carry such insurance at cost to the Government if they currently maintain insurance for such liability.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.5070–3 Contract clauses.

(a) The clause at 952.250–70, Nuclear Hazards Indemnity Agreement, shall be included in all management and operating contracts involving the risk of public liability for the occurrence of a nuclear incident or precautionary evacuation arising out of or in connection with the contract work, including such events caused by a product delivered to a DOE-owned, facility for use by DOE or its contractors. The clause at 952.250–70 also shall be included in any management and operating contract for the design of a DOE facility, the construction or operation of which may involve the risk of public liability for a nuclear incident or a precautionary evacuation.

(b) The clause at 952.250–70 shall not be included in contracts in which the contractor is subject to Nuclear Regulatory Commission (NRC) financial protection requirements under section 170b. of the Act or NRC agreements of indemnification under section 170 c. or k. of the Act for activities to be performed under the contract.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

Subpart 970.52—Solicitation Provisions and Contract Clauses for Management and Operating Contracts

970.5200 Scope of subpart.

This subpart prescribes some of the solicitation provisions and contract clauses for use in management and operating contracts. The provisions and clauses contained in this subpart supplement the provisions and clauses prescribed in the FAR and in other parts of the DEAR (48 CFR 901 through 48 CFR 952), and, pursuant to the individual provision or clause prescription, are to be used in addition to or in place of such clauses. Management and operating contracts are hybrid contracts, in some cases including aspects of several FAR contract types, for example, supplies and construction. For some FAR solicitation provisions and contract clauses, this subpart prescribes their use despite the hybrid nature of the work required. To assist Departmental contracting personnel in determining the applicability of FAR and DEAR clauses to management and operating contracts, additional guidance is published and made available by the Office of Procurement and Assistance Policy, within the Headquarters procurement organization.

970.5201 Text of provisions and clauses.

970.5203–1 Management controls.

As prescribed in 970.0370–2(a) and 970.3270(a)(4), insert the following clause:

MANAGEMENT CONTROLS (JUN 2007)

(a)(1) The Contractor shall be responsible for maintaining, as an integral part of its organization, effective systems of management controls for both administrative and programmatic functions. Management controls comprise the plan of organization, methods, and procedures adopted by management to reasonably ensure that: the mission and functions assigned to the Contractor are properly executed; efficient and effective operations are promoted including consideration of outsourcing of functions; resources are safeguarded against waste, loss, mismanagement, unauthorized use, or misappropriation; all encumbrances and costs that are incurred under the contract and fees that are earned are in compliance with applicable clauses and other current terms, conditions, and intended purposes; all collections accruing to the Contractor in connection with the work under this contract, expenditures, and all other transactions and assets are properly recorded, managed, and reported; and financial, statistical, and other reports necessary to maintain accountability and managerial control are accurate, reliable, and timely.

(2) The systems of controls employed by the Contractor shall be documented and satisfactory to DOE.

(3) Such systems shall be an integral part of the Contractor's management functions, including defining specific roles and responsibilities for each level of management, and holding employees accountable for the adequacy of the management systems and controls in their areas of assigned responsibility.

(4) The Contractor shall, as part of the internal audit program required elsewhere in

this contract, periodically review the management systems and controls employed in programs and administrative areas to ensure that they are adequate to provide reasonable assurance that the objectives of the systems are being accomplished and that these systems and controls are working effectively. Annually, or at other intervals directed by the Contracting Officer, the Contractor shall supply to the Contracting Officer copies of the reports reflecting the status of recommendations resulting from management audits performed by its internal audit activity and any other audit organization. This requirement may be satisfied in part by the reports required under paragraph (i) of 48 CFR 970.5232–3, Accounts, records, and inspection.

(b) The Contractor shall be responsible for maintaining, as a part of its operational responsibilities, a baseline quality assurance program that implements documented performance, quality standards, and control and assessment techniques.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 71 FR 16243, Mar. 31, 2006; 72 FR 29081, May 24, 2007; 72 FR 39761, July 20, 2007; 74 FR 36374, 36378, 36380, July 22, 2009]

970.5203–2 Performance improvement and collaboration.

As prescribed in 970.0370–2(b), insert the following clause:

PERFORMANCE IMPROVEMENT AND COLLABORATION (MAY 2006)

(a) The Contractor agrees that it shall affirmatively identify, evaluate, and institute practices, where appropriate, that will improve performance in the areas of environmental and health, safety, scientific and technical, security, business and administrative, and any other areas of performance in the management and operation of the contract. This may entail the alteration of existing practices or the institution of new procedures to more effectively or efficiently perform any aspect of contract performance or reduce overall cost of operation under the contract. Such improvements may result from changes in organization, outsourcing decisions, simplification of systems while retaining necessary controls, or any other approaches consistent with the statement of work and performance measures of this contract.

(b) The Contractor agrees to work collaboratively with the Department, all other management and operating, DOE major facilities management contractors and affiliated contractors which manage or operate DOE sites or facilities for the following purposes: (i) to exchange information generally, (ii) to evaluate concepts that may be of benefit in resolving common issues, in confronting common problems, or in reducing costs of operations, and (iii) to otherwise identify and implement DOE-complex-wide management improvements discussed in paragraph (a). In doing so, it shall also affirmatively provide information relating to its management improvements to such contractors, including lessons learned, subject to security considerations and the protection of data proprietary to third parties.

(c) The Contractor may consult with the Contracting Officer in those instances in which improvements being considered pursuant to paragraph (a) involve the cooperation of the DOE. The Contractor may request the assistance of the Contracting Officer in the communication of the success of improvements to other management and operating contractors in accordance with paragraph (b) of this clause.

(d) The Contractor shall notify the Contracting Officer and seek approval where necessary to fulfill its obligations under the contract. Compliance with this clause in no way alters the obligations of the Contractor under any other provision of this contract.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 71 FR 16243, Mar. 31, 2006; 74 FR 36374, 36378, 36380, July 22, 2009]

970.5203–3 Contractor's organization.

As prescribed in 970.0371–9, insert the following clause:

CONTRACTOR'S ORGANIZATION (DEC 2000)

(a) *Organization chart.* As promptly as possible after the execution of this contract, the Contractor shall furnish to the Contracting Officer a chart showing the names, duties, and organization of key personnel (see 48 CFR 952.215–70) to be employed in connection with the work, and shall furnish supplemental information to reflect any changes as they occur.

(b) *Supervisory representative of Contractor.* Unless otherwise directed by the Contracting Officer, a competent full-time resident supervisory representative of the Contractor satisfactory to the Contracting Officer shall be in charge of the work at the site, and any work off-site, at all times.

(c) *Control of employees.* The Contractor shall be responsible for maintaining satisfactory standards of employee competency, conduct, and integrity and shall be responsible for taking such disciplinary action with respect to its employees as may be necessary. In the event the Contractor fails to remove any employee from the contract work whom DOE deems incompetent, careless, or insubordinate, or whose continued employment on

the work is deemed by DOE to be inimical to the Department's mission, the Contracting Officer may require, with the approval of the Secretary of Energy, the Contractor to remove the employee from work under the contract. This includes the right to direct the Contractor to remove its most senior key person from work under the contract for serious contract performance deficiencies.

(d) *Standards and procedures.* The Contractor shall establish such standards and procedures as are necessary to implement the requirements set forth in 48 CFR 970.0371. Such standards and procedures shall be subject to the approval of the Contracting Officer.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, 36378, 36380, July 22, 2009]

970.5204–1 Counterintelligence.

(a) As prescribed in 970.0404–4(a), insert the following clause in contracts containing the clauses at 952.204–2, Security, and 952.204–70, Classification/Declassification:

COUNTERINTELLIGENCE (DEC 2010)

(a) The Contractor shall take all reasonable precautions in the work under this contract to protect DOE programs, facilities, technology, personnel, unclassified sensitive information and classified matter from foreign intelligence threats and activities conducted for governmental or industrial purposes, in accordance with DOE Order 475.1, Counterintelligence Program, or its successor; Executive Order 12333, U.S. Intelligence Activities; and other pertinent national and Departmental Counterintelligence requirements.

(b) The Contractor shall appoint a qualified employee(s) to function as the Contractor Counterintelligence Officer. The Contractor Counterintelligence Officer will be responsible for conducting defensive Counterintelligence briefings and debriefings of employees traveling to foreign countries or interacting with foreign nationals; providing thoroughly documented written reports relative to targeting, suspicious activity and other matters of Counterintelligence interest; immediately reporting targeting, suspicious activity and other Counterintelligence concerns to the DOE Headquarters Counterintelligence Division; and providing assistance to other elements of the U.S. Intelligence Community as stated in the aforementioned Executive Order, the DOE Counterintelligence Order, and other pertinent national and Departmental Counterintelligence requirements.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, 36378, July 22, 2009; 75 FR 68220, Nov. 5, 2010]

970.5204–2 Laws, regulations, and DOE directives.

As prescribed in 970.0470–2, insert the following clause:

LAWS, REGULATIONS, AND DOE DIRECTIVES (DEC 2000)

(a) In performing work under this contract, the Contractor shall comply with the requirements of applicable Federal, State, and local laws and regulations (including DOE regulations), unless relief has been granted in writing by the appropriate regulatory agency. A List of Applicable Laws and regulations (List A) may be appended to this contract for information purposes. Omission of any applicable law or regulation from List A does not affect the obligation of the Contractor to comply with such law or regulation pursuant to this paragraph.

(b) In performing work under this contract, the Contractor shall comply with the requirements of those Department of Energy directives, or parts thereof, identified in the List of Applicable Directives (List B) appended to this contract. Except as otherwise provided for in paragraph (d) of this clause, the Contracting Officer may, from time to time and at any time, revise List B by unilateral modification to the contract to add, modify, or delete specific requirements. Prior to revising List B, the Contracting Officer shall notify the Contractor in writing of the Department's intent to revise List B and provide the Contractor with the opportunity to assess the effect of the Contractor's compliance with the revised list on contract cost and funding, technical performance, and schedule; and identify any potential inconsistencies between the revised list and the other terms and conditions of the contract. Within 30 days after receipt of the Contracting Officer's notice, the Contractor shall advise the Contracting Officer in writing of the potential impact of the Contractor's compliance with the revised list. Based on the information provided by the Contractor and any other information available, the Contracting Officer shall decide whether to revise List B and so advise the Contractor not later than 30 days prior to the effective date of the revision of List B. The Contractor and the Contracting Officer shall identify and, if appropriate, agree to any changes to other contract terms and conditions, including cost and schedule, associated with the revision of List B pursuant to the clause of this contract entitled, ''Changes.''

(c) Environmental, safety, and health (ES&H) requirements appropriate for work conducted under this contract may be determined by a DOE approved process to evaluate the work and the associated hazards and identify an appropriately tailored set of standards, practices, and controls, such as a tailoring process included in a DOE approved Safety Management System implemented under the clause entitled ''Integration of Environment, Safety, and Health into Work Planning and Execution.'' When such a process is used, the set of tailored (ES&H) requirements, as approved by DOE pursuant to the process, shall be incorporated into List B as contract requirements with full force and effect. These requirements shall supersede, in whole or in part, the contractual environmental, safety, and health requirements previously made applicable to the contract by List B. If the tailored set of requirements identifies an alternative requirement varying from an ES&H requirement of an applicable law or regulation, the Contractor shall request an exemption or other appropriate regulatory relief specified in the regulation.

(d) Except as otherwise directed by the Contracting Officer, the Contractor shall procure all necessary permits or licenses required for the performance of work under this contract.

(e) Regardless of the performer of the work, the Contractor is responsible for compliance with the requirements of this clause. The Contractor is responsible for flowing down the requirements of this clause to subcontracts at any tier to the extent necessary to ensure the Contractor's compliance with the requirements.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, 36378, 36380, July 22, 2009]

970.5204–3 Access to and ownership of records.

As prescribed in 970.0407–1–3, insert the following clause:

ACCESS TO AND OWNERSHIP OF RECORDS (OCT 2014)

(a) *Government-owned records.* Except as provided in paragraph (b) of this clause, all records acquired or generated by the contractor in its performance of this contract, including records series described within the contract as Privacy Act systems of records, shall be the property of the Government and shall be maintained in accordance with 36 CFR, Chapter XII, Subchapter B, ''Records Management.'' The contractor shall ensure records classified as Privacy Act system of records are maintained in accordance with FAR 52.224.2 ''Privacy Act.''

(b) *Contractor-owned records.* The following records are considered the property of the contractor and are not within the scope of paragraph (a) of this clause. [The contracting officer shall identify which of the following categories of records will be included in the clause, excluding records operated and maintained in DOE Privacy Act system of records].

(1) Employment-related records (such as worker's compensation files; employee relations records, records on salary and employee benefits; drug testing records, labor negotiation records; records on ethics, employee concerns; records generated during the course of responding to allegations of research misconduct; records generated during other employee related investigations conducted under an expectation of confidentiality; employee assistance program records; and personnel and medical/health-related records and similar files), and non-employee patient medical/health-related records, excluding records operated and maintained by the Contractor in Privacy Act system of records. Employee-related systems of record may include, but are not limited to: Employee Relations Records (DOE–3), Personnel Records of Former Contractor Employees (DOE–5), Payroll and Leave Records (DOE–13), Report of Compensation (DOE–14), Personnel Medical Records (DOE–33), Employee Assistance Program (EAP) Records (DOE–34) and Personnel Radiation Exposure Records (DOE–35).

(2) Confidential contractor financial information, internal corporate governance records and correspondence between the contractor and other segments of the contractor located away from the DOE facility (i.e., the contractor's corporate headquarters);

(3) Records relating to any procurement action by the contractor, except for records that under 48 CFR 970.5232–3 are described as the property of the Government; and

(4) Legal records, including legal opinions, litigation files, and documents covered by the attorney-client and attorney work product privileges; and

(5) The following categories of records maintained pursuant to the technology transfer clause of this contract:

(i) Executed license agreements, including exhibits or appendices containing information on royalties, royalty rates, other financial information, or commercialization plans, and all related documents, notes and correspondence.

(ii) The contractor's protected Cooperative Research and Development Agreement (CRADA) information and appendices to a CRADA that contain licensing terms and conditions, or royalty or royalty rate information.

(iii) Patent, copyright, mask work, and trademark application files and related contractor invention disclosures, documents and

correspondence, where the contractor has elected rights or has permission to assert rights and has not relinquished such rights or turned such rights over to the Government.

(c) *Contract completion or termination.* Upon contract completion or termination, the contractor shall ensure final disposition of all Government-owned records to a Federal Record Center, the National Archives and Records Administration, to a successor contractor, its designee, or other destinations, as directed by the Contracting Officer. Upon the request of the Government, the contractor shall provide either the original contractor-owned records or copies of the records identified in paragraph (b) of this clause, to DOE or its designees, including successor contractors. Upon delivery, title to such records shall vest in DOE or its designees, and such records shall be protected in accordance with applicable federal laws (including the Privacy Act) as appropriate. If the contractor chooses to provide its original contractor-owned records to the Government or its designee, the contractor shall retain future rights to access and copy such records as needed.

(d) *Inspection, copying, and audit of records.* All records acquired or generated by the Contractor under this contract in the possession of the Contractor, including those described at paragraph (b) of this clause, shall be subject to inspection, copying, and audit by the Government or its designees at all reasonable times, and the Contractor shall afford the Government or its designees reasonable facilities for such inspection, copying, and audit; provided, however, that upon request by the Contracting Officer, the Contractor shall deliver such records to a location specified by the Contracting Officer for inspection, copying, and audit. The Government or its designees shall use such records in accordance with applicable federal laws (including the Privacy Act), as appropriate.

(e) *Applicability.* This clause applies to all records created, received and maintained by the contractor without regard to the date or origination of such records including all records acquired from a predecessor contractor.

(f) *Records maintenance and retention.* Contractor shall create, maintain, safeguard, and disposition records in accordance with 36 CFR Chapter XII, Subchapter B, ''Records Management'' and the National Archives and Records Administration (NARA)-approved Records Disposition Schedules. Records retention standards are applicable for all classes of records, whether or not the records are owned by the Government or the contractor. The Government may waive application of the NARA-approved Records Disposition Schedules, if, upon termination or completion of the contract, the Government exercises its right under paragraph (c) of this clause to obtain copies of records described in paragraph (b) and delivery of records described in paragraph (a) of this clause.

(g) *Subcontracts.* The contractor shall include the requirements of this clause in all subcontracts that contain the *Integration of Environment, Safety and Health into Work Planning and Execution* clause at 952.223–71 or, the *Radiation Protection and Nuclear Criticality* clause at 952.223–72.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 70 FR 37016, June 28, 2005; 74 FR 36374, 36378, 36380, July 22, 2009; 79 FR 56285, Sept. 19, 2014]

970.5208–1 Printing.

As prescribed in 970.0808–3, insert the following clause:

PRINTING (DEC 2000)

(a) To the extent that duplicating or printing services may be required in the performance of this contract, the Contractor shall provide or secure such services in accordance with the Government Printing and Binding Regulations, Title 44 of the U.S. Code, and DOE Directives relative thereto.

(b) The term ''Printing'' includes the following processes: Composition, platemaking, presswork, binding, microform publishing, or the end items produced by such processes. Provided, however, that performance of a requirement under this contract involving the duplication of less than 5,000 copies of a single page, or no more than 25,000 units in the aggregate of multiple pages, will not be deemed to be printing.

(c) Printing services not obtained in compliance with this guidance shall result in the cost of such printing being disallowed.

(d) The Contractor shall include the substance of this clause in all subcontracts hereunder which require printing (as that term is defined in Title I of the U.S. Government Printing and Binding Regulations).

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.5209–1 Requirement for guarantee of performance.

As prescribed in 970.0970–2, the contracting officer shall insert the following provision in solicitations for management and operating contracts:

REQUIREMENT FOR GUARANTEE OF PERFORMANCE (DEC 2000)

The successful offeror is required by other provisions of this solicitation to organize a

dedicated corporate entity to carry out the work under the contract to be awarded as a result of this solicitation. The successful offeror will be required, as part of the determination of responsibility of the newly organized, dedicated corporate entity and as a condition of the award of the contract to that entity, to furnish a guarantee of that entity's performance. That guarantee of performance must be satisfactory in all respects to the Department of Energy.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36374, July 22, 2009]

970.5211–1 Work authorization.

As prescribed in 970.1170–2, insert the following clause:

WORK AUTHORIZATION (MAY 2007)

(a) *Work authorization proposal.* Prior to the start of each fiscal year, the Contracting Officer or designee shall provide the Contractor with program execution guidance in sufficient detail to enable the Contractor to develop an estimated cost, scope, and schedule. In addition, the Contracting Officer may unilaterally assign work. The Contractor shall submit to the Contracting Officer or other designated official, a detailed description of work, a budget of estimated costs, and a schedule of performance for the work it recommends be undertaken during that upcoming fiscal year.

(b) *Cost estimates.* The Contractor and the Contracting Officer shall establish a budget of estimated costs, description of work, and schedule of performance for each work assignment. If agreement cannot be reached as to scope, schedule, and estimated cost, the Contracting Officer may issue a unilateral work authorization, pursuant to this clause. The work authorization, whether issued bilaterally or unilaterally shall become part of the contract. No activities shall be authorized or costs incurred prior to Contracting Officer issuance of a work authorization or direction concerning continuation of activities of the contract.

(c) *Performance.* The Contractor shall perform work as specified in the work authorization, consistent with the terms and conditions of this contract.

(d) *Modification.* The Contracting Officer may at any time, without notice, issue changes to work authorizations within the overall scope of the contract. A proposal for adjustment in estimated costs and schedule for performance of work, recognizing work made unnecessary as a result, along with new work, shall be submitted by the Contractor in accordance with paragraph (a) of this clause. Resolution shall be in accordance with paragraph (b) of this clause.

(e) *Increase in estimated cost.* The Contractor shall notify the Contracting Officer immediately whenever the cost incurred, plus the projected cost to complete work is projected to differ (plus or minus) from the estimate by 10 percent. The Contractor shall submit a proposal for modification in accordance with paragraph (a) of this clause. Resolution shall be in accordance with paragraph (b) of this clause.

(f) *Expenditure of funds and incurrence of costs.* The expenditure of monies by the Contractor in the performance of all authorized work shall be governed by the ''Obligation of Funds'' or equivalent clause of the contract.

(g) *Responsibility to achieve environment, safety, health, and security compliance.* Notwithstanding other provisions of the contract, the Contractor may, in the event of an emergency, take that corrective action necessary to sustain operations consistent with applicable environmental, safety, health, and security statutes, regulations, and procedures. If such action is taken, the Contractor shall notify the Contracting Officer within 24 hours of initiation and, within 30 days, submit a proposal for adjustment in estimated costs and schedule established in accordance with paragraphs (a) and (b) of this clause.

(End of clause)

[72 FR 29434, May 29, 2007, as amended at 74 FR 36378, July 22, 2009]

970.5215–1 Total available fee: Base fee amount and performance fee amount.

As prescribed in 970.1504–5(a), insert the following clause. The clause should be tailored to reflect the contract's actual inclusion of base fee amount and performance fee amount.

TOTAL AVAILABLE FEE: BASE FEE AMOUNT AND PERFORMANCE FEE AMOUNT (DEC 2000)

(a) *Total available fee.* Total available fee, consisting of a base fee amount (which may be zero) and a performance fee amount (consisting of an incentive fee component for objective performance requirements, an award fee component for subjective performance requirements, or both) determined in accordance with the provisions of this clause, is available for payment in accordance with the clause of this contract entitled, ''Payments and advances.''

(b) *Fee negotiations.* Prior to the beginning of each fiscal year under this contract, or other appropriate period as mutually agreed upon and, if exceeding one year, approved by

the Senior Procurement Executive, or designee, the Contracting Officer and Contractor shall enter into negotiation of the requirements for the year or appropriate period, including the evaluation areas and individual requirements subject to incentives, the total available fee, and the allocation of fee. The Contracting Officer shall modify this contract at the conclusion of each negotiation to reflect the negotiated requirements, evaluation areas and individual requirements subject to incentives, the total available fee, and the allocation of fee. In the event the parties fail to agree on the requirements, the evaluation areas and individual requirements subject to incentives, the total available fee, or the allocation of fee, a unilateral determination will be made by the Contracting Officer. The total available fee amount shall be allocated to a twelve month cycle composed of one or more evaluation periods, or such longer period as may be mutually agreed to between the parties and approved by the Senior Procurement Executive, or designee.

(c) *Determination of total available fee amount earned.* (1) The Government shall, at the conclusion of each specified evaluation period, evaluate the Contractor's performance of all requirements, including performance based incentives completed during the period, and determine the total available fee amount earned. At the Contracting Officer's discretion, evaluation of incentivized performance may occur at the scheduled completion of specific incentivized requirements.

(2) The DOE Operations/Field Office Manager, or designee, will be (insert title of DOE Operations/Field Office Manager, or designee). The Contractor agrees that the determination as to the total available fee earned is a unilateral determination made by the DOE Operations/Field Office Manager, or designee.

(3) The evaluation of Contractor performance shall be in accordance with the Performance Evaluation and Measurement Plan(s) described in subparagraph (d) of this clause unless otherwise set forth in the contract. The Contractor shall be promptly advised in writing of the fee determination, and the basis of the fee determination. In the event that the Contractor's performance is considered to be less than the level of performance set forth in the Statement of Work, as amended to include the current Work Authorization Directive or similar document, for any contract requirement, it will be considered by the DOE Operations/Field Office Manager, or designee, who may at his/her discretion adjust the fee determination to reflect such performance. Any such adjustment shall be in accordance with the clause entitled, ''Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts'' if contained in the contract.

(d) *Performance evaluation and measurement plan(s).* To the extent not set forth elsewhere in the contract:

(1) The Government shall establish a Performance Evaluation and Measurement Plan(s) upon which the determination of the total available fee amount earned shall be based. The Performance Evaluation and Measurement Plan(s) will address all of the requirements of contract performance specified in the contract directly or by reference. A copy of the Performance Evaluation and Measurement Plan(s) shall be provided to the Contractor—

(i) Prior to the start of an evaluation period if the requirements, evaluation areas, specific incentives, amount of fee, and allocation of fee to such evaluation areas and specific incentives have been mutually agreed to by the parties; or

(ii) Not later than thirty days prior to the scheduled start date of the evaluation period, if the requirements, evaluation areas, specific incentives, amount of fee, and allocation of fee to such evaluation areas and specific incentives have been unilaterally established by the Contracting Officer.

(2) The Performance Evaluation and Measurement Plan(s) will set forth the criteria upon which the Contractor will be evaluated relating to any technical, schedule, management, and/or cost objectives selected for evaluation. Such criteria should be objective, but may also include subjective criteria. The Plan(s) shall also set forth the method by which the total available fee amount will be allocated and the amount earned determined.

(3) The Performance Evaluation and Measurement Plan(s) may, consistent with the contract statement of work, be revised during the period of performance. The Contracting Officer shall notify the contractor—

(i) Of such unilateral changes at least ninety calendar days prior to the end of the affected evaluation period and at least thirty calendar days prior to the effective date of the change;

(ii) Of such bilateral changes at least sixty calendar days prior to the end of the affected evaluation period; or

(iii) If such change, whether unilateral or bilateral, is urgent and high priority, at least thirty calendar days prior to the end of the evaluation period.

(e) *Schedule for total available fee amount earned determinations.* The DOE Operations/Field Office Manager, or designee, shall issue the final total available fee amount earned determination in accordance with: the schedule set forth in the Performance Evaluation and Measurement Plan(s); or as otherwise set forth in this contract . However, a determination must be made within sixty calendar days after the receipt by the Contracting Officer of the Contractor's self-assessment, if one is required or permitted by

paragraph (f) of this clause, or seventy calendar days after the end of the evaluation period, whichever is later, or a longer period if the Contractor and Contracting Officer agree. If the Contracting Officer evaluates the Contractor's performance of specific requirements on their completion, the payment of any earned fee amount must be made within seventy calendar days (or such other time period as mutually agreed to between the Contracting Officer and the Contractor) after such completion. If the determination is delayed beyond that date, the Contractor shall be entitled to interest on the determined total available fee amount earned at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the payment date. This rate is referred to as the ''Renegotiation Board Interest Rate,'' and is published in the FEDERAL REGISTER semiannually on or about January 1 and July 1. The interest on any late total available fee amount earned determination will accrue daily and be compounded in 30-day increments inclusive from the first day after the schedule determination date through the actual date the determination is issued. That is, interest accrued at the end of any 30-day period will be added to the determined amount of fee earned and be subject to interest if not paid in the succeeding 30-day period.

(End of clause)

Alternate I (DEC 2000). As prescribed in 970.1504–5(a)(1), when the award fee cycle consists of two or more evaluation periods, add the following to paragraph (c):

(4) At the sole discretion of the Government, unearned total available fee amounts may be carried over from one evaluation period to the next, so long as the periods are within the same award fee cycle.

Alternate II (DEC 2000). As prescribed in 970.1504–5(a)(2), when the award fee cycle consists of one evaluation period, add the following to paragraph (c):

(4) Award fee not earned during the evaluation period shall not be allocated to future evaluation periods.

Alternate III (DEC 2000). As prescribed in 970.1504–5(a)(3), when the DOE Operations/Field Office Manager, or designee, requires the contractor to submit a self-assessment, add the following as paragraph (f):

(f) *Contractor self-assessment.* Following each evaluation period, the Contractor shall submit a self-assessment within (*Insert Number*) calendar days after the end of the period. This self-assessment shall address both the strengths and weaknesses of the Contractor's performance during the evaluation period. Where deficiencies in performance are noted, the Contractor shall describe the actions planned or taken to correct such deficiencies and avoid their recurrence. The DOE Operations/Field Office Manager, or designee, will review the Contractor's self-assessment, if submitted, as part of its independent evaluation of the Contractor's management during the period. A self-assessment, in and of itself may not be the only basis for the award fee determination.

Alternate IV (DEC 2000). As prescribed in 970.1504–5(a)(4), when the DOE Operations/Field Office Manager, or designee, permits the contractor to submit a self-assessment at the contractor's option, add the following text as paragraph (f):

(f) *Contractor self-assessment.* Following each evaluation period, the Contractor may submit a self-assessment, provided such assessment is submitted within (*Insert Number*) calendar days after the end of the period. This self-assessment shall address both the strengths and weaknesses of the Contractor's performance during the evaluation period. Where deficiencies in performance are noted, the Contractor shall describe the actions planned or taken to correct such deficiencies and avoid their recurrence. The DOE Operations/Field Office Manager, or designee, will review the Contractor's self-assessment, if submitted, as part of its independent evaluation of the Contractor's management during the period. A self-assessment, in and of itself may not be the only basis for the award fee determination.

[65 FR 81009, Dec. 22, 2000, as amended at 68 FR 68782, Dec. 10, 2003; 74 FR 36374, 36378, 36380, July 22, 2009]

970.5215–2 [Reserved]

970.5215–3 Conditional payment of fee, profit, and other incentives—facility management contracts

As prescribed in 970.1504–5(b)(1), insert the following clause:

CONDITIONAL PAYMENT OF FEE, PROFIT, AND OTHER INCENTIVES—FACILITY MANAGEMENT CONTRACTS (AUG 2009)

(a) *General.* (1) The payment of earned fee, fixed fee, profit, or share of cost savings under this contract is dependent upon—

(i) The Contractor's or Contractor employees' compliance with the terms and conditions of this contract relating to environment, safety and health (ES&H), which includes worker safety and health (WS&H), including performance under an approved Integrated Safety Management System (ISMS); and

(ii) The Contractor's or Contractor employees' compliance with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information.

(2) The ES&H performance requirements of this contract are set forth in its ES&H terms and conditions, including the DOE approved contractor ISMS or similar document. Financial incentives for timely mission accomplishment or cost effectiveness shall never compromise or impede full and effective implementation of the ISMS and full ES&H compliance.

(3) The performance requirements of this contract relating to the safeguarding of Restricted Data and other classified information are set forth in the clauses of this contract entitled, ''Security'' and ''Laws, Regulations, and DOE Directives,'' as well as in other terms and conditions.

(4) If the Contractor does not meet the performance requirements of this contract relating to ES&H or to the safeguarding of Restricted Data and other classified information during any performance evaluation period established under the contract pursuant to the clause of this contract entitled, ''Total Available Fee: Base Fee Amount and Performance Fee Amount,'' otherwise earned fee, fixed fee, profit or share of cost savings may be unilaterally reduced by the contracting officer.

(b) *Reduction amount.* (1) The amount of earned fee, fixed fee, profit, or share of cost savings that may be unilaterally reduced will be determined by the severity of the performance failure pursuant to the degrees specified in paragraphs (c) and (d) of this clause.

(2) If a reduction of earned fee, fixed fee, profit, or share of cost savings is warranted, unless mitigating factors apply, such reduction shall not be less than 26 percent nor greater than 100 percent of the amount of earned fee, fixed fee, profit, or the Contractor's share of cost savings for a first degree performance failure, not less than 11 percent nor greater than 25 percent for a second degree performance failure, and up to 10 percent for a third degree performance failure.

(3) In determining the amount of the reduction and the applicability of mitigating factors, the contracting officer must consider the Contractor's overall performance in meeting the ES&H or security requirements of the contract. Such consideration must include performance against any site specific performance criteria/requirements that provide additional definition, guidance for the amount of reduction, or guidance for the applicability of mitigating factors. In all cases, the contracting officer must consider mitigating factors that may warrant a reduction below the applicable range (see 48 CFR 970.1504–1–2). The mitigating factors include, but are not limited to, the following ((v), (vi), (vii) and (viii) apply to ES&H only).

(i) Degree of control the Contractor had over the event or incident.

(ii) Efforts the Contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of: ES&H and compliance in related areas; or of safeguarding Restricted Data and other classified information and compliance in related areas.

(v) Contractor demonstration to the Contracting Officer's satisfaction that the principles of industrial ES&H standards are routinely practiced (e.g., Voluntary Protection Program, ISO 14000).

(vi) Event caused by ''Good Samaritan'' act by the Contractor (e.g., offsite emergency response).

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain ES&H performance (including effective resource allocation) and to support DOE corporate decision-making (e.g., policy, ES&H programs).

* * *

(viii) Contractor demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in ES&H by use of lessons-learned and best practices inter- and intra-DOE sites.

(4)(i) The amount of fee, fixed fee, profit, or share of cost savings that is otherwise earned by a contractor during an evaluation period may be reduced in accordance with this clause if it is determined that a performance failure warranting a reduction under this clause occurs within the evaluation period.

(ii) The amount of reduction under this clause, in combination with any reduction made under any other clause in the contract, shall not exceed the amount of fee, fixed fee, profit, or the Contractor's share of cost savings that is otherwise earned during the evaluation period.

(iii) For the purposes of this clause, earned fee, fixed fee, profit, or share of cost savings for the evaluation period shall mean the amount determined by the Contracting Officer or fee determination official as otherwise payable based on the Contractor's performance during the evaluation period. Where the contract provides for financial incentives

that extend beyond a single evaluation period, this amount shall also include: any provisional amounts determined otherwise payable in the evaluation period; and, if provisional payments are not provided for, the allocable amount of any incentive determined otherwise payable at the conclusion of a subsequent evaluation period. The allocable amount shall be the total amount of the earned incentive divided by the number of evaluation periods over which it was earned.

(iv) The Government will effect the reduction as soon as practicable after the end of the evaluation period in which the performance failure occurs. If the Government is not aware of the failure, it will effect the reduction as soon as practical after becoming aware. For any portion of the reduction requiring an allocation the Government will effect the reduction at the end of the evaluation period in which it determines the total amount earned under the incentive. If at any time a reduction causes the sum of the payments the Contractor has received for fee, fixed fee, profit, or share of cost savings to exceed the sum of fee, fixed fee, profit, or share of cost savings the Contractor has earned (provisionally or otherwise), the Contractor shall immediately return the excess to the Government. (What the Contractor ''has earned'' reflects any reduction made under this or any other clause of the contract.)

(v) At the end of the contract—

(A) The Government will pay the Contractor the amount by which the sum of fee, fixed fee, profit, or share of cost savings the Contractor has earned exceeds the sum of the payments the Contractor has received; or

(B) The Contractor shall return to the Government the amount by which the sum of the payments the Contractor has received exceeds the sum of fee, fixed fee, profit, or share of cost savings the Contractor has earned. (What the Contractor ''has earned'' reflects any reduction made under this or any other clause of the contract.)

(c) *Environment, Safety and Health (ES&H).* Performance failures occur if the Contractor does not comply with the contract's ES&H terms and conditions, including the DOE approved Contractor ISMS. The degrees of performance failure under which reductions of earned or fixed fee, profit, or share of cost savings will be determined are:

(1) *First Degree:* Performance failures that are most adverse to ES&H. Failure to develop and obtain required DOE approval of an ISMS is considered first degree. The Government will perform necessary review of the ISMS in a timely manner and will not unreasonably withhold approval of the Contractor's ISMS. The following performance failures or performance failures of similar import will be considered first degree.

(i) Type A accident (defined in DOE Order 225.1B, or successor version).

(ii) Two Second Degree performance failures during an evaluation period.

(2) *Second Degree:* Performance failures that are significantly adverse to ES&H. They include failures to comply with an approved ISMS that result in an actual injury, exposure, or exceedence that occurred or nearly occurred but had minor practical long-term health consequences. They also include breakdowns of the Safety Management System. The following performance failures or performance failures of similar import will be considered second degree:

(i) Type B accident (defined in DOE Order 225.1B, or successor version).

(ii) Non-compliance with an approved ISMS that results in a near miss of a Type A or B accident. A near miss is a situation in which an inappropriate action occurs, or a necessary action is omitted, but does not result in an adverse effect.

(iii) Failure to mitigate or notify DOE of an imminent danger situation after discovery, where such notification is a requirement of the contract.

(3) *Third Degree:* Performance failures that reflect a lack of focus on improving ES&H. They include failures to comply with an approved ISMS that result in potential breakdown of the System. The following performance failures or performance failures of similar import will be considered third degree:

(i) Failure to implement effective corrective actions to address deficiencies/non-compliances documented through: external (e.g., Federal) oversight and/or reported per DOE Order 232.1–2 requirements; or internal oversight of DOE Order 440.1A requirements.

(ii) Multiple similar non-compliances identified by external (e.g., Federal) oversight that in aggregate indicate a significant programmatic breakdown.

(iii) Non-compliances that either have, or may have, significant negative impacts to the worker, the public, or the environment or that indicate a significant programmatic breakdown.

(iv) Failure to notify DOE upon discovery of events or conditions where notification is required by the terms and conditions of the contract.

(d) *Safeguarding restricted data and other classified information.* Performance failures occur if the Contractor does not comply with the terms and conditions of this contract relating to the safeguarding of Restricted Data and other classified information. The degrees of performance failure under which reductions of fee, profit, or share of cost savings will be determined are as follows:

(1) *First Degree:* Performance failures that have been determined, in accordance with applicable law, DOE regulation, or directive, to have resulted in, or that can reasonably be expected to result in, exceptionally grave damage to the national security. The following are examples of performance failures

or performance failures of similar import that will be considered first degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating a risk of, loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a Special Access Program (SAP), information identified as sensitive compartmented information (SCI), or high risk nuclear weapons-related data.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data, or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Top Secret Restricted Data or other information classified as Top Secret, any classification level of information in a SAP, information identified as SCI, or high risk nuclear weapons-related data.

(2) *Second Degree:* Performance failures that have been determined, in accordance with applicable law, DOE regulation, or directive, to have actually resulted in, or that can reasonably be expected to result in, serious damage to the national security. The following are examples of performance failures or performance failures of similar import that will be considered second degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Secret Restricted Data or other information classified as Secret.

(ii) Contractor actions that result in a breakdown of the safeguards and security management system that can reasonably be expected to result in the loss, compromise, or unauthorized disclosure of Secret Restricted Data, or other information classified as Secret.

(iii) Failure to promptly report the loss, compromise, or unauthorized disclosure of Restricted Data or other classified information regardless of classification (except for information covered by paragraph (d)(1)(iii) of this clause).

(iv) Failure to timely implement corrective actions stemming from the loss, compromise, or unauthorized disclosure of Secret Restricted Data or other classified information classified as Secret.

(3) *Third Degree:* Performance failures that have been determined, in accordance with applicable law, regulation, or DOE directive, to have actually resulted in, or that can reasonably be expected to result in, undue risk to the common defense and security. In addition, this category includes performance failures that result from a lack of Contractor management and/or employee attention to the proper safeguarding of Restricted Data and other classified information. These performance failures may be indicators of future, more severe performance failures and/or conditions, and if identified and corrected early would prevent serious incidents. The following are examples of performance failures or performance failures of similar import that will be considered third degree:

(i) Non-compliance with applicable laws, regulations, and DOE directives actually resulting in, or creating risk of, loss, compromise, or unauthorized disclosure of Restricted Data or other information classified as Confidential.

(ii) Failure to promptly report alleged or suspected violations of laws, regulations, or directives pertaining to the safeguarding of Restricted Data or other classified information.

(iii) Failure to identify or timely execute corrective actions to mitigate or eliminate identified vulnerabilities and reduce residual risk relating to the protection of Restricted Data or other classified information in accordance with the Contractor's Safeguards and Security Plan or other security plan, as applicable.

(iv) Contractor actions that result in performance failures which unto themselves pose minor risk, but when viewed in the aggregate indicate degradation in the integrity of the Contractor's safeguards and security management system relating to the protection of Restricted Data and other classified information.

(End of clause)

Alternate I (AUG 2009). As prescribed in 970.1504–5(b)(2), replace paragraphs (a), (b)(1), (b)(2), and (b)(3) of the basic clause with the following paragraphs (a), (b)(1), (b)(2), and (b)(3) and delete paragraph (d).

(a) *General.* (1) The payment of earned fee, fixed fee, profit, or share of cost savings under this contract is dependent upon the Contractor's or Contractor employees' compliance with the terms and conditions of this contract relating to environment, safety and health (ES&H), which includes worker safety and health (WS&H), including performance

under an approved Integrated Safety Management System (ISMS).

(2) The ES&H performance requirements of this contract are set forth in its ES&H terms and conditions, including the DOE approved contractor ISMS or similar document. Financial incentives for timely mission accomplishment or cost effectiveness shall never compromise or impede full and effective implementation of the ISMS and full ES&H compliance.

(3) If the Contractor does not meet the performance requirements of this contract relating to ES&H during any performance evaluation period established under the contract pursuant to the clause of this contract entitled, ''Total Available Fee: Base Fee Amount and Performance Fee Amount,'' otherwise earned fee, fixed fee, profit or share of cost savings may be unilaterally reduced by the Contracting Officer.

(b) *Reduction amount.* (1) The amount of earned fee, fixed fee, profit, or share of cost savings that may be unilaterally reduced will be determined by the severity of the performance failure pursuant to the degrees specified in paragraph (c) of this clause.

(2) If a reduction of earned fee, fixed fee, profit, or share of cost savings is warranted, unless mitigating factors apply, such reduction shall not be less than 26 percent nor greater than 100 percent of the amount of earned fee, fixed fee, profit, or the Contractor's share of cost savings for a first degree performance failure, not less than 11 percent nor greater than 25 percent for a second degree performance failure, and up to 10 percent for a third degree performance failure.

(3) In determining the amount of the reduction and the applicability of mitigating factors, the Contracting Officer must consider the Contractor's overall performance in meeting the ES&H requirements of the contract. Such consideration must include performance against any site specific performance criteria/requirements that provide additional definition, guidance for the amount of reduction, or guidance for the applicability of mitigating factors. In all cases, the Contracting Officer must consider mitigating factors that may warrant a reduction below the applicable range (see 48 CFR 970.1504–1–2). The mitigating factors include the following.

(i) Degree of control the Contractor had over the event or incident.

(ii) Efforts the Contractor had made to anticipate and mitigate the possibility of the event in advance.

(iii) Contractor self-identification and response to the event to mitigate impacts and recurrence.

(iv) General status (trend and absolute performance) of ES&H and compliance in related areas.

(v) Contractor demonstration to the Contracting Officer's satisfaction that the principles of industrial ES&H standards are routinely practiced (e.g., Voluntary Protection Program Star Status, or ISO 14000 Certification).

(vi) Event caused by ''Good Samaritan'' act by the Contractor (e.g., offsite emergency response).

(vii) Contractor demonstration that a performance measurement system is routinely used to improve and maintain ES&H performance (including effective resource allocation) and to support DOE corporate decision-making (e.g., policy, ES&H programs).

(viii) Contractor demonstration that an Operating Experience and Feedback Program is functioning that demonstrably affects continuous improvement in ES&H by use of lessons-learned and best practices inter- and intra-DOE sites.

Alternate II (AUG 2009). As prescribed in 970.1504–5(b)(3), insert the following as paragraphs (e) and (f), incentive fee or multiple fee basis (if Alternate I is also used, redesignate the following as paragraphs (d) and (e)).

(e) *Minimum requirements for specified level of performance.* (1) At a minimum the Contractor must perform the following—

(i) The requirements with specific incentives which do not require the achievement of cost efficiencies in order to be performed at the level of performance set forth in the Statement of Work, Work Authorization Directive, or similar document unless an otherwise minimum level of performance has been established in the specific incentive;

(ii) All of the performance requirements directly related to requirements specifically incentivized which do not require the achievement of cost efficiencies in order to be performed at a level of performance such that the overall performance of these related requirements is at an acceptable level; and

(iii) All other requirements at a level of performance such that the total performance of the contract is not jeopardized.

(2) The evaluation of the Contractor's achievement of the level of performance shall be unilaterally determined by the Government. To the extent that the Contractor fails to achieve the minimum performance levels specified in the Statement of Work, Work Authorization Directive, or similar document, during the performance evaluation period, the DOE Operations/Field Office Manager, or designee, may reduce any otherwise earned fee, fixed fee, profit, or shared net savings for the performance evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit, or shared net savings being less than 25 percent of the total available fee amount. Such 25 percent shall include base fee, if any.

(f) *Minimum requirements for cost performance.* (1) Requirements incentivized by other than cost incentives must be performed

within their specified cost constraint and must not adversely impact the costs of performing unrelated activities.

(2) The performance of requirements with a specific cost incentive must not adversely impact the costs of performing unrelated requirements.

(3) The Contractor's performance within the stipulated cost performance levels for the performance evaluation period shall be determined by the Government. To the extent the Contractor fails to achieve the stipulated cost performance levels, the DOE Operations/Field Office Manager, or designee, may reduce in whole or in part any otherwise earned fee, fixed fee, profit, or shared net savings for the performance evaluation period. Such reduction shall not result in the total of earned fee, fixed fee, profit or shared net savings being less than 25 percent of the total available fee amount. Such 25 percent shall include base fee, if any.

[69 FR 68782, Dec. 10, 2004, as amended at 74 FR 36375, 36378, 36380, July 22, 2009; 75 FR 68221, Nov. 5, 2010; 81 FR 45978, July 15, 2016]

970.5215–4 Cost reduction.

As prescribed in 970.1504–5(c), insert the following clause:

COST REDUCTION (AUG 2009)

(a) *General.* It is the Department of Energy's (DOE's) intent to have its facilities and laboratories operated in an efficient and effective manner. To this end, the Contractor shall assess its operations and identify areas where cost reductions would bring cost efficiency to operations without adversely affecting the level of performance required by the contract. The Contractor, to the maximum extent practical, shall identify areas where cost reductions may be effected, and develop and submit Cost Reduction Proposals (CRPs) to the Contracting Officer. If accepted, the Contractor may share in any shared net savings from accepted CRPs in accordance with paragraph (g) of this clause.

(b) *Definitions. Administrative cost* is the Contractor cost of developing and administering the CRP.

Design, process, or method change is a change to a design, process, or method which has established cost, technical and schedule baseline, is defined, and is subject to a formal control procedure. Such a change must be innovative, initiated by the Contractor, and applied to a specific project or program.

Development cost is the Contractor cost of up-front planning, engineering, prototyping, and testing of a design, process, or method.

DOE cost is the Government cost incurred implementing and validating the CRP.

Implementation cost is the Contractor cost of tooling, facilities, documentation, etc., required to effect a design, process, or method change once it has been tested and approved.

Net Savings means a reduction in the total amount (to include all related costs and fee) of performing the effort where the savings revert to DOE control and may be available for deobligation. Such savings may result from a specific cost reduction effort which is negotiated on a cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price basis, or may result directly from a design, process, or method change. They may also be savings resulting from formal or informal direction given by DOE or from changes in the mission, work scope, or routine reorganization of the Contractor due to changes in the budget.

Shared Net Savings are those net savings which result from—

(1) A specific cost reduction effort which is negotiated on a cost-plus-incentive-fee or fixed-price incentive basis, and is the difference between the negotiated target cost of performing an effort as negotiated and the actual allowable cost of performing that effort; or

(2) A design, process, or method change, which occurs in the fiscal year in which the change is accepted and the subsequent fiscal year, and is the difference between the estimated cost of performing an effort as originally planned and the actual allowable cost of performing that same effort utilizing a revised plan intended to reduce costs along with any Contractor development costs, implementation costs, administrative costs, and DOE costs associated with the revised plan. Administrative costs and DOE costs are only included at the discretion of the Contracting Officer. Savings resulting from formal or informal direction given by the DOE or changes in the mission, work scope, or routine reorganization of the Contractor due to changes in the budget are not to be considered as shared net savings for purposes of this clause and do not qualify for incentive sharing.

(c) *Procedure for submission of CRPs.* (1) CRPs for the establishment of cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price efforts or for design, process, or methods changes submitted by the Contractor shall contain, at a minimum, the following:

(i) Current Method (Baseline)—A verifiable description of the current scope of work, cost, and schedule to be impacted by the initiative, and supporting documentation.

(ii) New Method (New Proposed Baseline)—A verifiable description of the new scope of work, cost, and schedule, how the initiative will be accomplished, and supporting documentation.

(iii) Feasibility Assessment—A description and evaluation of the proposed initiative and

benefits, risks, and impacts of implementation. This evaluation shall include an assessment of the difference between the current method (baseline) and proposed new method including all related costs.

(2) In addition, CRPs for the establishment of cost-plus-incentive-fee, fixed-price incentive, or firm-fixed-price efforts shall contain, at a minimum, the following—

(i) The proposed contractual arrangement and the justification for its use; and

(ii) A detailed cost/price estimate and supporting rationale. If the approach is proposed on an incentive basis, minimum and maximum cost estimates should be included along with any proposed sharing arrangements.

(d) *Evaluation and decision.* All CRPs must be submitted to and approved by the Contracting Officer. Included in the information provided by the CRP must be a discussion of the extent the proposed cost reduction effort may—

(1) Pose a risk to the health and safety of workers, the community, or to the environment;

(2) Result in a waiver or deviation from DOE requirements, such as DOE Orders and joint oversight agreements;

(3) Require a change in other contractual agreements;

(4) Result in significant organizational and personnel impacts;

(5) Create a negative impact on the cost, schedule, or scope of work in another area;

(6) Pose a potential negative impact on the credibility of the Contractor or the DOE; and

(7) Impact successful and timely completion of any of the work in the cost, technical, and schedule baseline.

(e) *Acceptance or rejection of CRPs.* Acceptance or rejection of a CRP is a unilateral determination made by the Contracting Officer. The Contracting Officer will notify the Contractor that a CRP has been accepted, rejected, or deferred within (*Insert Number*) days of receipt. The only CRPs that will be considered for acceptance are those which the Contractor can demonstrate, at a minimum, will—

(1) Result in net savings (in the sharing period if a design, process, or method change);

(2) Not reappear as costs in subsequent periods; and

(3) Not result in any impairment of essential functions.

(f) The failure of the Contracting Officer to notify the Contractor of the acceptance, rejection, or deferral of a CRP within the specified time shall not be construed as approval.

(g) *Adjustment to original estimated cost and fee.* If a CRP is established on a cost-plus-incentive-fee, fixed-price incentive or firm-fixed-price basis, the originally estimated cost and fee for the total effort shall be adjusted to remove the estimated cost and fee amount associated with the CRP effort.

(h) *Sharing arrangement.* If a CRP is accepted, the Contractor may share in the shared net savings. For a CRP negotiated on a cost-plus-incentive-fee or fixed-price incentive basis, with the specific incentive arrangement (negotiated target costs, target fees, share lines, ceilings, profit, etc.) set forth in the contractual document authorizing the effort, the Contractor's share shall be the actual fee or profit resulting from such an arrangement. For a CRP negotiated as a cost savings incentive resulting from a design, process, or method change, the Contractor's share shall be a percentage, not to exceed 25% of the shared net savings. The specific percentage and sharing period shall be set forth in the contractual document.

(i) *Validation of Shared Net Savings.* The Contracting Officer shall validate actual shared net savings. If actual shared net savings cannot be validated, the Contractor will not be entitled to a share of the net shared savings.

(j) *Relationship to other incentives.* Only those benefits of an accepted CRP not awardable under other clauses of this contract shall be considered under this clause.

(k) *Subcontracts.* The Contractor may include a clause similar to this clause in any subcontract. In calculating any estimated shared net savings in a CRP under this contract, the Contractor's administration, development, and implementation costs shall include any subcontractor's allowable costs, and any CRP incentive payments to a subcontractor resulting from the acceptance of such CRP. The Contractor may choose any arrangement for subcontractor CRP incentive payments, provided that the payments not reduce the DOE's share of shared net savings.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36375, 36378, 36380, July 22, 2009]

970.5215–5 Limitation on fee.

As prescribed in 970.1504–5(d), the contracting officer shall insert the following provision:

LIMITATION ON FEE (DEC 2000)

(a) For the purpose of this solicitation, fee amounts shall not exceed the total available fee allowed by the fee policy at 48 CFR 970.1504–1–1, or as specifically stated elsewhere in the solicitation.

(b) The Government reserves the unilateral right, in the event an offeror's proposal is selected for award, to limit: fixed fee to not exceed an amount established pursuant to 48 CFR 970.1504–1–5; and total available fee to not exceed an amount established pursuant to 48 CFR 970.1504–1–9; or fixed fee or total

available fee to an amount as specifically stated elsewhere in the solicitation.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36375, July 22, 2009]

970.5217–1 Strategic Partnership Projects Program.

As prescribed in 970.1707–4 insert the following clause:

STRATEGIC PARTNERSHIP PROJECTS PROGRAM (NON-DOE FUNDED WORK) (APRIL 23, 2015)

(a) *Authority to perform Strategic Partnership Projects.* Pursuant to the Economy Act of 1932, as amended (31 U.S.C. 1535), and the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*) or other applicable authority, the Contractor may perform work for non-DOE entities (sponsors) on a fully reimbursable basis in accordance with this clause.

(b) *Contractor's implementation.* The Contractor must draft, implement, and maintain formal policies, practices, and procedures in accordance with this clause, which must be submitted to the Contracting Officer for review and approval.

(c) *Conditions of participation in Strategic Partnership Projects program.* The Contractor—

(1) Must not perform Strategic Partnership Projects activities that would place it in direct competition with the domestic private sector;

(2) Must not respond to a request for proposals or any other solicitation from another Federal agency or non-Federal organization that involves direct comparative competition, either as an offeror, team member, or subcontractor to an offeror; however, the Contractor may, following notification to the Contracting Officer, respond to Broad Agency Announcements, Financial Assistance solicitations, and similar solicitations from another Federal Agency or non-Federal organizations when the selection is based on merit or peer review, the work involves basic or applied research to further advance scientific knowledge or understanding, and a response does not result in direct, comparative competition;

(3) Must not commence work on any Strategic Partnership Projects activity until a Strategic Partnership Projects proposal package has been approved by the DOE Contracting Officer or designated representative;

(4) Must not incur project costs until receipt of DOE notification that a budgetary resource is available for the project, except as provided in 48 CFR 970.5232–6;

(5) Must ensure that all costs associated with the performance of the work, including specifically all DOE direct costs and applicable surcharges, are included in any Strategic Partnership Projects proposal;

(6) Must maintain records for the accumulation of costs and the billing of such work to ensure that DOE's appropriated funds are not used in support of Strategic Partnership Projects activities and to provide an accounting of the expenditures to DOE and the sponsor upon request;

(7) Must perform all Strategic Partnership Projects projects in accordance with the standards, policies, and procedures that apply to performance under this contract, including but not limited to environmental, safety and health, security, safeguards and classification procedures, and human and animal research regulations;

(8) May subcontract portion(s) of a Work for Others project; however, the Contractor must select the subcontractor and the work to be subcontracted. Any subcontracted work must be in direct support of the DOE Contractor's performance as defined in the DOE approved Strategic Partnership Projects proposal package; and,

(9) Must maintain a summary listing of project information for each active Strategic Partnership Projects project, consisting of—

(i) Sponsoring agency;

(ii) Total estimated costs;

(iii) Project title and description;

(iv) Project point of contact; and,

(v) Estimated start and completion dates.

(d) *Negotiation and execution of Strategic Partnership Projects agreement.* (1) When delegated authority by the Contracting Officer, the Contractor may negotiate the terms and conditions that will govern the performance of a specific Strategic Partnership Projects project. Such terms and conditions must be consistent with the terms, conditions, and requirements of the Contractor's contract with DOE. The Contractor may use DOE-approved contract terms and conditions as delineated in DOE Manual 481.1–1A or terms and conditions previously approved by the responsible Contracting Officer or authorized designee for agreements with non-Federal entities. The Contractor must not hold itself out as representing DOE when negotiating the proposed Strategic Partnership Projects agreement.

(2) The Contractor must submit all Strategic Partnership Projects agreements to the DOE Contracting Officer for DOE review and approval. The Contractor may not execute any proposed agreement until it has received notice of DOE approval.

(e) *Preparation of project proposals.* When the Contractor proposes to perform Strategic Partnership Projects activities pursuant to this clause, it may assist the project sponsor in the preparation of project proposal packages including the preparation of cost estimates.

(f) *Strategic Partnership Projects appraisals.* DOE may conduct periodic appraisals of the Contractor's compliance with its Strategic Partnership Projects Program policies, practices and procedures. The Contractor must provide facilities and other support in conjunction with such appraisals as directed by the Contracting Officer or authorized designee.

(g) *Annual Strategic Partnership Projects report.* The Contractor must provide assistance as required by the Contracting Officer or authorized designee in the preparation of a DOE Annual Summary Report of Strategic Partnership Projects Activities under the contract.

(End of clause)

[69 FR 75004, Dec. 15, 2004, as amended at 74 FR 36375, 36378, July 22, 2009; 80 FR 15519, Mar. 24, 2015]

970.5222–1 Collective Bargaining Agreements Management and Operating Contracts.

As prescribed in 970.2201–1–3, insert the following clause:

COLLECTIVE BARGAINING AGREEMENTS—MANAGEMENT AND OPERATING CONTRACTS (DEC 2000)

When negotiating collective bargaining agreements applicable to the work force under this contract, the Contractor shall use its best efforts to ensure such agreements contain provisions designed to assure continuity of services. All such agreements entered into during the contract period of performance should provide that grievances and disputes involving the interpretation or application of the agreement will be settled without resorting to strike, lockout, or other interruption of normal operations. For this purpose, each collective bargaining agreement should provide an effective grievance procedure with arbitration as its final step, unless the parties mutually agree upon some other method of assuring continuity of operations. As part of such agreements, management and labor should agree to cooperate fully with the Federal Mediation and Conciliation Service. The Contractor shall include the substance of this clause in any subcontracts for protective services or other services performed on the DOE-owned site which will affect the continuity of operation of the facility.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36375, July 22, 2009; 75 FR 68221, Nov. 5, 2010]

970.5222–2 Overtime management.

As prescribed in 970.2201–2–2, insert the following clause:

OVERTIME MANAGEMENT (DEC 2000)

(a) The Contractor shall maintain adequate internal controls to ensure that employee overtime is authorized only if cost effective and necessary to ensure performance of work under this contract.

(b) The Contractor shall notify the Contracting Officer when in any given year it is likely that overtime usage as a percentage of payroll may exceed 4%.

(c) The Contracting Officer may require the submission, for approval, of a formal annual overtime control plan whenever Contractor overtime usage as a percentage of payroll has exceeded, or is likely to exceed, 4%, or if the Contracting Officer otherwise deems overtime expenditures excessive. The plan shall include, at a minimum—

(1) An overtime premium fund (maximum dollar amount);

(2) Specific controls for casual overtime for non-exempt employees;

(3) Specific parameters for allowability of exempt overtime;

(4) An evaluation of alternatives to the use of overtime; and

(5) Submission of a semi-annual report that includes for exempt and non-exempt employees—

(i) Total cost of overtime;

(ii) Total cost of straight time;

(iii) Overtime cost as a percentage of straight-time cost;

(iv) Total overtime hours;

(v) Total straight-time hours; and

(vi) Overtime hours as a percentage of straight-time hours.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36375, 36378, 36380, July 22, 2009]

970.5223–1 Integration of environment, safety, and health into work planning and execution.

As prescribed in 970.2303–3(a), insert the following clause:

INTEGRATION OF ENVIRONMENT, SAFETY, AND HEALTH INTO WORK PLANNING AND EXECUTION (DEC 2000)

(a) For the purposes of this clause,

(1) Safety encompasses environment, safety and health, including pollution prevention and waste minimization; and

(2) Employees include subcontractor employees.

(b) In performing work under this contract, the Contractor shall perform work safely, in a manner that ensures adequate protection

for employees, the public, and the environment, and shall be accountable for the safe performance of work. The Contractor shall exercise a degree of care commensurate with the work and the associated hazards. The Contractor shall ensure that management of environment, safety and health (ES&H) functions and activities becomes an integral but visible part of the Contractor's work planning and execution processes. The Contractor shall, in the performance of work, ensure that:

(1) Line management is responsible for the protection of employees, the public, and the environment. Line management includes those Contractor and subcontractor employees managing or supervising employees performing work.

(2) Clear and unambiguous lines of authority and responsibility for ensuring ES&H are established and maintained at all organizational levels.

(3) Personnel possess the experience, knowledge, skills, and abilities that are necessary to discharge their responsibilities.

(4) Resources are effectively allocated to address ES&H, programmatic, and operational considerations. Protecting employees, the public, and the environment is a priority whenever activities are planned and performed.

(5) Before work is performed, the associated hazards are evaluated and an agreed-upon set of ES&H standards and requirements are established which, if properly implemented, provide adequate assurance that employees, the public, and the environment are protected from adverse consequences.

(6) Administrative and engineering controls to prevent and mitigate hazards are tailored to the work being performed and associated hazards. Emphasis should be on designing the work and/or controls to reduce or eliminate the hazards and to prevent accidents and unplanned releases and exposures.

(7) The conditions and requirements to be satisfied for operations to be initiated and conducted are established and agreed-upon by DOE and the Contractor. These agreed-upon conditions and requirements are requirements of the contract and binding upon the Contractor. The extent of documentation and level of authority for agreement shall be tailored to the complexity and hazards associated with the work and shall be established in a Safety Management System.

(c) The Contractor shall manage and perform work in accordance with a documented Safety Management System (System) that fulfills all conditions in paragraph (b) of this clause at a minimum. Documentation of the System shall describe how the Contractor will—

(1) Define the scope of work;

(2) Identify and analyze hazards associated with the work;

(3) Develop and implement hazard controls;

(4) Perform work within controls; and

(5) Provide feedback on adequacy of controls and continue to improve safety management.

(d) The System shall describe how the Contractor will establish, document, and implement safety performance objectives, performance measures, and commitments in response to DOE program and budget execution guidance while maintaining the integrity of the System. The System shall also describe how the Contractor will measure system effectiveness.

(e) The Contractor shall submit to the Contracting Officer documentation of its System for review and approval. Dates for submittal, discussions, and revisions to the System will be established by the Contracting Officer. Guidance on the preparation, content, review, and approval of the System will be provided by the Contracting Officer. On an annual basis, the Contractor shall review and update, for DOE approval, its safety performance objectives, performance measures, and commitments consistent with and in response to DOE's program and budget execution guidance and direction. Resources shall be identified and allocated to meet the safety objectives and performance commitments as well as maintain the integrity of the entire System. Accordingly, the System shall be integrated with the Contractor's business processes for work planning, budgeting, authorization, execution, and change control.

(f) The Contractor shall comply with, and assist the Department of Energy in complying with, ES&H requirements of all applicable laws and regulations, and applicable directives identified in the clause of this contract entitled ''Laws, Regulations, and DOE Directives.'' The Contractor shall cooperate with Federal and non-Federal agencies having jurisdiction over ES&H matters under this contract.

(g) The Contractor shall promptly evaluate and resolve any noncompliance with applicable ES&H requirements and the System. If the Contractor fails to provide resolution or if, at any time, the Contractor's acts or failure to act causes substantial harm or an imminent danger to the environment or health and safety of employees or the public, the Contracting Officer may issue an order stopping work in whole or in part. Any stop work order issued by a contracting officer under this clause (or issued by the Contractor to a subcontractor in accordance with paragraph (i) of this clause) shall be without prejudice to any other legal or contractual rights of the Government. In the event that the Contracting Officer issues a stop work order, an order authorizing the resumption of the work may be issued at the discretion of the Contracting Officer. The Contractor shall not be entitled to an extension of time or additional fee or damages by reason of, or in

connection with, any work stoppage ordered in accordance with this clause.

(h) Regardless of the performer of the work, the Contractor is responsible for compliance with the ES&H requirements applicable to this contract. The Contractor is responsible for flowing down the ES&H requirements applicable to this contract to subcontracts at any tier to the extent necessary to ensure the Contractor's compliance with the requirements.

(i) The Contractor shall include a clause substantially the same as this clause in subcontracts involving complex or hazardous work on site at a DOE-owned or -leased facility. Such subcontracts shall provide for the right to stop work under the conditions described in paragraph (g) of this clause. Depending on the complexity and hazards associated with the work, the Contractor may choose not to require the subcontractor to submit a Safety Management System for the Contractor's review and approval.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36375, 36378, 36380, July 22, 2009; 75 FR 68221, Nov. 5, 2010; 81 FR 45978, July 15, 2016]

970.5223–3 Agreement regarding Workplace Substance Abuse Programs at DOE sites.

As prescribed in 970.2305–4(a), the contracting officer shall insert the following provision:

AGREEMENT REGARDING WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES (DEC 2010)

(a) Any contract awarded as a result of this solicitation will be subject to the policies, criteria, and procedures of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites.

(b) By submission of its offer, the officer agrees to provide to the Contracting Officer, within 30 days after notification of selection for award, or award of a contract, whichever occurs first, pursuant to this solicitation, its written workplace substance abuse program consistent with the requirements of 10 CFR part 707. DOE may grant an extension to the notification or implementation period if necessary as per 10 CFR 707.5(g).

(c) Failure of the offeror to agree to the condition of responsibility set forth in paragraph (b) of this provision, renders the offeror unqualified and ineligible for award.

(End of provision)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36380, July 22, 2009; 75 FR 68220, Nov. 5, 2010]

970.5223–4 Workplace Substance Abuse Programs at DOE Sites.

As prescribed in 970.2305–4(b), insert the following clause:

WORKPLACE SUBSTANCE ABUSE PROGRAMS AT DOE SITES (DEC 2010)

(a) *Program implementation.* The Contractor shall, consistent with 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, incorporated herein by reference with full force and effect, develop, implement, and maintain a workplace substance abuse program.

(b) *Remedies.* In addition to any other remedies available to the Government, the Contractor's failure to comply with the requirements of 10 CFR part 707 or to perform in a manner consistent with its approved program may render the Contractor subject to: the suspension of contract payments, or, where applicable, a reduction in award fee; termination for default; and suspension or debarment.

(c) *Subcontracts.* (1) The Contractor agrees to notify the Contracting Officer reasonably in advance of, but not later than 30 days prior to, the award of any subcontract the Contractor believes may be subject to the requirements of 10 CFR part 707, unless the Contracting Officer agrees to a different date.

(2) The DOE Prime Contractor shall require all subcontracts subject to the provisions of 10 CFR part 707 to agree to develop and implement a workplace substance abuse program that complies with the requirements of 10 CFR part 707, Workplace Substance Abuse Programs at DOE Sites, as a condition for award of the subcontract. The DOE Prime Contractor shall review and approve each subcontractor's program, and shall periodically monitor each subcontractor's implementation of the program for effectiveness and compliance with 10 CFR part 707.

(3) The Contractor agrees to include, and require the inclusion of, the requirements of this clause in all subcontracts, at any tier, that are subject to the provisions of 10 CFR part 707.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36375, 36378, 36380, July 22, 2009; 75 FR 68220, Nov. 5, 2010]

970.5223–6 Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management.

In accordance with the prescriptions at 923.002(b) or 970.2301–2(b), insert the following in contracts for the operation

of a DOE facility or motor vehicle fleet.

EXECUTIVE ORDER 13423, STRENGTHENING FEDERAL ENVIRONMENTAL, ENERGY, AND TRANSPORTATION MANAGEMENT (OCT 2010)

Since this contract involves Contractor operation of Government-owned facilities and/or motor vehicles, the provisions of Executive Order 13423 are applicable to the Contractor to the same extent they would be applicable if the Government were operating the facilities or motor vehicles. Information on the requirements of the Executive Order may be found at *http://www.archives.gov/federal-register/executive-orders/*.

(End of clause)

[75 FR 57695, Sept. 22, 2010]

970.5223–7 Sustainable acquisition program.

As prescribed in 970.2301–2, insert the following clause in contracts:

SUSTAINABLE ACQUISITION PROGRAM (OCT 2010)

(a) Pursuant to Executive Order 13423, Strengthening Federal Environmental, Energy and Transportation Management, and Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance, the Department of Energy (DOE) is committed to managing its facilities in an environmentally preferable and sustainable manner that will promote the natural environment and protect the health and well being of its Federal employees and contractor service providers. In the performance of work under this contract, the Contractor shall provide its services in a manner that promotes the natural environment, reduces greenhouse gas emissions and protects the health and well being of Federal employees, contract service providers and visitors using the facility.

(b) Green purchasing or sustainable acquisition has several interacting initiatives. The Contractor must comply with initiatives that are current as of the contract award date. DOE may require compliance with revised initiatives from time to time. The Contractor may request an equitable adjustment to the terms of its contract using the procedures at 48 CFR 970.5243–1 Changes. The initiatives important to these Orders are explained on the following Government or Industry Internet Sites:

(1) Recycled Content Products are described at *http://epa.gov/cpg*.

(2) Biobased Products are described at *http://www.biopreferred.gov/*.

(3) Energy efficient products are at *http://energystar.gov/products* for Energy Star products.

(4) Energy efficient products are at *http://www.femp.energy.gov/procurement* for FEMP designated products.

(5) Environmentally preferable and energy efficient electronics including desktop computers, laptops and monitors are at *http://www.epeat.net* the Electronic Products Environmental Assessment Tool (EPEAT) the Green Electronics Council site.

(6) Green house gas emission inventories are required, including Scope 3 emissions which include contractor emissions. These are discussed at Section 13 of Executive Order 13514 which can be found at *http://www.archives.gov/federal-register/executive-orders/disposition.html*.

(7) Non-Ozone Depleting Alternative Products are at *http://www.epa.gov/ozone/strathome.html*.

(8) Water efficient plumbing products are at *http://epa.gov/watersense*.

(c) The clauses at FAR 52.223–2, Affirmative Procurement of Biobased Products under Service and Construction Contracts, 52.223–15, Energy Efficiency in Energy Consuming Products, and 52.223–17 Affirmative Procurement of EPA–Designated Items in Service and Construction Contracts, require the use of products that have biobased content, are energy efficient, or have recycled content. To the extent that the services provided by the Contractor require provision of any of the above types of products, the Contractor must provide the energy efficient and environmentally sustainable type of product unless that type of product—

(1) Is not available;

(2) Is not life cycle cost effective (or does not exceed 110% of the price of alternative items if life cycle cost data is unavailable), EPEAT is an example of lifecycle costs that have been analyzed by DOE and found to be acceptable at the silver and gold level;

(3) Does not meet performance needs; or,

(4) Cannot be delivered in time to meet a critical need.

(d) In the performance of this contract, the Contractor shall comply with the requirements of Executive Order 13423, Strengthening Federal Environmental, Energy and Transportation Management, (*http://www.epa.gov/greeningepa/practices/eo13423.htm*) and Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance (*http://www.archives.gov/federal-register/executive-orders/disposition.html*). The Contractor shall also consider the best practices within the DOE Acquisition Guide, Chapter 23, *Acquisition Considerations Regarding Federal Leadership in Environmental, Energy, and Economic Performance.* This guide includes information concerning

recycled content products, biobased products, energy efficient products, water efficient products, alternative fuels and vehicles, non ozone depleting substances and other environmentally preferable products and services. This guide is available on the Internet at: *http://management.energy.gov/documents/AcqGuide23pt0Rev1.pdf*.

(e) Contractors must establish and maintain a documented energy management program which includes requirements for energy and water efficient equipment, EnergyStar or WaterSense, as applicable and procedures for verification of purchases, following the criteria in DOE Order 430.2B, Departmental Energy, Renewable Energy, and Transportation Management, Attachment 1, or its successor. This requirement should not be flowed down to subcontractors.

(f) In complying with the requirements of paragraph (c) of this clause, the Contractor shall coordinate its activities with and submit required reports through the Environmental Sustainability Coordinator or equivalent position.

(g) The Contractor shall prepare and submit performance reports using prescribed DOE formats, at the end of the Federal fiscal year, on matters related to the acquisition of environmentally preferable and sustainable products and services. This is a material delivery under the contract. Failure to perform this requirement may be considered a failure that endangers performance of this contract and may result in termination for default [see FAR 52.249–6, Termination (Cost Reimbursement)].

(h) These provisions shall be flowed down only to first tier subcontracts exceeding the simplified acquisition threshold that support operation of the DOE facility and offer significant subcontracting opportunities for energy efficient or environmentally sustainable products or services. The Subcontractor will comply with the procedures in paragraphs (c) through (f) of this clause regarding the collection of all data necessary to generate the reports required under paragraphs (c) through (f) of this clause, and submit the reports directly to the Prime Contractor's Environmental Sustainability Coordinator at the supported facility. The Subcontractor will advise the Contractor if it is unable to procure energy efficient and environmentally sustainable items and cite which of the reasons in paragraph (c) of this clause apply. The reports may be submitted at the conclusion of the subcontract term provided that the subcontract delivery term is not multi-year in nature. If the delivery term is multi-year, the Subcontractor shall report its accomplishments for each Federal fiscal year in a manner and at a time or times acceptable to both parties. Failure to comply with these reporting requirements may be considered a breach of contract with attendant consequences.

(i) When this clause is used in a subcontract, the word ''Contractor'' will be understood to mean ''Subcontractor.''

(End of clause)

Alternate I for Construction Contracts and Subcontracts (OCT 2010)—When contracting for construction, alteration, or renovation of DOE facilities, substitute the following paragraphs (d) through (i):

(d) In the performance of this contract, the Contractor shall comply with the requirements of Executive Order 13423, Strengthening Federal Environmental, Energy and Transportation Management, (*http://www.epa.gov/greeningepa/practices/eo13423.htm*) and Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance (*http://www.archives.gov/federal-register/executive-orders/disposition.html*). The Contractor shall also consider the best practices within the DOE Acquisition Guide, Chapter 23, *Acquisition Considerations Regarding Federal Leadership in Environmental, Energy, and Economic Performance*. This guide includes information concerning recycled content products, biobased products, energy efficient products, water efficient products, alternative fuels and vehicles, non-ozone depleting substances and other environmentally preferable products and services. This guide is available on the Internet at: *http://management.energy.gov/documents/AcqGuide23pt0Rev1.pdf*. When developing the Bill of Materials for approval of the Contracting Officer or Representative, the contractor shall specify energy efficient and environmentally sustainable materials to the extent possible within the constraints of the general design specifications. Compliance with the *Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings* (Guiding Principles) shall be achieved through certification to the Leadership in Energy and Environmental Design (LEED) Gold level under the LEED rating system most suited to the building type.

(e) [Reserved]

(f) In complying with the requirements of paragraph (c) of this clause, the Contractor(s) shall coordinate its activities with and submit required reports through the Environmental Sustainability Coordinator or equivalent position.

(g) The Contractor shall prepare and submit performance reports using prescribed DOE formats, at the end of the Federal fiscal year, on matters related to the acquisition of energy efficient and environmentally sustainable products and services. This is a material delivery under the contract. Failure to perform this requirement may be considered a failure that endangers performance of this contract and may result in termination for

default, see 48 CFR 52.249–6, Termination (Cost Reimbursement).

(h) These provisions shall be flowed down only to first tier construction subcontracts exceeding the simplified acquisition threshold that support operation of the DOE facility and offer significant opportunities for designating energy efficient or environmentally sustainable products or services in the materials selection process. The subcontractor will comply with the procedures in paragraphs (c) through (f) of this clause regarding the collection of all data necessary to generate the reports required under paragraphs (c) through (f) of this clause, and submit the reports directly to the Prime Contractor's Environmental Sustainability Coordinator at the supported facility. The subcontractor will advise the contractor if it is unable to procure energy efficient and environmentally sustainable items and cite which of the reasons in paragraph (c) of this clause apply. The reports may be submitted at the conclusion of the subcontract term provided that the subcontract delivery term is not multi-year in nature. If the delivery term is multi-year, the subcontractor shall report its accomplishments for each Federal fiscal year in a manner and at a time or times acceptable to both parties. Failure to comply with these reporting requirements may be considered a breach of contract with attendant consequences.

(i) When this clause is used in a subcontract, the word ''Contractor'' will be understood to mean ''Subcontractor.''

(End of clause)

[75 FR 57695, Sept. 22, 2010]

970.5225–1 Compliance with export control laws and regulations (Export Clause).

As prescribed in 970.2571–3, use the following clause:

COMPLIANCE WITH EXPORT CONTROL LAWS AND REGULATIONS (NOV 2015)

(a) The Contractor shall comply with all applicable U.S. export control laws and regulations.

(b) The Contractor's responsibility to comply with all applicable laws and regulations exists independent of, and is not established or limited by, the information provided by this clause.

(c) Nothing in the terms of this contract adds to, changes, supersedes, or waives any of the requirements of applicable Federal laws, Executive Orders, and regulations, including but not limited to—

(1) The Atomic Energy Act of 1954, as amended;

(2) The Arms Export Control Act (22 U.S.C. 2751 *et seq.*);

(3) The Export Administration Act of 1979 (50 U.S.C. app. 2401 *et seq.*), as continued under the International Emergency Economic Powers Act (Title II of Pub. L. 95–223, 91 Stat. 1626, October 28, 1977; 50 U.S.C. 1701 *et seq.*);

(4) Trading with the Enemy Act (50 U.S.C. App. 5(b), as amended by the Foreign Assistance Act of 1961);

(5) Assistance to Foreign Atomic Energy Activities (10 CFR part 810);

(6) Export and Import of Nuclear Equipment and Material (10 CFR part 110);

(7) International Traffic in Arms Regulations (ITAR) (22 CFR parts 120 through 130);

(8) Export Administration Regulations (EAR) (15 CFR parts 730 through 774); and

(9) Regulations administered by the Office of Foreign Assets Control (31 CFR parts 500 through 598).

(d) In addition to the Federal laws and regulations cited above, National Security Decision Directive (NSDD) 189, National Policy on the Transfer of Scientific, Technical, and Engineering Information establishes a national policy that, to the maximum extent possible, the products of fundamental research shall remain unrestricted. NSDD 189 provides that no restrictions may be placed upon the conduct or reporting of federally funded fundamental research that has not received national security classification, except as provided in applicable U.S. statutes. As a result, contracts confined to the performance of unclassified fundamental research generally do not involve any export-controlled activities.

NSDD 189 does not take precedence over statutes. NSDD 189 does not exempt any research from statutes that apply to export controls such as the Atomic Energy Act, as amended; the Arms Export Control Act; the Export Administration Act of 1979, as amended; or the U.S. International Emergency Economic Powers Act; or the regulations that implement those statutes (*e.g.*, the ITAR, the EAR, 10 CFR part 110 and 10 CFR part 810). Thus, if items (*e.g.*, commodities, software or technologies) that are controlled by U.S. export control laws or regulations are used to conduct research or are generated as part of the research efforts, the export control laws and regulations apply to the controlled items.

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all solicitations and subcontracts.

[80 FR 64369, Oct. 23, 2015]

970.5226–1 Diversity plan.

As prescribed in 970.2671–2, insert the following clause:

DIVERSITY PLAN (DEC 2000)

The Contractor shall submit a Diversity Plan to the Contracting Officer for approval within 90 days after the effective date of this contract (or contract modification, if appropriate). The Contractor shall submit an update to its Plan annually or with its annual fee proposal. Guidance for preparation of a Diversity Plan is provided in the Appendix __. The Plan shall include innovative strategies for increasing opportunities to fully use the talents and capabilities of a diverse work force. The Plan shall address, at a minimum, the Contractor's approach for promoting diversity through (1) the Contractor's work force, (2) educational outreach, (3) community involvement and outreach, (4) subcontracting, (5) economic development (including technology transfer), and (6) the prevention of profiling based on race or national origin.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 75 FR 68221, Nov. 5, 2010]

970.5226–2 Workforce restructuring under section 3161 of the National Defense Authorization Act for fiscal year 1993.

As prescribed in 970.2672–3, insert the following clause:

WORKFORCE RESTRUCTURING UNDER SECTION 3161 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1993 (DEC 2000)

(a) Consistent with the objectives of Section 3161 of the National Defense Authorization Act for Fiscal Year 1993, 42 U.S.C. 7274h, in instances where the Department of Energy has determined that a change in workforce at a Department of Energy Defense Nuclear Facility is necessary, the contractor agrees to (1) comply with the Department of Energy Workforce Restructuring Plan for the facility, if applicable, and (2) use its best efforts to accomplish workforce restructuring or displacement so as to mitigate social and economic impacts.

(b) The requirements of this clause shall be included in subcontracts at any tier (except subcontracts for commercial items pursuant to 41 U.S.C. 403) expected to exceed $500,000.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 75 FR 68221, Nov. 5, 2010]

970.5226–3 Community commitment.

As prescribed in 970.2673–2, insert the following clause:

COMMUNITY COMMITMENT (DEC 2000)

It is the policy of the DOE to be a constructive partner in the geographic region in which DOE conducts its business. The basic elements of this policy include: (1) Recognizing the diverse interests of the region and its stakeholders, (2) engaging regional stakeholders in issues and concerns of mutual interest, and (3) recognizing that giving back to the community is a worthwhile business practice. Accordingly, the Contractor agrees that its business operations and performance under the Contract will be consistent with the intent of the policy and elements set forth above.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 75 FR 68221, Nov. 5, 2010]

970.5227–1 Rights in data-facilities.

As prescribed in 48 CFR 970.2704–3(a), insert the following clause:

RIGHTS IN DATA—FACILITIES (DEC 2000)

(a) *Definitions.* (1) *Computer data bases,* as used in this clause, means a collection of data 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.

(2) *Computer software,* as used in this clause, means (i) computer programs which are data comprising 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) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

(3) *Data,* as used in this clause, 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 ''data'' does not include data incidental to the administration of this contract, such as financial, administrative, cost and pricing, or management information.

(4) *Limited rights data,* as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of subparagraph (e) of this clause.

(5) *Restricted computer software*, as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of paragraph (f) of this clause.

(6) *Technical data,* as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

(7) *Unlimited rights,* as used in this clause, means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights.* (1) The Government shall have:

(i) Ownership of all technical data and computer software first produced in the performance of this Contract;

(ii) Unlimited rights in technical data and computer software specifically used in the performance of this Contract, except as provided herein regarding copyright, limited rights data, or restricted computer software, or except for other data specifically protected by statute for a period of time or, where, approved by DOE, appropriate instances of the DOE Strategic Partnership Projects Program;

(iii) The right to inspect technical data and computer software first produced or specifically used in the performance of this Contract at all reasonable times. The Contractor shall make available all necessary facilities to allow DOE personnel to perform such inspection;

(iv) The right to have all technical data and computer software first produced or specifically used in the performance of this Contract delivered to the Government or otherwise disposed of by the Contractor, either as the contracting officer may from time to time direct during the progress of the work or in any event as the contracting officer shall direct upon completion or termination of this Contract. The Contractor agrees to leave a copy of such data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the contracting officer. If such data are limited rights data or restricted computer software, the rights of the Government in such data shall be governed solely by the provisions of paragraph (e) of this clause (''Rights in Limited Rights Data'') or paragraph (f) of this clause (''Rights in Restricted Computer Software''); and

(v) The right to remove, cancel, correct, or ignore any markings not authorized by the terms of this Contract on any data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the Contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the Contractor of the action taken.

(2) The Contractor shall have:

(i) The right to withhold limited rights data and restricted computer software unless otherwise provided in accordance with the provisions of this clause; and

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this Contract, data it first produces in the performance of this Contract, except for data in DOE's Uranium Enrichment Technology, including diffusion, centrifuge, and atomic vapor laser isotope separation, provided the data requirements of this Contract have been met as of the date of the private use of such data.

(3) The Contractor agrees that for limited rights data or restricted computer software or other technical, business or financial data in the form of recorded information which it receives from, or is given access to by, DOE or a third party, including a DOE Contractor or subcontractor, and for technical data or computer software it first produces under this Contract which is authorized to be marked by DOE, the Contractor shall treat such data in accordance with any restrictive legend contained thereon.

(c) *Copyrighted Material.* (1) The Contractor shall not, without prior written authorization of the Patent Counsel, assert copyright in any technical data or computer software first produced in the performance of this contract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf, a nonexclusive, paid-up, irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, and perform any such data copyrighted by the Contractor.

(2) The Contractor agrees not to include in the technical data or computer software delivered under the contract any material copyrighted by the Contractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (c)(1) of this clause. If the Contractor believes that such copyrighted material for which the license cannot be obtained must be included in the technical

data or computer software to be delivered, rather than merely incorporated therein by reference, the Contractor shall obtain the written authorization of the contracting officer to include such material in the technical data or computer software prior to its delivery.

(d) *Subcontracting.* (1) Unless otherwise directed by the contracting officer, the Contractor agrees to use in subcontracts in which technical data or computer software is expected to be produced or in subcontracts for supplies that contain a requirement for production or delivery of data in accordance with the policy and procedures of 48 CFR Subpart 27.4 as supplemented by 48 CFR 927.401 through 927.409, the clause entitled, ''Rights in Data-General'' at 48 CFR 52.227–14 modified in accordance with 927.409(a) and including Alternate V. Alternates II through IV of that clause may be included as appropriate with the prior approval of DOE Patent Counsel, and the Contractor shall not acquire rights in a subcontractor's limited rights data or restricted computer software, except through the use of Alternates II or III, respectively, without the prior approval of DOE Patent Counsel. The clause at 48 CFR 52.227–16, Additional Data Requirements, shall be included in subcontracts in accordance with DEAR 927.409(h). The contractor shall use instead the Rights in Data-Facilities clause at 48 CFR 970.5227–1 in subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated under its contract with DOE.

(2) It is the responsibility of the Contractor to obtain from its subcontractors technical data and computer software and rights therein, on behalf of the Government, necessary to fulfill the Contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the Contractor shall:

(i) Promptly submit written notice to the contracting officer setting forth reasons or the subcontractor's refusal and other pertinent information which may expedite disposition of the matter, and

(ii) Not proceed with the subcontract without the written authorization of the contracting officer.

(3) Neither the Contractor nor higher-tier subcontractors shall use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data or restricted computer software for their private use.

(e) *Rights in Limited Rights Data.* Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license by or for the Government, in any limited rights data of the Contractor specifically used in the performance of this Contract, provided, however, that to the extent that any limited rights data when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Limited Rights Notice'' set forth. All such limited rights data shall be marked with the following ''Limited Rights Notice'':

Limited Rights Notice

These data contain ''limited rights data,'' furnished under Contract No. _____ with the United States Department of Energy which may be duplicated and used by the Government with the express limitations that the ''limited rights data'' may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Contractor, except that further disclosure or use may be made solely for the following purposes:

(a) Use (except for manufacture) by support services contractors within the scope of their contracts;

(b) This ''limited rights data'' may be disclosed for evaluation purposes under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(c) This ''limited rights data'' may be disclosed to other contractors participating in the Government's program of which this Contract is a part for information or use (except for manufacture) in connection with the work performed under their contracts and under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(d) This ''limited rights data'' may be used by the Government or others on its behalf for emergency repair or overhaul work under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed; and

(e) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government. This Notice shall be marked on any reproduction of this data in whole or in part.

(End of notice)

(f) *Rights in restricted computer software.* (1) Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up, license by

or for the Government, in any restricted computer software of the Contractor specifically used in the performance of this Contract, provided, however, that to the extent that any restricted computer software when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Restricted Rights Notice'' set forth below. All such restricted computer software shall be marked with the following ''Restricted Rights Notice'':

Restricted Rights Notice-Long Form

(a) This computer software is submitted with restricted rights under Department of Energy Contract No. _____. It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice.

(b) This computer software may be:

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used, copied for use, in a backup or replacement computer if any computer for which it was acquired is inoperative or is replaced;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that only the portions of the derivative software consisting of the restricted computer software are to be made subject to the same restricted rights; and

(5) Disclosed to and reproduced for use by contractors under a service contract (of the type defined in 48 CFR 37.101) in accordance with subparagraphs (b)(1) through (4) of this Notice, provided the Government makes such disclosure or reproduction subject to these restricted rights.

(c) Notwithstanding the foregoing, if this computer software has been published under copyright, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in the restricted rights notice above.

(d) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(2) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used.

Restricted Rights Notice—Short Form

Use, reproduction, or disclosure is subject to restrictions set forth in the Long Form Notice of DOE Contract No. _____ with (name of Contractor).

(End of notice)

(3) If the software is embedded, or if it is commercially impractical to mark it with human readable text, then the symbol R and the clause date (mo/yr), in brackets or a box, a [R-mo/yr], may be used. This will be read to mean restricted computer software, subject to the rights of the Government as described in the Long Form Notice, in effect as of the date indicated next to the symbol. The symbol shall not be used to mark human readable material. In the event this Contract contains any variation to the rights in the Long Form Notice, then the contract number must also be cited.

(4) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, the software will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions and with unlimited rights, unless the Contractor includes the following statement with such copyright notice ''Unpublished-rights reserved under the Copyright Laws of the United States.''

(g) *Relationship to patents.* Nothing contained in this clause creates or is intended to imply a license to the Government in any patent or is intended to be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(End of clause)

Alternate I (DEC 2000). As prescribed in 48 CFR 970.2704–3(a), where access to Category C–24 restricted data is contemplated in the performance of a contract the contracting officer shall insert the phrase ''and except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to receive reasonable compensation for the use of its inventions and discoveries, including related data and technology'' after ''laser isotope separation'' and before the comma in paragraph (b)(2)(ii) of the clause at 48 CFR 970.5227–1, Rights in Data—Facilities, as appropriate.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 80 FR 15519, Mar. 24, 2015]

970.5227–2 Rights in data-technology transfer.

As prescribed in 48 CFR 970.2704–3(b), insert the following clause:

RIGHTS IN DATA—TECHNOLOGY TRANSFER
(DEC 2000)

(a) *Definitions.* (1) *Computer data bases,* as used in this clause, means a collection of data 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.

(2) *Computer software,* as used in this clause, means (i) computer programs which are data comprising 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) data comprising source code listings, design details, algorithms, processes, flow charts, formulae, and related material that would enable the computer program to be produced, created, or compiled. The term does not include computer data bases.

(3) *Data,* as used in this clause, 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 ''data'' does not include data incidental to the administration of this contract, such as financial, administrative, cost and pricing, or management information.

(4) *Limited rights data,* as used in this clause, means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged. The Government's rights to use, duplicate, or disclose limited rights data are as set forth in the Limited Rights Notice of paragraph (g) of this clause.

(5) *Restricted computer software,* as used in this clause, means computer software developed at private expense and that is a trade secret; is commercial or financial and is confidential or privileged; or is published copyrighted computer software, including minor modifications of any such computer software. The Government's rights to use, duplicate, or disclose restricted computer software are as set forth in the Restricted Rights Notice of subparagraph (h) of this clause.

(6) *Technical data,* as used in this clause, means recorded data, regardless of form or characteristic, that are of a scientific or technical nature. Technical data does not include computer software, but does include manuals and instructional materials and technical data formatted as a computer data base.

(7) *Unlimited rights,* as used in this clause, means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, including by electronic means, and perform publicly and display publicly, in any manner, including by electronic means, and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of Rights.* (1) The Government shall have:

(i) Ownership of all technical data and computer software first produced in the performance of this Contract;

(ii) Unlimited rights in technical data and computer software specifically used in the performance of this Contract, except as provided herein regarding copyright, limited rights data, or restricted computer software, and except for data subject to the withholding provisions for protected Cooperative Research and Development Agreement (CRADA) information in accordance with Technology Transfer actions under this Contract, or other data specifically protected by statute for a period of time or, where, approved by DOE, appropriate instances of the DOE Strategic Partnership Projects Program;

(iii) The right to inspect technical data and computer software first produced or specifically used in the performance of this Contract at all reasonable times. The Contractor shall make available all necessary facilities to allow DOE personnel to perform such inspection;

(iv) The right to have all technical data and computer software first produced or specifically used in the performance of this Contract delivered to the Government or otherwise disposed of by the Contractor, either as the contracting officer may from time to time direct during the progress of the work or in any event as the contracting officer shall direct upon completion or termination of this Contract. The Contractor agrees to leave a copy of such data at the facility or plant to which such data relate, and to make available for access or to deliver to the Government such data upon request by the contracting officer. If such data are limited rights data or restricted computer software. the rights of the Government in such data shall be governed solely by the provisions of paragraph (g) of this clause (''Rights in Limited Rights Data'') or paragraph (h) of this clause (''Rights in Restricted Computer Software''); and (v) The right to remove, cancel, correct, or ignore any markings not authorized by the terms of this Contract on any data furnished hereunder if, in response to a written inquiry by DOE concerning the propriety of the markings, the Contractor fails to respond thereto within 60 days or fails to substantiate the propriety of the markings. In either case DOE will notify the Contractor of the action taken.

(2) The Contractor shall have:

(i) The right to withhold limited rights data and restricted computer software unless

otherwise provided in provisions of this clause;

(ii) The right to use for its private purposes, subject to patent, security or other provisions of this Contract, data it first produces in the performance of this Contract, except for data in DOE's Uranium Enrichment Technology, including diffusion, centrifuge, and atomic vapor laser isotope separation, provided the data requirements of this Contract have been met as of the date of the private use of such data; and

(iii) The right to assert copyright subsisting in scientific and technical articles as provided in paragraph (d) of this clause and the right to request permission to assert copyright subsisting in works other than scientific and technical articles as provided in paragraph (e) of this clause.

(3) The Contractor agrees that for limited rights data or restricted computer software or other technical business or financial data in the form of recorded information which it receives from, or is given access to by DOE or a third party, including a DOE contractor or subcontractor, and for technical data or computer software it first produces under this Contract which is authorized to be marked by DOE, the Contractor shall treat such data in accordance with any restrictive legend contained thereon.

(c) *Copyright (General).* (1) The Contractor agrees not to mark, register, or otherwise assert copyright in any data in a published or unpublished work, other than as set forth in paragraphs (d) and (e) of this clause.

(2) Except for material to which the Contractor has obtained the right to assert copyright in accordance with either paragraph (d) or (e) of this clause, the Contractor agrees not to include in the data delivered under this Contract any material copyrighted by the Contractor and not to knowingly include any material copyrighted by others without first granting or obtaining at no cost a license therein for the benefit of the Government of the same scope as set forth in paragraph (d) of this clause. If the Contractor believes that such copyrighted material for which the license cannot be obtained must be included in the data to be delivered, rather than merely incorporated therein by reference, the Contractor shall obtain the written authorization of the contracting officer to include such material in the data prior to its delivery.

(d) *Copyrighted works (scientific and technical articles).* (1) The Contractor shall have the right to assert, without prior approval of the contracting officer, copyright subsisting in scientific and technical articles composed under this contract or 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. When assertion of copyright is made, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) on 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. The Contractor grants to the Government, and others acting on its behalf, a nonexclusive, paid-up, irrevocable, world-wide 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.

(2) The contractor shall mark each scientific or technical article first produced or composed under this Contract and submitted for journal publication or similar means of dissemination with a notice, similar in all material respects to the following, on the front reflecting the Government's non-exclusive, paid-up, irrevocable, world-wide license in the copyright.

Notice: This manuscript has been authored by [insert the name of the Contractor] under Contract No. [insert the contract number] with the U.S. Department of Energy. The United States Government retains and the publisher, by accepting the article for publication, acknowledges that the United States Government retains a non-exclusive, paid-up, irrevocable, world-wide license to publish or reproduce the published form of this manuscript, or allow others to do so, for United States Government purposes.

(End of notice)

(3) The title to the copyright of the original of unclassified graduate theses and the original of related unclassified scientific papers shall vest in the author thereof, subject to the right of DOE to retain duplicates of such documents and to use such documents for any purpose whatsoever without any claim on the part of the author or the contractor for additional compensation.

(e) *Copyrighted works (other than scientific and technical articles and data produced under a CRADA).* The Contractor may obtain permission to assert copyright subsisting in technical data and computer software first produced by the Contractor in performance of this Contract, where the Contractor can show that commercialization would be enhanced by such copyright protection, subject to the following:

(1) Contractor Request to Assert Copyright.

(i) For data other than scientific and technical articles and data produced under a CRADA, the Contractor shall submit in writing to Patent Counsel its request to assert copyright in data first produced in the performance of this Contract pursuant to this clause. The right of the Contractor to copyright data first produced under a CRADA is

as described in the individual CRADA. Each request by the Contractor must include:

(A) The identity of the data (including any computer program) for which the Contractor requests permission to assert copyright, as well as an abstract which is descriptive of the data and is suitable for dissemination purposes, (B) The program under which it was funded, (C) Whether, to the best knowledge of the Contractor, the data is subject to an international treaty or agreement, (D) Whether the data is subject to export control, (E) A statement that the Contractor plans to commercialize the data in compliance with the clause of this contract entitled, ''Technology Transfer Mission,'' within five (5) years after obtaining permission to assert copyright or, on a case-by-case basis, a specified longer period where the Contractor can demonstrate that the ability to commercialize effectively is dependent upon such longer period, and (F) For data other than computer software, a statement explaining why the assertion of copyright is necessary to enhance commercialization and is consistent with DOE's dissemination responsibilities.

(ii) For data that is developed using other funding sources in addition to DOE funding, the permission to assert copyright in accordance with this clause must also be obtained by the Contractor from all other funding sources prior to the Contractor's request to Patent Counsel. The request shall include the Contractor's certification or other documentation acceptable to Patent Counsel demonstrating such permission has been obtained.

(iii) Permission for the Contractor to assert copyright in excepted categories of data as determined by DOE will be expressly withheld. Such excepted categories include data whose release (A) would be detrimental to national security, i.e., involve classified information or data or sensitive information under Section 148 of the Atomic Energy Act of 1954, as amended, or are subject to export control for nonproliferation and other nuclear-related national security purposes, (B) would not enhance the appropriate transfer or dissemination and commercialization of such data, (C) would have a negative impact on U.S. industrial competitiveness, (D) would prevent DOE from meeting its obligations under treaties and international agreements, or (E) would be detrimental to one or more of DOE's programs. Additional excepted categories may be added by the Assistant General Counsel for Technology Transfer and Intellectual Property. Where data are determined to be under export control restriction, the Contractor may obtain permission to assert copyright subject to the provisions of this clause for purposes of limited commercialization in a manner that complies with export control statutes and applicable regulations. In addition, notwithstanding any other provision of this Contract, all data developed with Naval Reactors' funding and those data that are classified fall within excepted categories. The rights of the Contractor in data are subject to the disposition of data rights in the treaties and international agreements identified under this Contract as well as those additional treaties and international agreements which DOE may from time to time identify by unilateral amendment to the Contract; such amendment listing added treaties and international agreements is effective only for data which is developed after the date such treaty or international agreement is added to this Contract. Also, the Contractor will not be permitted to assert copyright in data in the form of various technical reports generated by the Contractor under the Contract without first obtaining the advanced written permission of the contracting officer.

(2) DOE Review and Response to Contractor's Request. The Patent Counsel shall use its best efforts to respond in writing within 90 days of receipt of a complete request by the Contractor to assert copyright in technical data and computer software pursuant to this clause. Such response shall either give or withhold DOE's permission for the Contractor to assert copyright or advise the Contractor that DOE needs additional time to respond, and the reasons therefor.

(3) Permission for Contractor to Assert Copyright.

(i) For computer software, the Contractor shall furnish to the DOE designated, centralized software distribution and control point, the Energy Science and Technology Software Center, at the time permission to assert copyright is given under paragraph (e)(2) of this clause: (A) An abstract describing the software suitable for publication, (B) the source code for each software program, and (C) the object code and at least the minimum support documentation needed by a technically competent user to understand and use the software. The Patent Counsel, for good cause shown by the Contractor, may allow the minimum support documentation to be delivered within 60 days after permission to assert copyright is given or at such time the minimum support documentation becomes available. The Contractor acknowledges that the DOE designated software distribution and control point may provide a technical description of the software in an announcement identifying its availability from the copyright holder.

(ii) Unless otherwise directed by the contracting officer, for data other than computer software to which the Contractor has received permission to assert copyright under paragraph (e)(2) of this clause above, the Contractor shall within sixty (60) days of obtaining such permission furnish to DOE's

Office of Scientific and Technical Information (OSTI) a copy of such data as well as an abstract of the data suitable for dissemination purposes. The Contractor acknowledges that OSTI may provide an abstract of the data in an announcement to DOE, its contractors and to the public identifying its availability from the copyright holder.

(iii) For a five year period or such other specified period as specifically approved by Patent Counsel beginning on the date the Contractor is given permission to assert copyright in data, 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 and perform publicly and display publicly, by or on behalf of the Government. Upon request, the initial period may be extended after DOE approval. The DOE approval will be based on the standard that the work is still commercially available and the market demand is being met.

(iv) After the period approved by Patent Counsel for application of the limited Government license described in paragraph (e)(3)(iii) of this clause, or if, prior to the end of such period(s), the Contractor abandons commercialization activities pertaining to the data to which the Contractor has been given permission to assert copyright, 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, distribute copies to the public, prepare derivative works, perform publicly and display publicly, and to permit others to do so.

(v) Whenever the Contractor asserts copyright in data pursuant to this paragraph (e), the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 on the copyrighted data and also an acknowledgment of the Government sponsorship and license rights of paragraphs (e)(3) (iii) and (iv) of this clause. Such action shall be taken when the data are delivered to the Government, published, licensed or deposited for registration as a published work in the U.S. Copyright Office. The acknowledgment of Government sponsorship and license rights shall be as follows: Notice: These data were produced by (insert name of Contractor) under Contract No. _____ with the Department of Energy. For (period approved by DOE Patent Counsel) from (date permission to assert copyright was obtained), the Government is granted for itself and others acting on its behalf a nonexclusive, paid-up, irrevocable worldwide license in this data to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government. There is provision for the possible extension of the term of this license. Subsequent to that period or any extension granted, the Government is granted for itself and others acting on its behalf a nonexclusive, paid-up, irrevocable worldwide license in this data to reproduce, prepare derivative works, distribute copies to the public, perform publicly and display publicly, and to permit others to do so. The specific term of the license can be identified by inquiry made to Contractor or DOE. Neither the United States nor the United States Department of Energy, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any data , apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights.

(End of notice)

(vi) With respect to any data to which the Contractor has received permission to assert copyright, the DOE has the right, during the five (5) year or specified longer period approved by Patent Counsel as provided for in paragraph (e) of this clause, to request the Contractor to grant a nonexclusive, partially exclusive or exclusive license in any field of use to a responsible applicant(s) upon terms that are reasonable under the circumstances, and if the Contractor refuses such request, to grant such license itself, if the DOE determines that the Contractor has not made a satisfactory demonstration that either it or its licensee(s) is actively pursuing commercialization of the data as set forth in subparagraph (e)(1)(A) of this clause. Before licensing under this subparagraph (vi), DOE shall furnish the Contractor a written request for the Contractor to grant the stated license, and the Contractor shall be allowed thirty (30) days (or such longer period as may be authorized by the contracting officer for good cause shown in writing by the Contractor) after such notice to show cause why the license should not be granted. The Contractor shall have the right to appeal the decision of the DOE to grant the stated license to the Invention Licensing Appeal Board as set forth in 10 CFR 781.65—''Appeals.''

(vii) No costs shall be allowable for maintenance of copyrighted data, primarily for the benefit of the Contractor and/or a licensee which exceeds DOE Program needs, except as expressly provided in writing by the contracting officer. The Contractor may use its net royalty income to effect such maintenance costs.

(viii) At any time the Contractor abandons commercialization activities for data for which the Contractor has received permission to assert copyright in accordance with this clause, it shall advise OSTI and Patent Counsel and upon request assign the copyright to the Government so that the Government can distribute the data to the public.

(4) The following notice may be placed on computer software prior to any publication

and prior to the Contractor's obtaining permission from the Department of Energy to assert copyright in the computer software pursuant to paragraph (c)(3) of this section.

Notice: This computer software was prepared by [insert the Contractor's name and the individual author], hereinafter the Contractor, under Contract [insert the Contract Number] with the Department of Energy (DOE). All rights in the computer software are reserved by DOE on behalf of the United States Government and the Contractor as provided in the Contract. You are authorized to use this computer software for Governmental purposes but it is not to be released or distributed to the public. NEITHER THE GOVERNMENT NOR THE CONTRACTOR MAKES ANY WARRANTY, EXPRESS OR IMPLIED, OR ASSUMES ANY LIABILITY FOR THE USE OF THIS SOFTWARE. This notice including this sentence must appear on any copies of this computer software.

(End of notice)

(5) a similar notice can be used for data, other than computer software, upon approval of DOE Patent Counsel.

(f) *Subcontracting.* (1) Unless otherwise directed by the contracting officer, the Contractor agrees to use in subcontracts in which technical data or computer software is expected to be produced or in subcontracts for supplies that contain a requirement for production or delivery of data in accordance with the policy and procedures of 48 CFR Subpart 27.4 as supplemented by 48 CFR 927.401 through 927.409, the clause entitled, ''Rights in Data-General'' at 48 CFR 52.227–14 modified in accordance with 927.409(a) and including Alternate V. Alternates II through IV of that clause may be included as appropriate with the prior approval of DOE Patent Counsel, and the Contractor shall not acquire rights in a subcontractor's limited rights data or restricted computer software, except through the use of Alternates II or III, respectively, without the prior approval of DOE Patent Counsel. The clause at 48 CFR 52.227–16, Additional Data Requirements, shall be included in subcontracts in accordance with 48 CFR 927.409(h). The Contractor shall use instead the Rights in Data-Facilities clause at 48 CFR 970.5227–1 in subcontracts, including subcontracts for related support services, involving the design or operation of any plants or facilities or specially designed equipment for such plants or facilities that are managed or operated under its contract with DOE.

(2) It is the responsibility of the Contractor to obtain from its subcontractors technical data and computer software and rights therein, on behalf of the Government, necessary to fulfill the Contractor's obligations to the Government with respect to such data. In the event of refusal by a subcontractor to accept a clause affording the Government such rights, the Contractor shall:

(i) Promptly submit written notice to the contracting officer setting forth reasons or the subcontractor's refusal and other pertinent information which may expedite disposition of the matter, and

(ii) Not proceed with the subcontract without the written authorization of the contracting officer.

(3) Neither the Contractor nor higher-tier subcontractors shall use their power to award subcontracts as economic leverage to acquire rights in a subcontractor's limited rights data and restricted computer software for their private use.

(g) *Rights in Limited Rights Data.* Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable nonexclusive, paid-up license by or for the Government, in any limited rights data of the Contractor specifically used in the performance of this Contract, provided, however, that to the extent that any limited rights data when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Limited Rights Notice'' set forth below. All such limited rights data shall be marked with the following ''Limited Rights Notice:''

Limited Rights Notice

These data contain ''limited rights data,'' furnished under Contract No. _____ with the United States Department of Energy which may be duplicated and used by the Government with the express limitations that the ''limited rights data'' may not be disclosed outside the Government or be used for purposes of manufacture without prior permission of the Contractor, except that further disclosure or use may be made solely for the following purposes:

(a) Use (except for manufacture) by support services contractors within the scope of their contracts;

(b) This ''limited rights data'' may be disclosed for evaluation purposes under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(c) This ''limited rights data'' may be disclosed to other contractors participating in the Government's program of which this Contract is a part for information or use (except for manufacture) in connection with the work performed under their contracts and under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed;

(d) This ''limited rights data'' may be used by the Government or others on its behalf

for emergency repair or overhaul work under the restriction that the ''limited rights data'' be retained in confidence and not be further disclosed; and

(e) Release to a foreign government, or instrumentality thereof, as the interests of the United States Government may require, for information or evaluation, or for emergency repair or overhaul work by such government.

This Notice shall be marked on any reproduction of this data in whole or in part.

(End of notice)

(h) *Rights in restricted computer software.* (1) Except as may be otherwise specified in this Contract as data which are not subject to this paragraph, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up, license by or for the Government, in any restricted computer software of the Contractor specifically used in the performance of this Contract; provided, however, that to the extent that any restricted computer software when furnished or delivered is specifically identified by the Contractor at the time of initial delivery to the Government or a representative of the Government, such data shall not be used within or outside the Government except as provided in the ''Restricted Rights Notice'' set forth below. All such restricted computer software shall be marked with the following ''Restricted Rights Notice:''

Restricted Rights Notice—Long Form

(a) This computer software is submitted with restricted rights under Department of Energy Contract No. _____. It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice.

(b) This computer software may be:

(1) Used or copied for use in or with the computer or computers for which it was acquired, including use at any Government installation to which such computer or computers may be transferred;

(2) Used, copied for use, in a backup or replacement computer if any computer for which it was acquired is inoperative or is replaced;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, provided that only the portions of the derivative software consisting of the restricted computer software are to be made subject to the same restricted rights; and

(5) Disclosed to and reproduced for use by contractors under a service contract (of the type defined in 48 CFR 37.101) in accordance with subparagraphs (b)(1) through (4) of this Notice, provided the Government makes such disclosure or reproduction subject to these restricted rights.

(c) Notwithstanding the foregoing, if this computer software has been published under copyright, it is licensed to the Government, without disclosure prohibitions, with the rights set forth in the restricted rights notice above.

(d) This Notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(2) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form Notice may be used in lieu thereof:

Restricted Rights Notice—Short Form

Use, reproduction, or disclosure is subject to restrictions set forth in the Long Form Notice of DOE Contract No. _____ with (name of Contractor).

(End of notice)

(3) If the software is embedded, or if it is commercially impractical to mark it with human readable text, then the symbol R and the clause date (mo/yr) in brackets or a box, a [R-mo/yr], may be used. This will be read to mean restricted computer software, subject to the rights of the Government as described in the Long Form Notice, in effect as of the date indicated next to the symbol. The symbol shall not be used to mark human readable material. In the event this Contract contains any variation to the rights in the Long Form Notice, then the contract number must also be cited.

(4) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, the software will be presumed to be published copyrighted computer software licensed to the Government without disclosure prohibitions and with unlimited rights, unless the Contractor includes the following statement with such copyright notice ''Unpublished-rights reserved under the Copyright Laws of the United States.''

(i) *Relationship to patents.* Nothing contained in this clause creates or is intended to imply a license to the Government in any patent or is intended to be construed as affecting the scope of any licenses or other rights otherwise granted to the Government under any patent.

(End of clause)

Alternate I (DEC 2000). As prescribed in 48 CFR 970.2704–3(b), where access to Category C–24 restricted data is contemplated in the performance of a contract the contracting officer shall insert the phrase ''and except Restricted Data in category C–24, 10 CFR part 725, in which DOE has reserved the right to

receive reasonable compensation for the use of its inventions and discoveries, including related data and technology'' after ''laser isotope separation'' and before the comma in paragraph (b)(2)(ii) of the clause at 48 CFR 970.5227–2, Rights in Data—Technology Transfer, as appropriate.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 80 FR 15519, Mar. 24, 2015]

970.5227–3 Technology transfer mission.

As prescribed in 48 CFR 970.2770–4(a), insert the following clause:

TECHNOLOGY TRANSFER MISSION (AUG 2019)

This clause has as its purpose implementation of the National Competitiveness Technology Transfer Act of 1989 (Sections 3131, 3132, 3133, and 3157 of Pub. L. 101–189 and as amended by Pub. L. 103–160, Sections 3134 and 3160). The Contractor shall conduct technology transfer activities with a purpose of providing benefit from Federal research to U.S. industrial competitiveness.

(a) *Authority.* (1) In order to ensure the full use of the results of research and development efforts of, and the capabilities of, the Laboratory, technology transfer, including Cooperative Research and Development Agreements (CRADAs), is established as a mission of the Laboratory consistent with the policy, principles and purposes of Sections 11(a)(1) and 12(g) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a); Section 3132(b) of Pub. L. 101–189, Sections 3134 and 3160 of Pub. L. 103–160, and of Chapter 38 of the Patent Laws (35 U.S.C. 200 *et seq.*); Section 152 of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2182); Section 9 of the Federal Nonnuclear Energy Research and Development Act of 1974 (42 U.S.C. 5908); and Executive Order 12591 of April 10, 1987.

(2) In pursuing the technology transfer mission, the Contractor is authorized to conduct activities including but not limited to: identifying and protecting Intellectual Property made, created or acquired at or by the Laboratory; negotiating licensing agreements and assignments for Intellectual Property made, created or acquired at or by the Laboratory that the Contractor controls or owns; bailments; negotiating all aspects of and entering into CRADAs; providing technical consulting and personnel exchanges; conducting science education activities and reimbursable Strategic Partnership Projects (SPP); providing information exchanges; and making available laboratory or weapon production user facilities. It is fully expected that the Contractor shall use all of the mechanisms available to it to accomplish this technology transfer mission, including, but not limited to, CRADAs, user facilities, SPP, science education activities, consulting, personnel, assignments, and licensing in accordance with this clause.

(b) *Definitions.* (1) *Contractor's Laboratory Director* means the individual who has supervision over all or substantially all of the Contractor's operations at the Laboratory.

(2) *Intellectual Property* means patents, trademarks, copyrights, mask works, protected CRADA information, and other forms of comparable property rights protected by Federal Law and other foreign counterparts.

(3) *Cooperative Research and Development Agreement (CRADA)* means any agreement entered into between the Contractor as operator of the Laboratory, and one or more parties including at least one non-Federal party under which the Government, through its laboratory, provides personnel, services, facilities, equipment, intellectual property, or other resources with or without reimbursement (but not funds to non-Federal parties) and the non-Federal parties provide funds, personnel, services, facilities, equipment, intellectual property, or other resources toward the conduct of specified research or development efforts which are consistent with the missions of the Laboratory; except that such term does not include a procurement contract, grant, or cooperative agreement as those terms are used in sections 6303, 6304, and 6305 of Title 31 of the United States Code.

(4) *Joint Work Statement (JWS)* means a proposal for a CRADA prepared by the Contractor, signed by the Contractor's Laboratory Director or designee which describes the following:

(i) Purpose;

(ii) Scope of Work which delineates the rights and responsibilities of the Government, the Contractor and Third Parties, one of which must be a non-Federal party;

(iii) Schedule for the work; and

(iv) Cost and resource contributions of the parties associated with the work and the schedule.

(5) *Assignment* means any agreement by which the Contractor transfers ownership of Laboratory Intellectual Property, subject to the Government's retained rights.

(6) *Laboratory Biological Materials* means biological materials capable of replication or reproduction, such as plasmids, deoxyribonucleic acid molecules, ribonucleic acid molecules, living organisms of any sort and their progeny, including viruses, prokaryote and eukaryote cell lines, transgenic plants and animals, and any derivatives or modifications thereof or products produced through their use or associated biological products, made under this contract by Laboratory employees or

through the use of Laboratory research facilities.

(7) *Laboratory Tangible Research Product* means tangible material results of research which

(i) are provided to permit replication, reproduction, evaluation or confirmation of the research effort, or to evaluate its potential commercial utility;

(ii) are not materials generally commercially available; and

(iii) were made under this contract by Laboratory employees or through the use of Laboratory research facilities.

(8) *Bailment* means any agreement in which the Contractor permits the commercial or non-commercial transfer of custody, access or use of Laboratory Biological Materials or Laboratory Tangible Research Product for a specified purpose of technology transfer or research and development, including without limitation evaluation, and without transferring ownership to the bailee.

(c) *Allowable costs.* (1) The Contractor shall establish and carry out its technology transfer efforts through appropriate organizational elements consistent with the requirements for an Office of Research and Technology Applications (ORTA) pursuant to paragraphs (b) and (c) of Section 11 of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710). The costs associated with the conduct of technology transfer through the ORTA including activities associated with obtaining, maintaining, licensing, and assigning Intellectual Property rights, increasing the potential for the transfer of technology, widespread notice of technology transfer opportunities, and early stage and precommercial technology demonstration to remove barriers that limit private sector interest and demonstrate potential commercial applications of any research and technologies arising from Laboratory activities, shall be deemed allowable provided that such costs meet the other requirements of the allowable cost provisions of this Contract. In addition to any separately designated funds, these costs in any fiscal year shall not exceed an amount equal to 0.5 percent of the operating funds included in the Federal research and development budget (including Strategic Partnership Projects) of the Laboratory for that fiscal year without written approval of the contracting officer.

(2) The Contractor's participation in litigation to enforce or defend Intellectual Property claims incurred in its technology transfer efforts shall be as provided in the clause entitled ''Insurance—Litigation and Claims'' of this contract.

(d) *Conflicts of Interest—Technology Transfer.* The Contractor shall have implementing procedures that seek to avoid employee and organizational conflicts of interest, or the appearance of conflicts of interest, in the conduct of its technology transfer activities. These procedures shall apply to other persons participating in Laboratory research or related technology transfer activities. Such implementing procedures shall be provided to the contracting officer for review and approval within sixty (60) days after execution of this contract. The contracting officer shall have thirty (30) days thereafter to approve or require specific changes to such procedures. Such implementing procedures shall include procedures to:

(1) Inform employees of and require conformance with standards of conduct and integrity in connection with the CRADA activity in accordance with the provisions of paragraph (n)(5) of this clause;

(2) Review and approve employee activities so as to avoid conflicts of interest arising from commercial utilization activities relating to Contractor-developed Intellectual Property;

(3) Conduct work performed using royalties so as to avoid interference with or adverse effects on ongoing DOE projects and programs;

(4) Conduct activities relating to commercial utilization of Contractor-developed Intellectual Property so as to avoid interference with or adverse effects on user facility or SPP activities of the Contractor;

(5) Conduct DOE-funded projects and programs so as to avoid the appearance of conflicts of interest or actual conflicts of interest with non-Government funded work;

(6) Notify the contracting officer with respect to any new work to be performed or proposed to be performed under the Contract for DOE or other Federal agencies where the new work or proposal involves Intellectual Property in which the Contractor has obtained or intends to request or elect title;

(7) Except as provided elsewhere in this Contract, obtain the approval of the contracting officer for any licensing of or assignment of title to Intellectual Property rights by the Contractor to any business or corporate affiliate of the Contractor;

(8) Obtain the approval of the contracting officer prior to any assignment, exclusive licensing, or option for exclusive licensing, of Intellectual Property to any individual who has been a Laboratory employee within the previous two years or to the company in which the individual is a principal; and

(9) Notify non-Federal sponsors of SPP activities, or non-Federal users of user facilities, of any relevant Intellectual Property interest of the Contractor prior to execution of SPPs or user agreements.

(10) Notify DOE prior to evaluating a proposal by a third party or DOE, when the subject matter of the proposal involves an elected or waived subject invention under this contract or one in which the Contractor intends to elect to retain title under this contract.

(e) *Fairness of Opportunity*. In conducting its technology transfer activities, the Contractor shall prepare procedures and take all reasonable measures to ensure widespread notice of availability of technologies suited for transfer and opportunities for exclusive licensing and joint research arrangements. The requirement to widely disseminate the availability of technology transfer opportunities does not apply to a specific application originated outside of the Laboratory and by entities other than the Contractor.

(f) *U.S. Industrial Competitiveness*. (1) In the interest of enhancing U.S. Industrial Competitiveness, the Contractor shall, in its licensing and assignments of Intellectual Property, give preference in such a manner as to enhance the accrual of economic and technological benefits to the U.S. domestic economy. The Contractor shall consider the following factors in all of its licensing and assignment decisions involving Laboratory intellectual property where the Laboratory obtains rights during the course of the Contractor's operation of the Laboratory under this contract:

(i) whether any resulting design and development will be performed in the United States and whether resulting products, embodying parts, including components thereof, will be substantially manufactured in the United States; or

(ii) (A) whether the proposed licensee or assignee has a business unit located in the United States and whether significant economic and technical benefits will flow to the United States as a result of the license or assignment agreement; and

(B) in licensing any entity subject to the control of a foreign company or government, whether such foreign government permits United States agencies, organizations or other persons to enter into cooperative research and development agreements and licensing agreements, and has policies to protect United States Intellectual Property rights.

(2) If the Contractor determines that neither of the conditions in paragraphs (f)(1)(i) or (ii) of this clause are likely to be fulfilled, the Contractor, prior to entering into such an agreement, must obtain the approval of the contracting officer. The contracting officer shall act on any such requests for approval within thirty (30) days.

(3) The Contractor agrees to be bound by the provisions of 35 U.S.C. 204 (Preference for United States industry).

(g) *Indemnity—Product Liability*. In entering into written technology transfer agreements, including but not limited to, research and development agreements, licenses, assignments and CRADAs, the Contractor agrees to include in such agreements a requirement that the U.S. Government and the Contractor, except for any negligent acts or omissions of the Contractor, be indemnified for all damages, costs, and expenses, including attorneys' fees, arising from personal injury or property damage occurring as a result of the making, using or selling of a product, process or service by or on behalf of the Participant, its assignees or licensees which was derived from the work performed under the agreement. The Contractor shall identify and obtain the approval of the contracting officer for any proposed exceptions to this requirement such as where State or local law expressly prohibit the Participant from providing indemnification or where the research results will be placed in the public domain.

(h) *Disposition of Income*. (1) Royalties or other income earned or retained by the Contractor as a result of performance of authorized technology transfer activities herein shall be used by the Contractor for scientific research, development, technology transfer, and education at the Laboratory, consistent with the research and development mission and objectives of the Laboratory and subject to Section 12(b)(5) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(b)(5)) and Chapter 38 of the Patent Laws (35 U.S.C. 200 *et seq.*) as amended through the effective date of this contract award or modification. If the net amounts of such royalties and income received from patent licensing after payment of patenting costs, licensing costs, payments to inventors and other expenses incidental to the administration of Subject Inventions during any fiscal year exceed 5 percent of the Laboratory's budget for that fiscal year, 75 percent of such excess amounts shall be paid to the Treasury of the United States, and the remaining amount of such excess shall be used by the Contractor for the purposes as described above in this paragraph. Any inventions arising out of such scientific research and development activities shall be deemed to be Subject Inventions under the Contract.

(2) The Contractor shall include as a part of its annual Laboratory Institutional Plan or other such annual document a plan setting out those uses to which royalties and other income received as a result of performance of authorized technology transfer activities herein will be applied at the Laboratory, and at the end of the year, provide a separate accounting for how the funds were actually used. Under no circumstances shall these royalties and income be used for an illegal augmentation of funds furnished by the U.S. Government.

(3) The Contractor shall establish subject to the approval of the contracting officer a policy for making awards or sharing of royalties with Contractor employees, other coinventors and coauthors, including Federal employee coinventors when deemed appropriate by the contracting officer.

(i) *Transfer to successor contractor*. In the event of termination or upon the expiration

of this Contract, any unexpended balance of income received for use at the Laboratory shall be transferred, at the contracting officer's request, to a successor contractor, or in the absence of a successor contractor, to such other entity as designated by the contracting officer. The Contractor shall transfer title, as one package, to the extent the Contractor retains title, in all patents and patent applications, licenses, accounts containing royalty revenues from such license agreements, including equity positions in third party entities, and other Intellectual Property rights which arose at the Laboratory, to the successor contractor or to the Government as directed by the contracting officer.

(j) *Technology transfer affecting the national security.* (1) The Contractor shall notify and obtain the approval of the contracting officer, prior to entering into any technology transfer arrangement, when such technology or any part of such technology is classified or sensitive under Section 148 of the Atomic Energy Act (42 U.S.C. 2168). Such notification shall include sufficient information to enable DOE to determine the extent that commercialization of such technology would enhance or diminish security interests of the United States, or diminish communications within DOE's nuclear weapon production complex. DOE shall use its best efforts to complete its determination within sixty (60) days of the Contractor's notification, and provision of any supporting information, and DOE shall promptly notify the Contractor as to whether the technology is transferable.

(2) The Contractor shall include in all of its technology transfer agreements with third parties, including, but not limited to, CRADAs, licensing agreements and assignments, notice to such third parties that the export of goods and/or Technical Data from the United States may require some form of export control license or other authority from the U.S. Government and that failure to obtain such export control license may result in criminal liability under U.S. laws.

(3) For other than fundamental research as defined in National Security Decision Directive 189, the Contractor is responsible to conduct internal export control reviews and assure that technology is transferred in accordance with applicable law.

(k) *Records.* The Contractor shall maintain records of its technology transfer activities in a manner and to the extent satisfactory to the DOE and specifically including, but not limited to, the licensing agreements, assignments and the records required to implement the requirements of paragraphs (e), (f), and (h) of this clause and shall provide reports to the contracting officer to enable DOE to maintain the reporting requirements of Section 12(c)(6) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(c)(6)). Such reports shall be made annually in a format to be agreed upon between the Contractor and DOE and in such a format which will serve to adequately inform DOE of the Contractor's technology transfer activities while protecting any data not subject to disclosure under the Rights in Technical Data clause and paragraph (n) of this clause. Such records shall be made available in accordance with the clauses of this Contract pertaining to inspection, audit and examination of records.

(l) *Reports to Congress.* To facilitate DOE's reporting to Congress, the Contractor is required to submit annually to DOE a technology transfer plan for conducting its technology transfer function for the upcoming year, including plans for securing Intellectual Property rights in Laboratory innovations with commercial promise and plans for managing such innovations so as to benefit the competitiveness of United States industry. This plan shall be provided to the contracting officer on or before October 1st of each year.

(m) *Oversight and appraisal.* The Contractor is responsible for developing and implementing effective internal controls for all technology transfer activities consistent with the audit and record requirements of this Contract. Laboratory Contractor performance in implementing the technology transfer mission and the effectiveness of the Contractor's procedures will be evaluated by the contracting officer as part of the annual appraisal process, with input from the cognizant Secretarial Officer or program office.

(n) *Technology transfer through cooperative research and development agreements.* Upon approval of the contracting officer and as provided in a DOE approved Joint Work Statement (JWS), the Laboratory Director, or designee, may enter into CRADAs on behalf of the DOE subject to the requirements set forth in this paragraph.

(1) *Review and approval of CRADAs.* (i) Except as otherwise directed in writing by the contracting officer, each JWS shall be submitted to the contracting officer for approval. The Contractor's Laboratory Director or designee shall provide a program mission impact statement and shall include an impact statement regarding related Intellectual Property rights known by the Contractor to be owned by the Government to assist the contracting officer in the approval determination.

(ii) The Contractor shall also include (specific to the proposed CRADA), a statement of compliance with the Fairness of Opportunity requirements of paragraph (e) of this clause.

(iii) Within thirty (30) days after submission of a JWS or proposed CRADA, the contracting officer shall approve, disapprove or request modification to the JWS or CRADA. The contracting officer shall provide a written explanation to the Contractor's Laboratory Director or designee of any disapproval

or requirement for modification of a JWS or proposed CRADA.

(iv) Except as otherwise directed in writing by the contracting officer, the Contractor shall not enter into, or begin work under, a CRADA until approval of the CRADA has been granted by the contracting officer. The Contractor may submit its proposed CRADA to the contracting officer at the time of submitting its proposed JWS or any time thereafter.

(2) *Selection of participants.* The Contractor's Laboratory Director or designee in deciding what CRADA to enter into shall:

(i) Give special consideration to small business firms, and consortia involving small business firms;

(ii) Give preference to business units located in the United States which agree that products or processes embodying Intellectual Property will be substantially manufactured or practiced in the United States and, in the case of any industrial organization or other person subject to the control of a foreign company or government, take into consideration whether or not such foreign government permits United States agencies, organizations, or other persons to enter into cooperative research and development agreements and licensing agreements;

(iii) Provide Fairness of Opportunity in accordance with the requirements of paragraph (e) of this clause; and

(iv) Give consideration to the Conflicts of Interest requirements of paragraph (d) of this clause.

(3) *Withholding of data.* (i) Data that is first produced as a result of research and development activities conducted under a CRADA and that would be a trade secret or commercial or financial data that would be privileged or confidential, if such data had been obtained from a non-Federal third party, may be protected from disclosure under the Freedom of Information Act as provided in the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(c)(7)) for a period as agreed in the CRADA of up to five (5)years from the time the data is first produced. The DOE shall cooperate with the Contractor in protecting such data.

(ii) Unless otherwise expressly approved by the contracting officer in advance for a specific CRADA, the Contractor agrees, at the request of the contracting officer, to transmit such data to other DOE facilities for use by DOE or its Contractors by or on behalf of the Government. When data protected pursuant to paragraph (n)(3)(i) of this clause is so transferred, the Contractor shall clearly mark the data with a legend setting out the restrictions against private use and further dissemination, along with the expiration date of such restrictions.

(iii) In addition to its authority to license Intellectual Property, the Contractor may enter into licensing agreements with third parties for data developed by the Contractor under a CRADA subject to other provisions of this Contract. However, the Contractor shall neither use the protection against dissemination nor the licensing of data as an alternative to the submittal of invention disclosures which include data protected pursuant to paragraph (n)(3)(i) of this clause.

(4) *Strategic Partnership Projects and user facility programs.* (i) SPP and User Facility Agreements (UFAs) are not CRADAs and will be available for use by the Contractor in addition to CRADAs for achieving utilization of employee expertise and unique facilities for maximizing technology transfer. The Contractor agrees form prospective CRADA participants, which are intending to substantially pay full cost recovery for the effort under a proposed CRADA, of the availability of alternative forms of agreements, i.e., SPP and UFA, and of the Class Patent Waiver provisions associated therewith.

(ii) Where the Contractor believes that the transfer of technology to the U.S. domestic economy will benefit from, or other equity considerations dictate, an arrangement other than the Class Waiver of patent rights to the sponsor in SPP and UFAs, a request may be made to the contracting officer for an exception to the Class Waivers.

(iii) Rights to inventions made under agreements other than funding agreements with third parties shall be governed by the appropriate provisions incorporated, with DOE approval, in such agreements, and the provisions in such agreements take precedence over any disposition of rights contained in this Contract. Disposition of rights under any such agreement shall be in accordance with any DOE class waiver (including Strategic Partnership Projects and User Class Waivers) or individually negotiated waiver which applies to the agreement.

(5) *Conflicts of interest.* (i) Except as provided in paragraph (n)(5)(iii) of this clause, the Contractor shall assure that no employee of the Contractor shall have a substantial role (including an advisory role) in the preparation, negotiation, or approval of a CRADA, if, to such employee's knowledge:

(A) Such employee, or the spouse, child, parent, sibling, or partner of such employee, or an organization (other than the Contractor) in which such employee serves as an officer, director, trustee, partner, or employee—

(*1*) Holds financial interest in any entity, other than the Contractor, that has a substantial interest in the preparation, negotiation, or approval of the CRADA;

(*2*) Receives a gift or gratuity from any entity, other than the Contractor, that has a substantial interest in the preparation, negotiation, or approval of the CRADA; or

(B) A financial interest in any entity, other than the Contractor, that has a substantial interest in the preparation, negotiation, or approval of the CRADA, is held by any person or organization with whom such employee is negotiating or has any arrangement concerning prospective employment.

(ii) The Contractor shall require that each employee of the Contractor who has a substantial role (including an advisory role) in the preparation, negotiation, or approval of a CRADA certify through the Contractor to the contracting officer that the circumstances described in paragraph (n)(5)(i) of this clause do not apply to that employee.

(iii) The requirements of paragraphs (n)(5)(i) and (n)(5)(ii) of this clause shall not apply in a case where the contracting officer is advised by the Contractor in advance of the participation of an employee described in those paragraphs in the preparation, negotiation or approval of a CRADA of the nature of and extent of any financial interest described in paragraph (n)(5)(i) of this clause, and the contracting officer determines that such financial interest is not so substantial as to be considered likely to affect the integrity of the Contractor employee's participation in the process of preparing, negotiating, or approving the CRADA.

(o) *Technology transfer in other cost-sharing agreements.* In conducting research and development activities in cost-shared agreements not covered by paragraph (n) of this clause, the Contractor, with prior written permission of the contracting officer, may provide for the withholding of data produced thereunder in accordance with the applicable provisions of paragraph (n)(3) of this clause.

(End of clause)

Alternate I (AUG 2002). As prescribed in 48 CFR 970.2770–4(b), add the following definition under paragraph (b) and the following new paragraph (p):

(b)(8) *Privately funded technology transfer* means the prosecuting, maintaining, licensing, and marketing of inventions which are not owned by the Government (and not related to CRADAs) when such activities are conducted entirely without the use of Government funds.

(p) *Technology partnership ombudsman.* (1) The Contractor agrees to establish a position to be known as ''Technology Partnership Ombudsman,'' to help resolve complaints from outside organizations regarding the policies and actions of the contractor with respect to technology partnerships (including CRADAs), patents owned by the contractor for inventions made at the laboratory, and technology licensing.

(2) The Ombudsman shall be a senior official of the Contactor's laborratory staff, who is not involved in day-to-day technology partnerships, patents or technology licensing, or, if appointed from outside the laboratory or facility, shall function as such senior official.

(3) The duties of the Technology Partnership Ombudsman shall include:

(i) Serving as the focal point for assisting the public and industry in resolving complaints and disputes with the laboratory or facility regarding technology partnerships, patents, and technology licensing;

(ii) Promoting the use of collaborative alternative dispute resolution techniques such as mediation to facilitate the speedy and low cost resolution of complaints and disputes, when appropriate; and

(iii) Submitting a quarterly report, in a format provided by DOE, to the Secretary of Energy, the Administrator for Nuclear Security, the Director of the DOE Office of Dispute Resolution, and the Contracting Officer concerning the number and nature of complaints and disputes raised, along with the Ombudsman's assessment of their resolution, consistent with the protection of confidential and sensitive information.

(q) Nothing in paragraphs (c) Allowable Costs, (e) Fairness of Opportunity, (f) U.S. Industrial Competitiveness, (g) Indemnity—Product Liability, (h) Disposition of Income, and (i) Transfer to Successor Contractor of this clause are intended to apply to the contractor's privately funded technology transfer activities if such privately funded activities are addressed elsewhere in the contract.

Alternate II (DEC 2000). As prescribed in 48 CFR 970.2770–4(c), the contracting officer shall substitute the phrase ''weapon production facility'' wherever the word ''laboratory'' appears in the clause.

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 48570, July 25, 2002; 80 FR 15519, Mar. 24, 2015; 84 FR 44753, Aug. 27, 2019]

970.5227–4 Authorization and consent.

Insert the following clause in solicitations and contracts in accordance with 970.2702–1:

AUTHORIZATION AND CONSENT (AUG 2002)

(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.

(b) If the Contractor is sued for copyright infringement or anticipates the filing of such a lawsuit, the Contractor may request authorization and consent to copy a copyrighted work from the contracting officer. Programmatic necessity is a major consideration for DOE in determining whether to grant such request.

(c)(1) The Contractor agrees to include, and require inclusion of, the Authorization and Consent clause at 52.227–1, without Alternate 1, but suitably modified to identify the parties, in all subcontracts expected to exceed $100,000 at any tier for supplies or services, including construction, architect-engineer services, and materials, supplies, models, samples, and design or testing services.

(2) The Contractor agrees to include, and require inclusion of, paragraph (a) of this Authorization and Consent clause, suitably modified to identify the parties, in all subcontracts at any tier for research and development activities expected to exceed $100,000.

(3) Omission of an authorization and consent clause from any subcontract, including those valued less than $100,000 does not affect this authorization and consent.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 48570, July 25, 2002]

970.5227–5 Notice and assistance regarding patent and copyright infringement.

Insert the following clause in solicitations and contracts in accordance with 970.2702–2:

NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (DEC 2000)

(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) If any person files a 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 hereunder, the Contractor shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in possession of the Contractor pertaining to such suit or claim. Except where the Contractor has agreed to indemnify the Government, the Contractor shall furnish such evidence and information at the expense of the Government.

(c) The Contractor agrees to include, and require inclusion of, this clause suitably modified to identify the parties, in all subcontracts at any tier expected to exceed $100,000.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 48570, July 25, 2002]

970.5227–6 Patent indemnity—subcontracts.

Insert the following clause in solicitations and contracts in accordance with 970.2702–3:

PATENT INDEMNITY—SUBCONTRACTS (DEC 2000)

Except as otherwise authorized by the Contracting Officer, the Contractor shall obtain indemnification of 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 by the Government) from Contractor's subcontractors for any contract work subcontracted in accordance with FAR 48 CFR 52.227–3.

(End of clause)

970.5227–7 Royalty information.

Insert the following provision in solicitations in accordance with 970.2702–4:

ROYALTY INFORMATION (DEC 2000)

(a) *Cost or charges for royalties.* If 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; and

(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 or other basis upon which the royalty may be payable.

(End of provision)

970.5227–8 Refund of royalties.

Insert the following clause in solicitations and contracts in accordance with 970.2702–4:

REFUND OF ROYALTIES (AUG 2002)

(a) During performance of this Contract, if any royalties are proposed to be charged to the Government as costs under this Contract, the Contractor agrees to submit for approval of the Contracting Officer, prior to the execution of any license, the following information relating to each separate item of royalty:

(1) Name and address of licensor;

(2) Patent numbers, patent application serial numbers, or other basis on which the royalty is payable;

(3) Brief description, including any part or model numbers of each contract item or component on which the royalty is payable;

(4) Percentage or dollar rate of royalty per unit;

(5) Unit price of contract item;

(6) Number of units;

(7) Total dollar amount of royalties; and

(8) A copy of the proposed license agreement.

(b) If specifically requested by the Contracting Officer, the Contractor shall furnish a copy of any license agreement entered into prior to the effective date of this clause and an identification of applicable claims of specific patents or other basis upon which royalties are payable.

(c) 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 that are used in the performance of this contract or any subcontract hereunder.

(d) The Contractor shall furnish to the Contracting Officer, annually upon request, a statement of royalties paid or required to be paid in connection with performing this Contract and subcontracts hereunder.

(e) For royalty payments under licenses entered into after the effective date of this Contract, costs incurred for royalties proposed under this paragraph shall be allowable only to the extent that such royalties are approved by the Contracting Officer. If the Contracting Officer determines that existing or proposed royalty payments are inappropriate, any payments subsequent to such determination shall be allowable only to the extent approved by the Contracting Officer.

(f) Regardless of prior DOE approval of any individual payments or royalties, DOE may contest at any time the enforceability, validity, scope of, or title to a patent for which the Contractor makes a royalty or other payment.

(g) 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 any royalties to which this clause applies, the Contractor shall promptly notify the Contracting Officer of that fact and shall promptly reimburse the Government for any refunds received or royalties paid after having received notice of such relief.

(h) The Contractor agrees to include, and require inclusion of, this clause, including this paragraph (h), suitably modified to identify the parties in any subcontract at any tier in which the amount of royalties reported during negotiation of the subcontract exceeds $250.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 48570, July 25, 2002]

970.5227–9 Notice of right to request patent waiver.

Insert the following provision in solicitations in accordance with 970.2704–6:

NOTICE OF RIGHT TO REQUEST PATENT WAIVER (DEC 2000)

Offerors have the right to request a waiver of all or any part of the rights of the United States in inventions conceived or first actually reduced to practice in performance of the contract, in advance of or within 30 days after the effective date of contracting. If such advance waiver is not requested or the request is denied, the Contractor has a continuing right under the contract to request a waiver of the rights of the Government in identified inventions, i.e., individual inventions conceived or first actually reduced to practice in performance of the contract. Contractors that are domestic small businesses and domestic nonprofit organizations may not need a waiver and will have included in their contracts a patent clause reflecting their right to elect title to subject inventions pursuant to the Bayh-Dole Act (35 U.S.C. 200 *et seq.*).

(End of provision)

970.5227–10 Patent rights—management and operating contracts, nonprofit organization or small business firm contractor.

As prescribed in 970.2703–1(b)(2), insert the following clause:

PATENT RIGHTS-MANAGEMENT AND OPERATING CONTRACTS, NONPROFIT ORGANIZATION OR SMALL BUSINESS FIRM CONTRACTOR (DEC 2000)

(a) *Definitions.* (1) *DOE licensing regulations* means the Department of Energy patent licensing regulations at 10 CFR part 781.

(2) *Exceptional circumstance subject invention* means any subject invention in a technical field or related to a task determined by the Department of Energy to be subject to an exceptional circumstance under 35 U.S.C. 202(a)(ii) and in accordance with 37 CFR 401.3(e).

(3) *Invention* means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321 *et seq.*).

(4) *Made* when used in relation to any invention means the conception or first actual reduction to practice of such invention.

(5) *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.

(6) *Patent Counsel* means the Department of Energy (DOE) Patent Counsel assisting the DOE contracting activity.

(7) *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.

(8) *Small business firm* means a small business concern as defined at section 2 of Pub. L. 85–536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3–8 and 13 CFR 121.3–12, respectively, are used.

(9) *Subject Invention* means any invention of the contractor conceived or first actually reduced to practice in the performance of work under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) shall also occur during the period of contract performance.

(b) *Allocation of Principal Rights.* (1) *Retention of title by the Contractor.* Except for exceptional circumstance subject inventions, the contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(2) *Exceptional circumstance subject inventions.* Except to the extent that rights are retained by the Contractor in a determination of exceptional circumstances or granted to a contractor through a determination of greater rights in accordance with subparagraph (b)(4) of this clause, the Contractor does not have a right to retain title to any exceptional circumstance subject inventions and agrees to assign to the Government the entire right, title, and interest, throughout the world, in and to any exceptional circumstance subject inventions.

(i) Inventions within or relating to the following fields of technology are exceptional circumstance subject inventions:

(A) Uranium enrichment technology;

(B) Storage and disposal of civilian high-level nuclear waste and spent fuel technology; and

(C) National security technologies classified or sensitive under Section 148 of the Atomic Energy Act (42 U.S.C. 2168).

(ii) Inventions made under any agreement, contract or subcontract related to the following are exceptional circumstance subject inventions:

(A) DOE Steel Initiative and Metals Initiative;

(B) U.S. Advanced Battery Consortium; and

(C) Any funding agreement which is funded in part by the Electric Power Research Institute (EPRI) or the Gas Research Institute (GRI).

(iii) DOE reserves the right to unilaterally amend this contract to modify, by deletion or insertion, technical fields, tasks, or other classifications for the purpose of determining DOE exceptional circumstance subject inventions.

(3) *Treaties and international agreements.* Any rights acquired by the Contractor in subject inventions are subject to any disposition of right, title, or interest in or to subject inventions provided for in treaties or international agreements identified at Appendix [*Insert Reference*] to this contract. DOE reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into or to be entered into by the Government after the effective date of this contract and

to effectuate those license or other rights which are necessary for the Government to meet its obligations to foreign governments, their nationals and international organizations under such treaties or international agreements with respect to subject inventions made after the date of the amendment.

(4) *Contractor request for greater rights in exceptional circumstance subject inventions.* The Contractor may request rights greater than allowed by the exceptional circumstance determination in an exceptional circumstance subject invention by submitting such a request in writing to Patent Counsel at the time the exceptional circumstance subject invention is disclosed to DOE or within eight (8) months after conception or first actual reduction to practice of the exceptional circumstance subject invention, whichever occurs first, unless a longer period is authorized in writing by the Patent Counsel for good cause shown in writing by the Contractor. DOE may, in its discretion, grant or refuse to grant such a request by the Contractor.

(5) *Contractor employee-inventor rights.* If the Contractor does not elect to retain title to a subject invention or does not request greater rights in an exceptional circumstance subject invention, a Contractor employee-inventor, after consultation with the Contractor and with written authorization from the Contractor in accordance with 10 CFR 784.9(b)(4), may request greater rights, including title, in the subject invention or the exceptional circumstance invention from DOE, and DOE may, in its discretion, grant or refuse to grant such a request by the Contractor employee-inventor.

(6) *Government assignment of rights in Government employees' subject inventions.* If a Government employee is a joint inventor of a subject invention or of an exceptional circumstance subject invention to which the Contractor has rights, the Government may assign or refuse to assign to the Contractor any rights in the subject invention or exceptional circumstance subject invention acquired by the Government from the Government employee, in accordance with 48 CFR 27.304–1(d). The rights assigned to the Contractor are subject to any provision of this clause that is applicable to subject inventions in which the Contractor retains title, including reservation by the Government of a nonexclusive, nontransferable, irrevocable, paid-up license, except that the Contractor shall file its initial patent application claiming the subject invention or exceptional circumstance invention within one (1) year after the assignment of such rights. The Contractor shall share royalties collected for the manufacture, use or sale of the subject invention with the Government employee.

(c) *Subject invention disclosure, election of title and filing of patent application by contractor*—(1) *Subject invention disclosure.* The contractor will disclose each subject invention to the Patent Counsel within two months after the inventor discloses it in writing to contractor personnel responsible for patent matters. The disclosure to the agency shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s) and all sources of funding by B&R code for the invention. It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. The disclosure shall include a written statement as to whether the invention falls within an exceptional circumstance field. DOE will make a determination and advise the Contractor within 30 days of receipt of an invention disclosure as to whether the invention is an exceptional circumstance subject invention. In addition, after disclosure to the Patent Counsel, the Contractor will promptly notify the agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the contractor. The Contractor shall obtain approval from Patent Counsel prior to any release or publication of information concerning any nonelectable subject invention such as an exceptional circumstance subject invention or any subject invention related to a treaty or international agreement.

(2) *Election by the Contractor.* Except as provided in paragraph (b)(2) of this clause, the Contractor will elect in writing whether or not to retain title to any such invention by notifying the Federal agency within two years of disclosure to the Federal agency. However, in any case where publication, on sale or public use has initiated the one year statutory period wherein valid patent protection can still 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) *Filing of patent applications by the Contractor.* The Contractor will file its initial patent application on a subject invention to which it elects to retain title within one year after election of title or, if earlier, or prior to the end of any 1-year statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Contractor will file patent applications in additional countries or international patent offices

within either ten months of the corresponding initial patent application or six months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) *Contractor's request for an extension of time.* Requests for an extension of the time for disclosure, election, and filing under subparagraphs (c)(1), (2) and (3) may, at the discretion of Patent Counsel, be granted.

(5) *Publication approval.* During the course of the work under this contract, the Contractor or its employees may desire to release or publish information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract. In order that public disclosure of such information will not adversely affect the patent interest of DOE or the Contractor, approval for release or publication shall be secured from the Contractor personnel responsible for patent matters prior to any such release or publication. Where DOE's approval of publication is requested, DOE's response to such requests for approval shall normally be provided within 90 days except in circumstances in which a domestic patent application must be filed in order to protect foreign rights. In the case involving foreign patent rights, DOE shall be granted an additional 180 days with which to respond to the request for approval, unless extended by mutual agreement.

(d) *Conditions when the Government may obtain title.* The Contractor will convey to the DOE, upon written request, title to any subject invention—

(1) If the Contractor fails to disclose or elect title to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain title; provided, that DOE may only request title within sixty (60) days after learning of the failure of the Contractor to disclose or to elect within the specified times.

(2) In those countries in which the Contractor fails to file a patent application within the times specified in subparagraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in subparagraph (c) above, but prior to its receipt of the written request of the DOE, the Contractor shall continue to retain title in that country.

(3) 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 a reexamination or opposition proceeding on, a patent on a subject invention.

(4) If the Contractor requests that DOE acquire title or rights from the Contractor in a subject invention to which the Contractor had initially retained title or rights, or in an exceptional circumstance subject invention to which the Contractor was granted greater rights, DOE may acquire such title or rights from the Contractor, or DOE may decide against acquiring such title or rights from the Contractor, at DOE's sole discretion.

(e) *Minimum rights of the Contractor and protection of the Contractor's right to file*—(1) *Request for a Contractor license.* The Contractor may request the right to reserve a revocable, nonexclusive, royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. DOE may grant or refuse to grant such a request by the Contractor. When DOE approves such reservation, the Contractor's license will normally extend to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a party and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of DOE, except when transferred to the successor of that part of the contractor's business to which the invention pertains.

(2) *Revocation or modification of a Contractor license.* The Contractor's domestic license may be revoked or modified by DOE to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR Part 404 and DOE licensing regulations at 10 CFR Part 781. This license will not be revoked in the field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the subject invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of DOE to the extent the Contractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application of the subject invention in that foreign country.

(3) *Notice of revocation of modification of a Contractor license.* Before revocation or modification of the license, DOE will furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor will be allowed thirty days (or such other time as may be authorized by DOE for good cause shown by the Contractor) 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 DOE licensing regulations at 10 CFR part 781 concerning the licensing of Government owned inventions, any decision

concerning the revocation or modification of the license.

(f) *Contractor action to protect the Government's interest*—(1) *Execution of delivery of title or license instruments.* The Contractor agrees to execute or to have executed, and promptly deliver to the Patent Counsel all instruments necessary to accomplish the following actions:

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions to which the Contractor elects to retain title, and

(ii) Convey title to DOE when requested under subparagraphs (b) or paragraph (d) of this clause and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) *Contractor employee agreements.* The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to Contractor personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor, each subject invention made under this contract 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 subparagraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) *Notification of discontinuation of patent protection.* The contractor will notify the Patent Counsel of any decision not to 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 thirty days before the expiration of the response period required by the relevant patent office.

(4) *Notification of Government rights.* The contractor agrees to include, within the specification of any United States patent applications and any patent issuing thereon covering a subject invention, the following statement, ''This invention was made with government support under (identify the contract) awarded by (identify the Federal agency). The government has certain rights in the invention.''

(5) *Invention identification procedures.* 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 written description of such procedures to the Contracting Officer so that the Contracting Officer may evaluate and determine their effectiveness.

(6) *Invention filing documentation.* If the Contractor files a domestic or foreign patent application claiming a subject invention, the Contractor shall promptly submit to Patent Counsel, upon request, the following information and documents:

(i) The filing date, serial number, title, and a copy of the patent application (including an English-language version if filed in a language other than English);

(ii) An executed and approved instrument fully confirmatory of all Government rights in the subject invention; and

(iii) The patent number, issue date, and a copy of any issued patent claiming the subject invention.

(7) *Duplication and disclosure of documents.* 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; provided, however, that any such duplication or disclosure by the Government is subject to the confidentiality provision at 35 U.S.C. 205 and 37 CFR part 40.

(g) *Subcontracts*—(1) *Subcontractor subject inventions.* The Contractor shall not obtain rights in the subcontractor's subject inventions as part of the consideration for awarding a subcontract.

(2) *Inclusion of patent rights clause—nonprofit organization or small business firm subcontractors.* Unless otherwise authorized or directed by the Contracting Officer, the Contractor shall include the patent rights clause at 48 CFR 952.227–11, suitably modified to identify the parties, in all subcontracts, at any tier, for experimental, developmental, demonstration or research work to be performed by a small business firm or domestic nonprofit organization, except subcontracts which are subject to exceptional circumstances in accordance with 35 U.S.C. 202 and subparagraph (b)(2) of this clause. The subcontractor retains all rights provided for the contractor in the patent rights clause at 48 CFR 952.227–11.

(3) *Inclusion of patent rights clause—subcontractors other than non-profit organizations and small business firms.* Except for the subcontracts described in subparagraph (g)(2) of this clause, the Contractor shall include the patent rights clause at 48 CFR 952.227–13, suitably modified to identify the parties, in any contract for experimental, developmental, demonstration or research work. For subcontracts subject to exceptional circumstances, the contractor must consult with DOE patent counsel with respect to the appropriate patent clause.

(4) *DOE and subcontractor contract.* With respect to subcontracts at any tier, DOE, the subcontractor, and the Contractor agree that the mutual obligations of the parties created

by this clause constitute a contract between the subcontractor and DOE 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 Act in connection with proceedings under paragraph (j) of this clause.

(5) *Subcontractor refusal to accept terms of patent clause.* If a prospective subcontractor refuses to accept the terms of a patent rights clause, the Contractor shall promptly submit a written notice to the Contracting Officer stating the subcontractor's reasons for such a refusal, including any relevant information for expediting disposition of the matter, and the Contractor shall not proceed with the subcontract without the written authorization of the Contracting Officer.

(6) *Notification of award of subcontract.* Upon the award of any subcontract at any tier containing a patent rights clause, the Contractor shall promptly notify the Contracting Officer in writing and identify 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 a subcontract.

(7) *Identification of subcontractor subject inventions.* If the Contractor in the performance of this contract becomes aware of a subject invention made under a subcontract, the Contractor shall promptly notify Patent Counsel and identify the subject invention.

(h) *Reporting on utilization of subject inventions.* The Contractor agrees to submit to DOE on request, periodic reports, no more frequently than annually, on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and such other data and information as DOE may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by DOE in connection with any march-in proceeding undertaken by DOE in accordance with paragraph (j) of this clause. As required by 35 U.S.C. 202(c)(5), DOE agrees it will not disclose such information to persons outside the Government without permission of the Contractor.

(i) *Preference for United States Industry.* Notwithstanding any other provision of this clause, the Contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any product 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 such an agreement may be waived by DOE 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.

(j) *March-in Rights.* The Contractor agrees that, with respect to any subject invention in which it has acquired title, DOE has the right in accordance with the procedures in 37 CFR 401.6 and any DOE supplemental regulations to require the Contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and, if the Contractor, assignee or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that—

(1) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or

(4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived, or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) *Special provisions for contracts with nonprofit organizations.* If the Contractor is a nonprofit organization, it agrees that—

(1) *DOE approval of assignment of rights.* Rights to a subject invention in the United States may not be assigned by the Contractor without the approval of DOE, except where such assignment is made to an organization which has as one of its primary functions the management of inventions; provided, that such assignee will be subject to the same provisions of this clause as the Contractor.

(2) *Small business firm licensees.* It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention if the Contractor determines that the small

business firm 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 firms; provided, that the Contractor is also satisfied that the small business firm 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. However, the Contractor agrees that the Secretary of Commerce may review the Contractor's licensing program and decisions regarding small business firm applicants, and the Contractor will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when that Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of this subparagraph (k)(2).

(3) *Contractor licensing of subject inventions.* To the extent that it provides the most effective technology transfer, licensing of subject inventions shall be administered by Contractor employees on location at the facility.

(l) *Communications.* The Contractor shall direct any notification, disclosure or request provided for in this clause to the Patent Counsel assisting the DOE contracting activity.

(m) *Reports*—(1) *Interim reports.* Upon DOE's request, the Contractor shall submit to DOE, no more frequently than annually, a list of subject inventions disclosed to DOE during a specified period, or a statement that no subject inventions were made during the specified period; and a list of subcontracts containing a patent clause and awarded by the Contractor during a specified period, or a statement that no such subcontracts were awarded during the specified period.

(2) *Final reports.* Upon DOE's request, the Contractor shall submit to DOE, prior to closeout of the contract, a list of all subject inventions disclosed during the performance period of the contract, or a statement that no subject inventions were made during the contract performance period; and a list of all subcontracts containing a patent clause and awarded by the Contractor during the contract performance period, or a statement that no such subcontracts were awarded during the contract performance period.

(n) *Examination of Records Relating to Subject Inventions*—(1) *Contractor compliance.* Until the expiration of three (3) years after final payment under this contract, the Contracting Officer or any authorized representative may examine any books (including laboratory notebooks), records, documents, and other supporting data of the Contractor, which the Contracting Officer or authorized representative deems reasonably pertinent to the discovery or identification of subject inventions, including exceptional circumstance subject inventions, or to determine Contractor compliance with any requirement of this clause.

(2) *Unreported inventions.* If the Contracting Officer is aware of an invention that is not disclosed by the Contractor to DOE, and the Contracting Officer believes the unreported invention may be a subject invention, including exceptional circumstance subject inventions, DOE may require the Contractor to submit to DOE a disclosure of the invention for a determination of ownership rights.

(3) *Confidentiality.* Any examination of records under this paragraph is subject to appropriate conditions to protect the confidentiality of the information involved.

(4) *Power of inspection.* With respect to a subject invention for which the Contractor has responsibility for patent prosecution, the Contractor shall furnish the Government, upon request by DOE, an irrevocable power to inspect and make copies of a prosecution file for any patent application claiming the subject invention.

(o) *Facilities License.* In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the Contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or product manufactured at the facility (1) to practice or have practiced by or for the Government at the facility, and (2) to transfer such license with the transfer of that facility. Notwithstanding the acceptance or exercise by the Government of these rights, the Government may contest at any time the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

(p) *Atomic Energy*—(1) *Pecuniary awards.* No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, may be asserted with respect to any invention or discovery made or conceived in the course of or under this contract.

(2) *Patent agreements.* Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall obtain patent agreements to effectuate the provisions of subparagraph (p)(1) of this clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

(q) *Classified inventions*—(1) *Approval for filing a foreign patent application.* The Contractor shall not file or cause to be filed an application or registration for a patent disclosing a subject invention related to classified subject matter in any country other than the United States without first obtaining the written approval of the Contracting Officer.

(2) *Transmission of classified subject matter.* If in accordance with this clause the Contractor files a patent application in the United States disclosing a subject invention that is classified for reasons of security, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter. If the Contractor transmits a patent application disclosing a classified subject invention to the United States Patent and Trademark Office (USPTO), the Contractor shall submit a separate letter to the USPTO identifying the contract or contracts by agency and agreement number that require security classification markings to be placed on the patent application.

(3) *Inclusion of clause in subcontracts.* The Contractor agrees to include the substance of this clause in subcontracts at any tier that cover or are likely to cover subject matter classified for reasons of security.

(r) *Patent functions.* Upon the written request of the Contracting Officer or Patent Counsel, the Contractor agrees to make reasonable efforts to support DOE in accomplishing patent-related functions for work arising out of the contract, including, but not limited to, the prosecution of patent applications, and the determination of questions of novelty, patentability, and inventorship.

(s) *Educational awards subject to 35 U.S.C. 212.* The Contractor shall notify the Contracting Officer prior to the placement of any person subject to 35 U.S.C. 212 in an area of technology or task (1) related to exceptional circumstance technology or (2) which is subject to treaties or international agreements as set forth in paragraph (b)(3) of this clause or agreements other than funding agreements. The Contracting Officer may disapprove of any such placement.

(t) *Annual appraisal by Patent Counsel.* Patent Counsel may conduct an annual appraisal to evaluate the Contractor's effectiveness in identifying and protecting subject inventions in accordance with DOE policy.

(End of clause)

Alternate 1 Weapons Related Subject Inventions. As prescribed at 970.2703–2(g), insert the following as subparagraphs (a)(10) and (b)(7), respectively:

(a) *Definitions.* (10) Weapons Related Subject Invention means any subject invention conceived or first actually reduced to practice in the course of or under work funded by or through defense programs , including Department of Defense and intelligence reimbursable work, or the Naval Nuclear Propulsion Program of the Department of Energy or the National Nuclear Security Administration.

(b) *Allocation of Principal Rights*—(7) *Weapons related subject inventions.* Except to the extent that DOE is solely satisfied that the Contractor meets certain procedural requirements and DOE grants rights to the Contractor in weapons related subject inventions, the Contractor does not have the right to retain title to any weapons related subject inventions.

(End of alternate)

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 48571, July 25, 2002]

970.5227–11 Patent rights—management and operating contracts, for-profit contractor, non-technology transfer.

Insert the following clause in solicitations and contracts in accordance with 970.2703–1(b)(4):

PATENT RIGHTS—MANAGEMENT AND OPERATING CONTRACTS, FOR-PROFIT CONTRACTOR, NON-TECHNOLOGY TRANSFER (DEC 2000)

(a) *Definitions.* (1) *DOE licensing regulations* means the Department of Energy patent licensing regulations at 10 CFR part 781.

(2) *DOE patent waiver regulations* means the Department of Energy patent waiver regulations at 10 CFR part 784.

(3) *Invention* means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

(4) *Made* when used in relation to any invention means the conception or first actual reduction to practice of such invention.

(5) *Patent Counsel* means DOE Patent Counsel assisting the contracting activity.

(6) *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.

(7) *Subject invention* means any invention of the contractor conceived or first actually reduced to practice in the course of or under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) shall also occur during the period of contract performance.

(b) *Allocation of principal rights*—(1) *Assignment to the Government.* Except to the extent that rights are retained by the Contractor by a determination of greater rights in accordance with subparagraph (b)(2) of this clause or by a request for foreign patent rights in accordance with subparagraph (d)(2) of this clause, the Contractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention.

(2) *Greater rights determinations.* The Contractor, or an Contractor employee-inventor after consultation with the Contractor and with the written authorization of the Contractor in accordance with DOE patent waiver regulations, may request greater rights, including title, in an identified subject invention than the nonexclusive license and the foreign patent rights provided for in paragraph (d) of this clause, in accordance with the DOE patent waiver regulations. Such a request shall be submitted in writing to Patent Counsel with a copy to the Contracting Officer at the time the subject invention is first disclosed to DOE in accordance with subparagraph (c)(2) of this clause, or not later than eight (8) months after such disclosure, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. DOE may grant or refuse to grant such a request by the Contractor or Contractor employee-inventor. Unless otherwise provided in the greater rights determination, any rights in a subject invention obtained by the Contractor pursuant to a determination of greater rights are subject to a nonexclusive, nontransferable, irrevocable, paid-up license to the Government to practice or have practiced the subject invention throughout the world by or on behalf of the Government of the United States (including any Government agency), and to any reservations and conditions deemed appropriate by the Secretary of Energy or designee.

(c) *Subject invention disclosures*—(1) *Contractor procedures for reporting subject inventions to Contractor personnel.* Subject inventions shall be reported to Contractor personnel responsible for patent matters within six (6) months of conception and/or first actual reduction to practice, whichever occurs first in the performance of work under this contract. Accordingly, the Contractor shall establish and maintain effective procedures for ensuring such prompt identification and timely disclosure of subject inventions to Contractor personnel responsible for patent matters, and the procedures shall include the maintenance of laboratory notebooks, or equivalent records, and other records that are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and the maintenance of records demonstrating compliance with such procedures. The Contractor shall submit a written description of such procedures to the Contracting Officer, upon request, for evaluation of the effectiveness of such procedures by the Contracting Officer.

(2) *Subject invention disclosure.* The Contractor shall disclose each subject invention to Patent Counsel with a copy to the Contracting Officer within two (2) months after the subject invention is reported to Contractor personnel responsible for patent matters, in accordance with subparagraph (c)(1) of this clause, or, if earlier, within six (6) months after the Contractor has knowledge of the subject invention, but in any event before any on sale, public use, or publication of the subject invention. The disclosure to DOE shall be in the form of a written report and shall include:

(i) The contract number under which the subject invention was made;

(ii) The inventor(s) of the subject invention;

(iii) A description of the subject invention in sufficient technical detail to convey a clear understanding of the nature, purpose and operation of the subject invention, and of the physical, chemical, biological or electrical characteristics of the subject invention, to the extent known by the Contractor at the time of the disclosure;

(iv) The date and identification of any publication, on sale or public use of the invention;

(v) The date and identification of any submissions for publication of any manuscripts describing the invention, and a statement of whether the manuscript is accepted for publication, to the extent known by the Contractor at the time of the disclosure;

(vi) A statement indicating whether the subject invention concerns exceptional circumstances pursuant to 35 U.S.C. 202(ii), related to national security, or subject to a treaty or an international agreement, to the extent known or believed by Contractor at the time of the disclosure;

(vii) All sources of funding by Budget and Resources (B&R) code; and

(viii) The identification of any agreement relating to the subject invention, including Cooperative Research and Development Agreements and Strategic Partnership Projects agreements. Unless the Contractor contends otherwise in writing at the time the invention is disclosed, inventions disclosed to DOE under this paragraph are

deemed made in the manner specified in Sections (a)(1) and (a)(2) of 42 U.S.C. 5908.

(3) *Publication after disclosure.* After disclosure of the subject invention to the DOE, the Contractor shall promptly notify Patent Counsel of the acceptance for publication of any manuscript describing the subject invention or of any expected or on sale or public use of the subject invention, known by the Contractor.

(4) *Contractor employee agreements.* The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to Contractor personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor, each subject invention made under this contract, and to execute all papers necessary to file patent applications claiming subject inventions or to establish the Government's rights in the subject inventions. This disclosure format shall at a minimum include the information required by subparagraph (c)(2) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(5) *Contractor procedures for reporting subject inventions to DOE.* The Contractor agrees to establish and maintain effective procedures for ensuring the prompt identification and timely disclosure of subject inventions to DOE. The Contractor shall submit a written description of such procedures to the Contracting Officer, upon request, for evaluation of the effectiveness of such procedures by the Contracting Officer.

(6) *Duplication and disclosure of documents.* 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; provided, however, that any such duplication or disclosure by the Government is subject to 35 U.S.C. 205 and 37 CFR 401.13.

(d) *Minimum rights of the Contractor*—(1) *Contractor License*—(i) *Request for a Contractor license.* Except for subject inventions that the Contractor fails to disclose within the time periods specified at subparagraph (c)(2) of this clause, the Contractor may request a revocable, nonexclusive, royalty-free license in each patent application filed in any country claiming a subject invention and any resulting patent in which the Government obtains title, and DOE may grant or refuse to grant such a request by the Contractor. If DOE grants the Contractor's request for a license, the Contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a party and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded.

(ii) *Transfer of a Contractor license.* DOE shall approve any transfer of the Contractor's license in a subject invention, and DOE may determine the Contractor's license is non-transferrable, on a case-by-case basis.

(iii) *Revocation or modification of a Contractor license.* DOE may revoke or modify the Contractor's domestic license to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in 37 CFR Part 404 and DOE licensing regulations. DOE may not revoke the Contractor's domestic license in that field of use or the geographical areas in which the Contractor, its licensee, or its domestic subsidiaries or affiliates achieved practical applications and continues to make the benefits of the invention reasonably accessible to the public. DOE may revoke or modify the Contractor's license in any foreign country to the extent the Contractor, its licensees, or its domestic subsidiaries or affiliates failed to achieve practical application in that foreign country.

(iv) *Notice of revocation or modification of a Contractor license.* Before revocation or modification of the license, DOE shall furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor shall be allowed thirty (30) days from the date of the notice (or such other time as may be authorized by DOE for good cause shown by the Contractor) to show cause why the license should not be revoked or modified. The Contractor has the right to appeal any decision concerning the revocation or modification of its license, in accordance with applicable regulations in 37 CFR part 404 and DOE licensing regulations.

(2) *Contractor's right to request foreign patent rights.* If the Government has title to a subject invention and the Government decides against securing patent rights in a foreign country for the subject invention, the Contractor may request such foreign patent rights from DOE, and DOE may grant the Contractor's request, subject to a nonexclusive, nontransferable, irrevocable, paid-up license to the Government to practice or have practiced the subject invention in the foreign country, and any reservations and conditions deemed appropriate by the Secretary of Energy or designee. Such a request shall be submitted in writing to the Patent Counsel as part of the disclosure required by subparagraph (c)(2) of this clause, with a copy to the DOE Contracting Officer, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. DOE may grant or refuse to grant such a request, and may consider whether granting the Contractor's

request best serves the interests of the United States.

(e) *Examination of records relating to inventions*—(1) *Contractor compliance.* Until the expiration of three (3) years after final payment under this contract, the Contracting Officer or any authorized representative may examine any books (including laboratory notebooks), records, and documents and other supporting data of the Contractor, which the Contracting Officer or authorized representative deems reasonably pertinent to the discovery or identification of subject inventions, or to determine Contractor (and inventor) compliance with the requirements of this clause, including proper identification and disclosure of subject inventions, and establishment and maintenance of invention disclosure procedures.

(2) *Unreported inventions.* If the Contracting Officer is aware of an invention that is not disclosed by the Contractor to DOE, and the Contracting Officer believes the unreported invention may be a subject invention, DOE may require the Contractor to submit to DOE a disclosure of the invention for a determination of ownership rights.

(3) *Confidentiality.* Any examination of records under this paragraph is subject to appropriate conditions to protect the confidentiality of the information involved.

(f) *Subcontracts*—(1) *Subcontractor subject inventions.* The Contractor shall not obtain rights in the subcontractor's subject inventions as part of the consideration for awarding a subcontract.

(2) *Inclusion of patent rights clause—nonprofit organization or small business firm subcontractors.* Unless otherwise authorized or directed by the Contracting Officer, the Contractor shall include the patent rights clause at 48 CFR 952.227–11, suitably modified to identify the parties in all subcontracts, at any tier, for experimental, developmental, demonstration or research work to be performed by a small business firm or domestic nonprofit organization, except subcontracts which are subject to exceptional circumstances in accordance with 35 U.S.C. 202(a)(ii).

(3) *Inclusion of patent rights clause—subcontractors other than non-profit organizations and small business firms.* Except for the subcontracts described in subparagraph (f)(2) of this clause, the Contractor shall include the patent rights clause at 48 CFR 952.227–13, suitably modified to identify the parties, in any contract for experimental, developmental, demonstration or research work.

(4) *DOE and subcontractor contract.* With respect to subcontracts at any tier, DOE, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and DOE with respect to those matters covered by this clause.

(5) *Subcontractor refusal to accept terms of patent rights clause.* If a prospective subcontractor refuses to accept the terms of a patent rights clause, the Contractor shall promptly submit a written notice to the Contracting Officer stating the subcontractor's reasons for such a refusal, including any relevant information for expediting disposition of the matter, and the Contractor shall not proceed with the subcontract without the written authorization of the Contracting Officer.

(6) *Notification of award of subcontract.* Upon the award of any subcontract at any tier containing a patent rights clause, the Contractor shall promptly notify the Contracting Officer in writing and identify 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 a subcontract.

(7) *Identification of subcontractor subject inventions.* If the Contractor in the performance of this contract becomes aware of a subject invention made under a subcontract, the Contractor shall promptly notify Patent Counsel and identify the subject invention, with a copy of the notification and identification to the Contracting Officer.

(g) *Atomic energy*—(1) *Pecuniary awards.* No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, may be asserted with respect to any invention or discovery made or conceived in the course of or under this contract.

(2) *Patent agreements.* Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall obtain patent agreements to effectuate the provisions of subparagraph (g)(1) of this clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

(h) *Publication.* The Contractor shall receive approval from Patent Counsel prior to releasing or publishing information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract, to ensure such release or publication does not adversely affect the patent interests of DOE or the Contractor.

(i) *Communications.* The Contractor shall direct any notification, disclosure, or request provided for in this clause to the Patent Counsel assisting the DOE contracting activity, with a copy of the communication to the Contracting Officer.

(j) *Reports*—(1) *Interim reports.* Upon DOE's request, the Contractor shall submit to DOE, no more frequently than annually, a list of subject inventions disclosed to DOE during a

specified period, or a statement that no subject inventions were made during the specified period; and/or a list of subcontracts containing a patent clause and awarded by the Contractor during a specified period, or a statement that no such subcontracts were awarded during the specified period. The interim report shall state whether the Contractor's invention disclosures were submitted to DOE in accordance with the requirements of subparagraphs (c)(1) and (c)(5) of this clause.

(2) *Final reports.* Upon DOE's request, the Contractor shall submit to DOE, prior to closeout of the contract or within three (3) months of the date of completion of the contracted work, a list of all subject inventions disclosed during the performance period of the contract, or a statement that no subject inventions were made during the contract performance period; and/or a list of all subcontracts containing a patent clause and awarded by the Contractor during the contract performance period, or a statement that no such subcontracts were awarded during the contract performance period.

(k) *Facilities License.* In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility (1) to practice or have practiced by or for the Government at the facility, and (2) to transfer such license with the transfer of that facility. Notwithstanding the acceptance or exercise by the Government of these rights, the Government may contest at any time the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

(l) *Classified inventions*—(1) *Approval for filing a foreign patent application.* The Contractor shall not file or cause to be filed an application or registration for a patent disclosing a subject invention related to classified subject matter in any country other than the United States without first obtaining the written approval of the Contracting Officer.

(2) *Transmission of classified subject matter.* If in accordance with this clause the Contractor files a patent application in the United States disclosing a subject invention that is classified for reasons of security, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter. If the Contractor transmits a patent application disclosing a classified subject invention to the United States Patent and Trademark Office (USPTO), the Contractor shall submit a separate letter to the USPTO identifying the contract or contracts by agency and agreement number that require security classification markings to be placed on the patent application.

(3) *Inclusion of clause in subcontracts.* The Contractor agrees to include the substance of this clause in subcontracts at any tier that cover or are likely to cover subject matter classified for reasons of security.

(m) *Patent functions.* Upon the written request of the Contracting Officer or Patent Counsel, the Contractor agrees to make reasonable efforts to support DOE in accomplishing patent-related functions for work arising out of the contract, including, but not limited to, the prosecution of patent applications, and the determination of questions of novelty, patentability, and inventorship.

(n) *Annual appraisal by Patent Counsel.* Patent Counsel may conduct an annual appraisal to evaluate the Contractor's effectiveness in identifying and protecting subject inventions in accordance with DOE policy.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 80 FR 15520, Mar. 24, 2015]

970.5227–12 Patent rights—management and operating contracts, for-profit contractor, advance class waiver.

Insert the following clause in solicitations and contracts in accordance with 970.2703–1(b)(3):

PATENT RIGHTS—MANAGEMENT AND OPERATING CONTRACTS, FOR-PROFIT CONTRACTOR, ADVANCE CLASS WAIVER (DEC 2000)

(a) *Definitions.* (1) *DOE licensing regulations* means the Department of Energy patent licensing regulations at 10 CFR Part 781.

(2) *DOE patent waiver regulations* means the Department of Energy patent waiver regulations at 10 CFR Part 784.

(3) *Exceptional Circumstance Subject Invention* means any subject invention in a technical field or related to a task determined by the Department of Energy to be subject to an exceptional circumstance under 35 U.S.C. 202(a)(ii), and in accordance with 37 CFR 401.3(e).

(4) *Invention* means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the

Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*).

(5) *Made* when used in relation to any invention means the conception or first actual reduction to practice of such invention.

(6) *Patent Counsel* means DOE Patent Counsel assisting the contracting activity.

(7) *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.

(8) *Subject Invention* means any invention of the contractor conceived or first actually reduced to practice in the course of or under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) shall also occur during the period of contract performance.

(b) *Allocation of Principal Rights*—(1) *Assignment to the Government.* Except to the extent that rights are retained by the Contractor by the granting of an advance class waiver pursuant to subparagraph (b)(2) of this clause or a determination of greater rights pursuant to subparagraph (b)(7) of this clause, the Contractor agrees to assign to the Government the entire right, title, and interest throughout the world in and to each subject invention.

(2) *Advance class waiver of Government rights to the Contractor.* DOE may grant to the Contractor an advance class waiver of Government rights in any or all subject inventions, at the time of execution of the contract, such that the Contractor may elect to retain the entire right, title and interest throughout the world to such waived subject inventions, in accordance with the terms and conditions of the advance class waiver. Unless otherwise provided by the terms of the advance class waiver, any rights in a subject invention retained by the Contractor under an advance class waiver are subject to 35 U.S.C. 203 and the provisions of this clause, including the Government license provided for in subparagraph (b)(3) of this clause, and any reservations and conditions deemed appropriate by the Secretary of Energy or designee.

(3) *Government license.* With respect to any subject invention to which the Contractor retains title, either under an advance class waiver pursuant to subparagraph (b)(2) or a determination of greater rights pursuant to subparagraph (b)(7) of this clause, the Government has a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(4) *Foreign patent rights.* If the Government has title to a subject invention and the Government decides against securing patent rights in a foreign country for the subject invention, the Contractor may request such foreign patent rights from DOE, and DOE may grant the Contractor's request, subject to 35 U.S.C. 203 and the provisions of this clause, including the Government license provided for in subparagraph (b)(3) of this clause, and any reservations and conditions deemed appropriate by the Secretary of Energy or designee.

(5) *Exceptional circumstance subject inventions.* Except to the extent that rights are retained by the Contractor by a determination of greater rights in accordance with subparagraph (b)(7) of this clause, the Contractor does not have the right to retain title to any exceptional circumstance subject inventions and agrees to assign to the Government the entire right, title, and interest, throughout the world, in and to any exceptional circumstance subject inventions.

(i) Inventions within or relating to the following fields of technology are exceptional circumstance subject inventions:

(A) Uranium enrichment technology;

(B) Storage and disposal of civilian high-level nuclear waste and spent fuel technology; and

(C) National security technologies classified or sensitive under Section 148 of the Atomic Energy Act (42 U.S.C. 2168).

(ii) Inventions made under any agreement, contract or subcontract related to the following initiatives or programs are exceptional circumstance subject inventions:

(A) DOE Steel Initiative and Metals Initiative;

(B) U.S. Advanced Battery Consortium; and

(C) Any funding agreement which is funded in part by the Electric Power Research Institute (EPRI) or the Gas Research Institute (GRI).

(iii) DOE reserves the right to unilaterally amend this contract to modify, by deletion or insertion, technical fields, programs, initiatives, and/or other classifications for the purpose of defining DOE exceptional circumstance subject inventions.

(6) *Treaties and international agreements.* Any rights acquired by the Contractor in subject inventions are subject to any disposition of right, title, or interest in or to subject inventions provided for in treaties or international agreements identified at Appendix [*Insert Reference*], to this contract. DOE reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into or to be entered into by the Government after the effective date of this contract and to effectuate those license or other rights

which are necessary for the Government to meet its obligations to foreign governments, their nationals and international organizations under such treaties or international agreements with respect to subject inventions made after the date of the amendment.

(7) *Contractor request for greater rights.* The Contractor may request greater rights in an identified subject invention, including an exceptional circumstance subject invention, to which the Contractor does not have the right to elect to retain title, in accordance with the DOE patent waiver regulations, by submitting such a request in writing to Patent Counsel with a copy to the Contracting Officer at the time the subject invention is first disclosed to DOE pursuant to subparagraph (c)(1) of this clause, or not later than eight (8) months after such disclosure, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. DOE may grant or refuse to grant such a request by the Contractor. Unless otherwise provided in the greater rights determination, any rights in a subject invention obtained by the Contractor under a determination of greater rights is subject to 35 U.S.C. 203 and the provisions of this clause, including the Government license provided for in subparagraph (b)(3) of this clause, and to any reservations and conditions deemed appropriate by the Secretary of Energy or designee.

(8) *Contractor employee-inventor rights.* If the Contractor does not elect to retain title to a subject invention or does not request greater rights in a subject invention, including an exceptional circumstance subject invention, to which the Contractor does not have the right to elect to retain title, a Contractor employee-inventor, after consultation with the Contractor and with written authorization from the Contractor in accordance with 10 CFR 784.9(b)(4), may request greater rights, including title, in the subject invention or the exceptional circumstance invention from DOE, and DOE may grant or refuse to grant such a request by the Contractor employee-inventor.

(9) *Government assignment of rights in Government employees' subject inventions.* If a DOE employee is a joint inventor of a subject invention to which the Contractor has rights, DOE may assign or refuse to assign any rights in the subject invention acquired by the Government from the DOE employee to the Contractor, consistent with 48 CFR 27.304–1(d). Unless otherwise provided in the assignment, the rights assigned to the Contractor are subject to the Government license provided for in subparagraph (b)(3) of this clause, and to any provision of this clause applicable to subject inventions in which rights are retained by the Contractor, and to any reservations and conditions deemed appropriate by the Secretary of Energy or designee. The Contractor shall share royalties collected for the manufacture, use or sale of the subject invention with the DOE employee.

(c) *Subject invention disclosure, election of title, and filing of patent application by Contractor*—(1) *Subject invention disclosure.* The Contractor shall disclose each subject invention to Patent Counsel with a copy to the Contracting Officer within two (2) months after an inventor discloses it in writing to Contractor personnel responsible for patent matters or, if earlier, within six (6) months after the Contractor has knowledge of the subject invention, but in any event before any on sale, public use, or publication of the subject invention. The disclosure to DOE shall be in the form of a written report and shall include:

(i) The contract number under which the subject invention was made;

(ii) The inventor(s) of the subject invention;

(iii) A description of the subject invention in sufficient technical detail to convey a clear understanding of the nature, purpose and operation of the subject invention, and of the physical, chemical, biological or electrical characteristics of the subject invention, to the extent known by the Contractor at the time of the disclosure;

(iv) The date and identification of any publication, on sale or public use of the invention;

(v) The date and identification of any submissions for publication of any manuscripts describing the invention, and a statement of whether the manuscript is accepted for publication, to the extent known by the Contractor at the time of the disclosure;

(vi) A statement indicating whether the subject invention is an exceptional circumstance subject invention, related to national security, or subject to a treaty or an international agreement, to the extent known or believed by Contractor at the time of the disclosure;

(vii) All sources of funding by Budget and Resources (B&R) code; and

(viii) The identification of any agreement relating to the subject invention, including Cooperative Research and Development Agreements and Strategic Partnership Projects agreements.

Unless the Contractor contends otherwise in writing at the time the invention is disclosed, inventions disclosed to DOE under this paragraph are deemed made in the manner specified in Sections (a)(1) and (a)(2) of 42 U.S.C. 5908.

(2) *Publication after disclosure.* After disclosure of the subject invention to the DOE, the Contractor shall promptly notify Patent Counsel of the acceptance for publication of any manuscript describing the subject invention or of any expected or on sale or public use of the subject invention, known by the

Contractor. The Contractor shall obtain approval from Patent Counsel prior to any release or publication of information concerning an exceptional circumstance subject invention or any subject invention related to a treaty or international agreement.

(3) *Election by the Contractor under an advance class waiver.* If the Contractor has the right to elect to retain title to subject inventions under an advance class waiver granted in accordance with subparagraph (b)(2) of this clause, and unless otherwise provided for by the terms of the advance class waiver, the Contractor shall elect in writing whether or not to retain title to any subject invention by notifying DOE within two (2) years of the date of the disclosure of the subject invention to DOE, in accordance with subparagraph (c)(1) of this clause. The notification shall identify the advance class waiver, state the countries, including the United States, in which rights are retained, and certify that the subject invention is not an exceptional circumstance subject invention or subject to a treaty or international agreement. If a publication, on sale or public use of the subject invention has initiated the 1-year statutory period under 35 U.S.C. 102(b), the period for election may be shortened by DOE to a date that is no more than sixty (60) days prior to the end of the 1-year statutory period.

(4) *Filing of patent applications by the Contractor under an advance class waiver.* If the Contractor has the right to retain title to a subject invention in accordance with an advance class waiver pursuant to subparagraph (b)(2) of this clause or a determination of greater rights pursuant to paragraph (b)(7) of this clause, and unless otherwise provided for by the terms of the advance class waiver or greater rights determination, the Contractor shall file an initial patent application claiming the subject invention to which it retains title either within one (1) year after the Contractor's election to retain or grant of title to the subject invention or prior to the end of any 1-year statutory period under 35 U.S.C. 102(b), whichever occurs first. Any patent applications filed by the Contractor in foreign countries or international patent offices shall be filed within either ten (10) months of the corresponding initial patent application or, if such filing has been prohibited by a Secrecy Order, within six (6) months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications.

(5) *Submission of patent information and documents.* If the Contractor files a domestic or foreign patent application claiming a subject invention, the Contractor shall promptly submit to Patent Counsel the following information and documents:

(i) The filing date, serial number, title, and a copy of the patent application (including an English-language version if filed in a language other than English);

(ii) An executed and approved instrument fully confirmatory of all Government rights in the subject invention; and

(iii) The patent number, issue date, and a copy of any issued patent claiming the subject invention.

(6) *Contractor's request for an extension of time.* Requests for an extension of the time to disclose a subject invention, to elect to retain title to a subject invention, or to file a patent application under subparagraphs (c)(1), (3), and (4) of this clause may be granted at the discretion of Patent Counsel or DOE.

(7) *Duplication and disclosure of documents.* 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; provided, however, that any such duplication or disclosure by the Government is subject to 35 U.S.C. 205 and 37 CFR part 40.

(d) *Conditions when the Government may obtain title notwithstanding an advance class waiver*—(1) *Return of title to a subject invention.* If the Contractor requests that DOE acquire title or rights from the Contractor in a subject invention, including an exceptional circumstance subject invention, to which the Contractor retained title or rights under subparagraph (b)(2) or subparagraph (b)(7) of this clause, DOE may acquire such title or rights from the Contractor, or DOE may decide against acquiring such title or rights from the Contractor, at DOE's sole discretion.

(2) *Failure to disclose or elect to retain title.* Title vests in DOE and DOE may request, in writing, a formal assignment of title to a subject invention from the Contractor, and the Contractor shall convey title to the subject invention to DOE, if the Contractor elects not to retain title to the subject invention under an advance class waiver, or the Contractor fails to disclose or fails to elect to retain title to the subject invention within the times specified in subparagraphs (c)(1) and (c)(3) of this clause.

(3) *Failure to file domestic or foreign patent applications.* In those countries in which the Contractor fails to file a patent application within the times specified in subparagraph (c)(4) of this clause, DOE may request, in writing, title to the subject invention from the Contractor, and the Contractor shall convey title to the subject invention to DOE; provided, however, that if the Contractor has filed a patent application in any country after the times specified in subparagraph (c)(4) of this clause, but prior to its receipt of DOE's written request for title, the Contractor continues to retain title in that country.

(4) *Discontinuation of patent protection by the Contractor.* If the Contractor decides to

discontinue the prosecution of a patent application, the payment of maintenance fees, or the defense of a subject invention in a reexamination or opposition proceeding, in any country, DOE may request, in writing, title to the subject invention from the Contractor, and the Contractor shall convey title to the subject invention to DOE.

(5) *Termination of advance class waiver.* DOE may request, in writing, title to any subject inventions from the Contractor, and the Contractor shall convey title to the subject inventions to DOE, if the advance class waiver granted under subparagraph (b)(2) of this clause is terminated under paragraph (u) of this clause.

(e) *Minimum rights of the Contractor*—(1) *Request for a Contractor license.* Except for subject inventions that the Contractor fails to disclose within the time periods specified at subparagraph (c)(1) of this clause, the Contractor may request a revocable, nonexclusive, royalty-free license in each patent application filed in any country claiming a subject invention and any resulting patent in which the Government obtains title, and DOE may grant or refuse to grant such a request by the Contractor. If DOE grants the Contractor's request for a license, the Contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a party and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded.

(2) *Transfer of a Contractor license.* DOE shall approve any transfer of the Contractor's license in a subject invention, and DOE may determine that the Contractor's license is non-transferrable, on a case-by-case basis.

(3) *Revocation or modification of a Contractor license.* DOE may revoke or modify the Contractor's domestic license to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in 37 CFR Part 404 and DOE licensing regulations. DOE may not revoke the Contractor's domestic license in that field of use or the geographical areas in which the Contractor, its licensees or its domestic subsidiaries or affiliates have achieved practical applications and continues to make the benefits of the invention reasonably accessible to the public. DOE may revoke or modify the Contractor's license in any foreign country to the extent the Contractor, its licensees, or its domestic subsidiaries or affiliates failed to achieve practical application in that foreign country.

(4) *Notice of revocation or modification of a Contractor license.* Before revocation or modification of the license, DOE shall furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor shall be allowed thirty (30) days from the date of the notice (or such other time as may be authorized by DOE for good cause shown by the Contractor) to show cause why the license should not be revoked or modified. The Contractor has the right to appeal any decision concerning the revocation or modification of its license, in accordance with applicable regulations in 37 CFR part 404 and DOE licensing regulations.

(f) *Contractor action to protect the Government's interest*—(1) *Execution and delivery of title or license instruments.* The Contractor agrees to execute or have executed, and to deliver promptly to DOE all instruments necessary to accomplish the following actions:

(i) Establish or confirm the Government's rights throughout the world in subject inventions to which the Contractor elects to retain title;

(ii) Convey title in a subject invention to DOE pursuant to subparagraph (b)(5) and paragraph (d) of this clause; or

(iii) Enable the Government to obtain patent protection throughout the world in a subject invention to which the Government has title.

(2) *Contractor employee agreements.* The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to Contractor personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor, each subject invention made under this contract, and to execute all papers necessary to file patent applications claiming subject inventions or to establish the Government's rights in the subject inventions. This disclosure format shall at a minimum include the information required by subparagraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) *Contractor procedures for reporting subject inventions to DOE.* The Contractor agrees to establish and maintain effective procedures for ensuring the prompt identification and timely disclosure of subject inventions to DOE. The Contractor shall submit a written description of such procedures to the Contracting Officer, upon request, for evaluation and approval of the effectiveness of such procedures by the Contracting Officer.

(4) *Notification of discontinuation of patent protection.* With respect to any subject invention for which the Contractor has responsibility for patent prosecution, the Contractor shall notify Patent Counsel of any decision to discontinue the prosecution of a patent application, payment of maintenance fees, or

defense of a subject invention in a reexamination or opposition proceeding, in any country, not less than thirty (30) days before the expiration of the response period for any action required by the corresponding patent office.

(5) *Notification of Government rights.* With respect to any subject invention to which the Contractor has title, the Contractor agrees to include, within the specification of any United States patent application and within any patent issuing thereon claiming a subject invention, the following statement, ''This invention was made with Government support under (identify the contract) awarded by the United States Department of Energy. The Government has certain rights in the invention.''

(6) *Avoidance of royalty charges.* If the Contractor licenses a subject invention, the Contractor agrees to avoid royalty charges on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government, to refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government, and to provide for such refund in any instrument transferring rights in the subject invention to any party.

(7) *DOE approval of assignment of rights.* Rights in a subject invention in the United States may not be assigned by the Contractor without the approval of DOE.

(8) *Small business firm licensees.* The Contractor shall make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and may give a preference to a small business firm when licensing a subject invention if the Contractor determines that the small business firm 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 firms; provided, the Contractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision as to whether to give a preference in any specific case is at the discretion of the Contractor.

(9) *Contractor licensing of subject inventions.* To the extent that it provides the most effective technology transfer, licensing of subject inventions shall be administered by Contractor employees on location at the facility.

(g) *Subcontracts*—(1) *Subcontractor subject inventions.* The Contractor shall not obtain rights in the subcontractor's subject inventions as part of the consideration for awarding a subcontract.

(2) *Inclusion of patent rights clause—nonprofit organization or small business firm subcontractors.* Unless otherwise authorized or directed by the Contracting Officer, the Contractor shall include the patent rights clause at 48 CFR 952.227–11, suitably modified to identify the parties, in all subcontracts, at any tier, for experimental, developmental, demonstration or research work to be performed by a small business firm or domestic nonprofit organization, except subcontracts which are subject to exceptional circumstances in accordance with 35 U.S.C. 202 and subparagraph (b)(5) of this clause.

(3) *Inclusion of patent rights clause—subcontractors other than non-profit organizations or small business firms.* Except for the subcontracts described in subparagraph (g)(2) of this clause, the Contractor shall include the patent rights clause at 48 CFR 952.227–13, suitably modified to identify the parties and any applicable exceptional circumstance, in any contract for experimental, developmental, demonstration or research work.

(4) *DOE and subcontractor contract.* With respect to subcontracts at any tier, DOE, the subcontractor and Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and DOE with respect to those matters covered by this clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (j) of this clause.

(5) Subcontractor refusal to accept terms of patent rights clause. If a prospective subcontractor refuses to accept the terms of a patent rights clause, the Contractor shall promptly submit a written notice to the Contracting Officer stating the subcontractor's reasons for such refusal and including relevant information for expediting disposition of the matter; and the Contractor shall not proceed with the subcontract without the written authorization of the Contracting Officer.

(6) *Notification of award of subcontract.* Upon the award of any subcontract at any tier containing a patent rights clause, the Contractor shall promptly notify the Contracting Officer in writing and identify 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 a subcontract.

(7) *Identification of subcontractor subject inventions.* If the Contractor in the performance of this contract becomes aware of a subject invention made under a subcontract, the Contractor shall promptly notify Patent Counsel and identify the subject invention, with a copy of the notification and identification to the Contracting Officer.

(h) *Reporting on utilization of subject inventions.* Upon request by DOE, the Contractor

agrees to submit periodic reports, no more frequently than annually, describing the utilization of a subject invention or efforts made by the Contractor or its licensees or assignees to obtain utilization of the subject invention. 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 reasonably specified by DOE. Upon request by DOE, the Contractor also agrees to provide reports in connection with any march-in proceedings undertaken by DOE, in accordance with paragraph (j) of this clause. If any data or information reported by the Contractor in accordance with this provision is considered privileged and confidential by the Contractor, its licensee, or assignee and the Contractor properly marks the data or information privileged or confidential, DOE agrees not to disclose such information to persons outside the Government, to the extent permitted by law.

(i) *Preference for United States industry.* Notwithstanding any other provision of this clause the Contractor agrees that with respect to any subject invention in which it retains title, neither it nor any assignee may grant to any person the exclusive right to use or sell any subject invention in the United States unless such 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, DOE may waive the requirement for such an agreement 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.

(j) *March-In rights.* With respect to any subject invention to which the Contractor has elected to retain or is granted title, DOE may, in accordance with the procedures in the DOE patent waiver regulations, require the Contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances. If the Contractor, assignee or exclusive licensee refuses such a request, DOE has the right to grant such a license itself if DOE determines that—

(1) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs that are not reasonably satisfied by the Contractor, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by government regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or

(4) Such action is necessary because the agreement to substantially manufacture in the United States and required by paragraph (i) of this clause has neither been obtained nor waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) *Communications.* The Contractor shall direct any notification, disclosure, or request provided for in this clause to the Patent Counsel identified in the contract.

(l) *Reports*—(1) *Interim reports.* Upon DOE's request, the Contractor shall submit to DOE, no more frequently than annually, a list of subject inventions disclosed to DOE during a specified period, or a statement that no subject inventions were made during the specified period; and/or a list of subcontracts containing a patent clause and awarded by the Contractor during a specified period, or a statement that no such subcontracts were awarded during the specified period. The interim report shall state whether the Contractor's invention disclosures were submitted to DOE in accordance with the requirements of subparagraphs (f)(3) and (f)(4) of this clause.

(2) *Final reports.* Upon DOE's request, the Contractor shall submit to DOE, prior to closeout of the contract or within three (3) months of the date of completion of the contracted work, a list of all subject inventions disclosed during the performance period of the contract, or a statement that no subject inventions were made during the contract performance period; and/or a list of all subcontracts containing a patent clause and awarded by the Contractor during the contract performance period, or a statement that no such subcontracts were awarded during the contract performance period.

(m) *Facilities License.* In addition to the rights of the parties with respect to inventions or discoveries conceived or first actually reduced to practice in the course of or under this contract, the Contractor agrees to and does hereby grant to the Government an irrevocable, nonexclusive, paid-up license in and to any inventions or discoveries regardless of when conceived or actually reduced to practice or acquired by the contractor at any time through completion of this contract and which are incorporated or embodied in the construction of the facility or which are utilized in the operation of the facility or which cover articles, materials, or products manufactured at the facility (1) to practice

or have practiced by or for the Government at the facility, and (2) to transfer such license with the transfer of that facility. Notwithstanding the acceptance or exercise by the Government of these rights, the Government may contest at any time the enforceability, validity or scope of, or title to, any rights or patents herein licensed.

(n) *Atomic energy*—(1) *Pecuniary awards.* No claim for pecuniary award of compensation under the provisions of the Atomic Energy Act of 1954, as amended, may be asserted with respect to any invention or discovery made or conceived in the course of or under this contract.

(2) *Patent agreements.* Except as otherwise authorized in writing by the Contracting Officer, the Contractor shall obtain patent agreements to effectuate the provisions of subparagraph (o)(1) of this clause from all persons who perform any part of the work under this contract, except nontechnical personnel, such as clerical employees and manual laborers.

(o) *Classified inventions*—(1) *Approval for filing a foreign patent application.* The Contractor shall not file or cause to be filed an application or registration for a patent disclosing a subject invention related to classified subject matter in any country other than the United States without first obtaining the written approval of the Contracting Officer.

(2) *Transmission of classified subject matter.* If in accordance with this clause the Contractor files a patent application in the United States disclosing a subject invention that is classified for reasons of security, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter. If the Contractor transmits a patent application disclosing a classified subject invention to the United States Patent and Trademark Office (USPTO), the Contractor shall submit a separate letter to the USPTO identifying the contract or contracts by agency and agreement number that require security classification markings to be placed on the patent application.

(3) *Inclusion of clause in subcontracts.* The Contractor agrees to include the substance of this clause in subcontracts at any tier that cover or are likely to cover subject matter classified for reasons of security.

(p) *Examination of records relating to inventions*—(1) *Contractor compliance.* Until the expiration of three (3) years after final payment under this contract, the Contracting Officer or any authorized representative may examine any books (including laboratory notebooks), records, and documents and other supporting data of the Contractor, which the Contracting Officer or authorized representative deems reasonably pertinent to the discovery or identification of subject inventions, including exceptional circumstance subject inventions, or to determine Contractor (and inventor) compliance with the requirements of this clause, including proper identification and disclosure of subject inventions, and establishment and maintenance of invention disclosure procedures.

(2) *Unreported inventions.* If the Contracting Officer is aware of an invention that is not disclosed by the Contractor to DOE, and the Contracting Officer believes the unreported invention may be a subject invention, DOE may require the Contractor to submit to DOE a disclosure of the invention for a determination of ownership rights.

(3) *Confidentiality.* Any examination of records under this paragraph is subject to appropriate conditions to protect the confidentiality of the information involved.

(4) *Power of inspection.* With respect to a subject invention for which the Contractor has responsibility for patent prosecution, the Contractor shall furnish the Government, upon request by DOE, an irrevocable power to inspect and make copies of a prosecution file for any patent application claiming the subject invention.

(q) *Patent functions.* Upon the written request of the Contracting Officer or Patent Counsel, the Contractor agrees to make reasonable efforts to support DOE in accomplishing patent-related functions for work arising out of the contract, including, but not limited to, the prosecution of patent applications, and the determination of questions of novelty, patentability, and inventorship.

(r) *Educational awards subject to 35 U.S.C. 212.* The Contractor shall notify the Contracting Officer prior to the placement of any person subject to 35 U.S.C. 212 in an area of technology or task (1) related to exceptional circumstance technology or (2) any person who is subject to treaties or international agreements as set forth in paragraph (b)(6) of this clause or to agreements other than funding agreements. The Contracting Officer may disapprove of any such placement.

(s) *Annual appraisal by Patent Counsel.* Patent Counsel may conduct an annual appraisal to evaluate the Contractor's effectiveness in identifying and protecting subject inventions in accordance with DOE policy.

(t) *Publication.* The Contractor shall receive approval from Patent Counsel prior to releasing or publishing information regarding scientific or technical developments conceived or first actually reduced to practice in the course of or under this contract, to ensure such release or publication does not adversely affect the patent rights of DOE or the Contractor.

(u) *Termination of contractor's advance class waiver.* If a request by the Contractor for an

advance class waiver pursuant to subparagraph (b)(2) of this clause or a determination of greater rights pursuant to paragraph (c) of this clause contains false material statements or fails to disclose material facts, and DOE relies on the false statements or omissions in granting the Contractor's request, the waiver or grant of any Government rights (in whole or in part) to the subject invention(s) may be terminated at the discretion of the Secretary of Energy or designee. Prior to termination, DOE shall provide the Contractor with written notification of the termination, including a statement of facts in support of the termination, and the Contractor shall be allowed thirty (30) days, or a longer period authorized by the Secretary of Energy or designee for good cause shown in writing by the Contractor, to show cause for not terminating the waiver or grant. Any termination of an advance class waiver or a determination of greater rights is subject to the Contractor's license as provided for in paragraph (f) of this clause.

(End of clause)

Alternate 1 Weapons Related Subject Inventions. As prescribed at 970.2703–2(g), insert the following as subparagraphs (a)(9)and (b)(10), respectively:

(a) *Definitions.* (9) *Weapons Related Subject Invention* means any subject invention conceived or first actually reduced to practice in the course of or under work funded by or through defense programs, including Department of Defense and intelligence reimbursable work, or the Naval Nuclear Propulsion Program of the Department of Energy or the National Nuclear Security Administration.

(b) *Allocation of Principal Rights.* (10) *Weapons related subject inventions.* Except to the extent that DOE is solely satisfied that the Contractor meets certain procedural requirements and DOE grants rights to the Contractor in weapons related subject inventions, the Contractor does not have a right to retain title to any weapons related subject inventions.

(End of alternate)

[65 FR 81009, Dec. 22, 2000, as amended at 67 FR 48571, July 25, 2002; 80 FR 15520, Mar. 24, 2015]

970.5228–1 Insurance—litigation and claims.

As prescribed in 970.2803–2, insert the following clause:

INSURANCE—LITIGATION AND CLAIMS (JUL 2013)

(a) The contractor must comply with 10 CFR part 719, Contractor Legal Management Requirements, if applicable.

(b)(1) Except as provided in paragraph (b)(2) of this clause, the contractor shall procure and maintain such bonds and insurance as required by law or approved in writing by the Contracting Officer.

(2) The contractor may, with the approval of the Contracting Officer, maintain a self-insurance program in accordance with FAR 28.308; provided that, with respect to workers' compensation, the contractor is qualified pursuant to statutory authority.

(3) All bonds and insurance required by this clause shall be in a form and amount and for those periods as the Contracting Officer may require or approve and with sureties and insurers approved by the Contracting Officer.

(c) 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 bonds and insurance that are maintained by the contractor in connection with the performance of this contract and for which the contractor seeks reimbursement. If an insurance cost (whether a premium for commercial insurance or related to self-insurance) includes a portion covering costs made unallowable elsewhere in the contract, and the share of the cost for coverage for the unallowable cost is determinable, the portion of the cost that is otherwise an allowable cost under this contract is reimbursable to the extent determined by the Contracting Officer.

(d) Except as provided in paragraph (f) of this clause, or specifically disallowed elsewhere in this contract, the contractor shall be reimbursed—

(1) For that portion of the reasonable cost of bonds and insurance allocable to this contract required in accordance with contract terms or approved under this clause, and

(2) For liabilities (and reasonable expenses incidental to such liabilities, including litigation costs) to third persons not compensated by insurance without regard to the clause of this contract entitled ''Obligation of Funds.''

(e) The Government's liability under paragraph (d) of this clause is subject to the availability of appropriated funds. Nothing in this contract shall be construed as implying that the Congress will, at a later date, appropriate funds sufficient to meet deficiencies.

(f)(1) Notwithstanding any other provision of this contract, the contractor shall not be reimbursed for liabilities to third parties, including contractor employees, and directly associated costs which may include but are

not limited to litigation costs, counsel fees, judgments and settlements—

(i) Which are otherwise unallowable by law or the provisions of this contract, including the cost reimbursement limitations contained in 48 CFR part 31, as supplemented by 48 CFR 970.31;

(ii) For which the contractor has failed to insure or to maintain insurance as required by law, this contract, or by the written direction of the Contracting Officer; or

(iii) Which were caused by contractor managerial personnel's—

(A) Willful misconduct;

(B) Lack of good faith; or

(C) Failure to exercise prudent business judgment, which means failure to act in the same manner as a prudent person in the conduct of competitive business; or, in the case of a non-profit educational institution, failure to act in the manner that a prudent person would under the circumstances prevailing at the time the decision to incur the cost is made.

(2) The term ''contractor's managerial personnel'' is defined in the Property clause in this contract.

(g)(1) All litigation costs, including counsel fees, judgments and settlements shall be segregated and accounted for by the contractor separately. If the Contracting Officer provisionally disallows such costs, then the contractor may not use funds advanced by DOE under the contract to finance the litigation.

(2) Punitive damages are not allowable unless the act or failure to act which gave rise to the liability resulted from compliance with specific terms and conditions of the contract or written instructions from the Contracting Officer.

(3) The portion of the cost of insurance obtained by the contractor that is allocable to coverage of liabilities referred to in paragraph (f) of this clause is not allowable.

(h) The contractor may at its own expense and not as an allowable cost procure for its own protection insurance to compensate the contractor for any unallowable or non-reimbursable costs incurred in connection with contract performance.

(End of clause)

[78 FR 25817, May 3, 2013]

970.5229–1 State and local taxes.

As prescribed in 970.2904–1(b), insert the following clause in management and operating contracts. The requirement for the notice prescribed in paragraph (a) of the clause may be broadened to include all State and local taxes which may be claimed as allowable costs when considered to be appropriate.

STATE AND LOCAL TAXES (DEC 2000)

(a) The Contractor agrees to notify the Contracting Officer of any State or local tax, fee, or charge levied or purported to be levied on or collected from the Contractor with respect to the contract work, any transaction thereunder, or property in the custody or control of the Contractor and constituting an allowable item of cost if due and payable, but which the Contractor has reason to believe, or the Contracting Officer has advised the Contractor, is or may be inapplicable or invalid; and the Contractor further agrees to refrain from paying any such tax, fee, or charge unless authorized in writing by the Contracting Officer. Any State or local tax, fee, or charge paid with the approval of the Contracting Officer or on the basis of advice from the Contracting Officer that such tax, fee, or charge is applicable and valid, and which would otherwise be an allowable item of cost, shall not be disallowed as an item of cost by reason of any subsequent ruling or determination that such tax, fee, or charge was in fact inapplicable or invalid.

(b) The Contractor agrees to take such action as may be required or approved by the Contracting Officer to cause any State or local tax, fee, or charge which would be an allowable cost to be paid under protest; and to take such action as may be required or approved by the Contracting Officer to seek recovery of any payments made, including assignment to the Government or its designee of all rights to an abatement or refund thereof, and granting permission for the Government to join with the Contractor in any proceedings for the recovery thereof or to sue for recovery in the name of the Contractor. If the Contracting Officer directs the Contractor to institute litigation to enjoin the collection of or to recover payment of any such tax, fee, or charge referred to above, or if a claim or suit is filed against the Contractor for a tax, fee, or charge it has refrained from paying in accordance with this clause, the procedures and requirements of the clause entitled ''Insurance—Litigation and Claims'' shall apply and the costs and expenses incurred by the Contractor shall be allowable items of costs, as provided in this contract, together with the amount of any judgment rendered against the Contractor.

(c) The Government shall hold the Contractor harmless from penalties and interest incurred through compliance with this clause. All recoveries or credits in respect of the foregoing taxes, fees, and charges (including interest) shall inure to and be for the sole benefit of the Government.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36375, 36378, 36380, July 22, 2009]

970.5231–4 Preexisting conditions.

As prescribed in 970.3170, insert the following clause:

PREEXISTING CONDITIONS (DEC 2000)

(a) The Department of Energy agrees to reimburse the Contractor, and the Contractor shall not be held responsible, for any liability (including without limitation, a claim involving strict or absolute liability and any civil fine or penalty), expense, or remediation cost, but limited to those of a civil nature, which may be incurred by, imposed on, or asserted against the Contractor arising out of any condition, act, or failure to act which occurred before the Contractor assumed responsibility on [Insert date contract began]. To the extent the acts or omissions of the Contractor cause or add to any liability, expense or remediation cost resulting from conditions in existence prior to [Insert date contract began], the Contractor shall be responsible in accordance with the terms and conditions of this contract.

(b) The obligations of the Department of Energy under this clause are subject to the availability of appropriated funds.

(End of clause)

Alternate I (DEC 2000). As prescribed in 970.3170 (a), in contracts with incumbent management and operating contractors, substitute the following for paragraph (a) of the basic clause:

(a) Any liability, obligation, loss, damage, claim (including without limitation, a claim involving strict or absolute liability), action, suit, civil fine or penalty, cost, expense or disbursement, which may be incurred or imposed, or asserted by any party and arising out of any condition, act or failure to act which occurred before [Insert date this clause was included in contract], in conjunction with the management and operation of [Insert name of facility], shall be deemed incurred under Contract No. [Insert number of prior contract].

Alternate II (DEC 2000). As prescribed in 970.3170 (b), add the following paragraph (c) to the basic clause in contracts with management and operating contractors not previously working at that particular site or facility:

(c) The Contractor has the duty to inspect the facilities and sites and timely identify to the Contracting Officer those conditions which it believes could give rise to a liability, obligation, loss, damage, penalty, fine, claim, action, suit, cost, expense, or disbursement or areas of actual or potential noncompliance with the terms and conditions of this contract or applicable law or regulation. The Contractor has the responsibility to take corrective action, as directed by the Contracting Officer and as required elsewhere in this contract.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36375, 36378, 36380, July 22, 2009]

970.5232–1 Reduction or suspension of advance, partial, or progress payments upon finding of substantial evidence of fraud.

As prescribed in 970.3200–1–1, insert the following clause:

REDUCTION OR SUSPENSION OF ADVANCE, PARTIAL, OR PROGRESS PAYMENTS (DEC 2000)

(a) The Contracting Officer may reduce or suspend further advance, partial, or progress payments to the Contractor upon a written determination by the Senior Procurement Executive that substantial evidence exists that the Contractor's request for advance, partial, or progress payment is based on fraud.

(b) The Contractor shall be afforded a reasonable opportunity to respond in writing.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36375, 36378, 36380, July 22, 2009]

970.5232–2 Payments and advances.

As prescribed in 970.3270(a)(1), insert the following clause:

PAYMENTS AND ADVANCES (DEC 2000)

(a) *Installments of fixed-fee.* The fixed-fee payable under this contract shall become due and payable in periodic installments in accordance with a schedule determined by the Contracting Officer. Fixed-fee payments shall be made by direct payment or withdrawn from funds advanced or available under this contract, as determined by the Contracting Officer. The Contracting Officer may offset against any such fee payment the amounts owed to the Government by the Contractor, including any amounts owed for disallowed costs under this contract. No fixed-fee payment may be withdrawn against the payments cleared financing arrangement without prior written approval of the Contracting Officer.

(b) *Payments on Account of Allowable Costs.* The Contracting Officer and the Contractor

shall agree as to the extent to which payment for allowable costs or payments for other items specifically approved in writing by the Contracting Officer (for example, negotiated fixed amounts) shall be made from advances of Government funds. When pension contributions are paid by the Contractor to the retirement fund less frequently than quarterly, accrued costs therefore shall be excluded from costs for payment purposes until such costs are paid. If pension contribution are paid on a quarterly or more frequent basis, accrual therefore may be included in costs for payment purposes, provided that they are paid to the fund within 30 days after the close of the period covered. If payments are not made to the fund within such 30-day period, pension contribution costs shall be excluded from cost for payment purposes until payment has been made.

(c) *Special financial institution account—use.* All advances of Government funds shall be withdrawn pursuant to a payments cleared financing arrangement prescribed by DOE in favor of the financial institution or, at the option of the Government, shall be made by direct payment or other payment mechanism to the Contractor, and shall be deposited only in the special financial institution account referred to in the Special Financial Institution Account Agreement, which is incorporated into this contract as Appendix—. No part of the funds in the special financial institution account shall be commingled with any funds of the Contractor or used for a purpose other than that of making payments for costs allowable and, if applicable, fees earned under this contract, negotiated fixed amounts, or payments for other items specifically approved in writing by the Contracting Officer. If the Contracting Officer determines that the balance of such special financial institution account exceeds the Contractor's current needs, the Contractor shall promptly make such disposition of the excess as the Contracting Officer may direct.

(d) *Title to funds advanced.* Title to the unexpended balance of any funds advanced and of any special financial institution account established pursuant to this clause shall remain in the Government and be superior to any claim or lien of the financial institution of deposit or others. It is understood that an advance to the Contractor hereunder is not a loan to the Contractor, and will not require the payment of interest by the Contractor, and that the Contractor acquires no right, title or interest in or to such advance other than the right to make expenditures therefrom, as provided in this clause.

(e) *Financial settlement.* The Government shall promptly pay to the Contractor the unpaid balance of allowable costs (or other items specifically approved in writing by the Contracting Officer) and fee upon termination of the work, expiration of the term of the contract, or completion of the work and its acceptance by the Government after—

(1) Compliance by the Contractor with DOE's patent clearance requirements; and

(2) The furnishing by the Contractor of—

(i) An assignment of the Contractor's rights to any refunds, rebates, allowances, accounts receivable, collections accruing to the Contractor in connection with the work under this contract, or other credits applicable to allowable costs under the contract;

(ii) A closing financial statement;

(iii) The accounting for Government-owned property required by the clause entitled ''Property''; and

(iv) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract subject only to the following exceptions—

(A) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible to exact statement by the Contractor;

(B) Claims, together with reasonable expenses incidental thereto, based upon liabilities of the Contractor to third parties arising out of the performance of this contract; provided that such claims are not known to the Contractor on the date of the execution of the release; and provided further that the Contractor gives notice of such claims in writing to the Contracting Officer promptly, but not more than one (1) year after the Contractor's right of action first accrues. In addition, the Contractor shall provide prompt notice to the Contracting Officer of all potential claims under this clause, whether in litigation or not (see Contract Clause, 48 CFR 970.5228–1, Insurance—Litigation and Claims);

(C) Claims for reimbursement of costs (other than expenses of the Contractor by reason of any indemnification of the Government against patent liability), including reasonable expenses incidental thereto, incurred by the Contractor under the provisions of this contract relating to patents; and

(D) Claims recognizable under the clause entitled, Nuclear Hazards Indemnity Agreement.

(3) In arriving at the amount due the Contractor under this clause, there shall be deducted—

(i) Any claim which the Government may have against the Contractor in connection with this contract; and

(ii) Deductions due under the terms of this contract and not otherwise recovered by or credited to the Government. The unliquidated balance of the special financial institution account may be applied to the amount due and any balance shall be returned to the Government forthwith.

(f) *Claims.* Claims for credit against funds advanced for payment shall be accompanied

by such supporting documents and justification as the Contracting Officer shall prescribe.

(g) *Discounts.* The Contractor shall take and afford the Government the advantage of all known and available cash and trade discounts, rebates, allowances, credits, salvage, and commissions unless the Contracting Officer finds that action is not in the best interest of the Government.

(h) *Collections.* All collections accruing to the Contractor in connection with the work under this contract, except for the Contractor's fee and royalties or other income accruing to the Contractor from technology transfer activities in accordance with this contract, shall be Government property and shall be processed and accounted for in accordance with applicable requirements imposed by the Contracting Officer pursuant to the Laws, regulations, and DOE directives clause of this contract and, to the extent consistent with those requirements, shall be deposited in the special financial institution account or otherwise made available for payment of allowable costs under this contract, unless otherwise directed by the Contracting Officer.

(i) *Direct payment of charges.* The Government reserves the right, upon ten days written notice from the Contracting Officer to the Contractor, to pay directly to the persons concerned, all amounts due which otherwise would be allowable under this contract. Any payment so made shall discharge the Government of all liability to the Contractor therefore.

(j) *Determining allowable costs.* The Contracting Officer shall determine allowable costs in accordance with the Federal Acquisition Regulation subpart 31.2 and the Department of Energy Acquisition Regulation subpart 48 CFR 970.31 in effect on the date of this contract and other provisions of this contract.

(End of clause)

Alternate I (DEC 2000). As prescribed in 970.3270(a)(1)(i), if a separate fixed-fee is provided for a separate item of work, paragraph (a) of the basic clause should be modified to permit payment of the entire fixed-fee upon completion of that item.

Alternate II (DEC 2000). As prescribed in 970.3270(a)(1)(ii), when total available fee provisions are used, replace paragraph (a) of the basic clause with the following paragraph (a):

(a) *Payment of Total available fee: Base Fee and Performance Fee.* The base fee amount, if any, is payable in equal monthly installments. Total available fee amount earned is payable following the Government's Determination of Total Available Fee Amount Earned in accordance with the clause of this contract entitled ''Total Available Fee: Base Fee Amount and Performance Fee Amount.'' Base fee amount and total available fee amount earned payments shall be made by direct payment or withdrawn from funds advanced or available under this contract, as determined by the Contracting Officer. The Contracting Officer may offset against any such fee payment the amounts owed to the Government by the Contractor, including any amounts owed for disallowed costs under this contract. No base fee amount or total available fee amount earned payment may be withdrawn against the payments cleared financing arrangement without the prior written approval of the contracting officer.

Alternate III (DEC 2000). As prescribed in 970.3270(a)(1)(iii), the following paragraph (k) shall be included in management and operating contracts with integrated accounting systems:

(k) Review and approval of costs incurred. The Contractor shall prepare and submit annually as of September 30, a ''Statement of Costs Incurred and Claimed'' (Cost Statement) for the total of net expenditures accrued (i.e., net costs incurred) for the period covered by the Cost Statement. The Contractor shall certify the Cost Statement subject to the penalty provisions for unallowable costs as stated in sections 306(b) and (i) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 256), as amended. DOE, after audit and appropriate adjustment, will approve such Cost Statement. This approval by DOE will constitute an acknowledgment by DOE that the net costs incurred are allowable under the contract and that they have been recorded in the accounts maintained by the Contractor in accordance with DOE accounting policies, but will not relieve the Contractor of responsibility for DOE's assets in its care, for appropriate subsequent adjustments, or for errors later becoming known to DOE.

Alternate IV (DEC 2000). As prescribed in 970.3270(a)(1)(iv), the following paragraph (k) shall be included in management and operating contracts without integrated accounting systems:

(k) *Certification and penalties.* The Contractor shall prepare and submit a ''Statement of Costs Incurred and Claimed'' (Cost Statement) for the total of net expenditures incurred for the period covered by the Cost Statement. It is anticipated that this will be an annual submission unless otherwise agreed to by the Contracting Officer. The Contractor shall certify the Cost Statement

subject to the penalty provisions for unallowable costs as stated in sections 306(b) and (i) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 256), as amended.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36375, 36376, 36378, 36380, July 22, 2009; 75 FR 68221, Nov. 5, 2010]

970.5232–3 Accounts, records, and inspection.

As prescribed in 970.3270(a)(2), insert the following clause:

ACCOUNTS, RECORDS, AND INSPECTION (DEC 2010)

(a) *Accounts.* The Contractor shall maintain a separate and distinct set of accounts, records, documents, and other evidence showing and supporting: all allowable costs incurred; collections accruing to the Contractor in connection with the work under this contract, other applicable credits, negotiated fixed amounts, and fee accruals under this contract; and the receipt, use, and disposition of all Government property coming into the possession of the Contractor under this contract. The system of accounts employed by the Contractor shall be satisfactory to DOE and in accordance with generally accepted accounting principles consistently applied.

(b) *Inspection and audit of accounts and records.* All books of account and records relating to this contract shall be subject to inspection and audit by DOE or its designees in accordance with the provisions of Clause 970.5204–3, Access to and ownership of records, at all reasonable times, before and during the period of retention provided for in paragraph (d) of this clause, and the Contractor shall afford DOE proper facilities for such inspection and audit.

(c) *Audit of subcontractors' records.* The Contractor also agrees, with respect to any subcontracts (including fixed-price or unit-price subcontracts or purchase orders) where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor of any tier, to either conduct an audit of the subcontractor's costs or arrange for such an audit to be performed by the cognizant government audit agency through the Contracting Officer.

(d) *Disposition of records.* Except as agreed upon by the Government and the Contractor, all financial and cost reports, books of account and supporting documents, system files, data bases, and other data evidencing costs allowable, collections accruing to the Contractor in connection with the work under this contract, other applicable credits, and fee accruals under this contract, shall be the property of the Government, and shall be delivered to the Government or otherwise disposed of by the Contractor either as the Contracting Officer may from time to time direct during the progress of the work or, in any event, as the Contracting Officer shall direct upon completion or termination of this contract and final audit of accounts hereunder. Except as otherwise provided in this contract, including provisions of Clause 970.5204–3, Access to and Ownership of Records, all other records in the possession of the Contractor relating to this contract shall be preserved by the Contractor for a period of three years after final payment under this contract or otherwise disposed of in such manner as may be agreed upon by the Government and the Contractor.

(e) *Reports.* The Contractor shall furnish such progress reports and schedules, financial and cost reports, and other reports concerning the work under this contract as the Contracting Officer may from time to time require.

(f) *Inspections.* The DOE shall have the right to inspect the work and activities of the Contractor under this contract at such time and in such manner as it shall deem appropriate.

(g) *Subcontracts.* The Contractor further agrees to require the inclusion of provisions similar to those in paragraphs (a) through (g) and paragraph (h) of this clause in all subcontracts (including fixed-price or unit-price subcontracts or purchase orders) of any tier entered into hereunder where, under the terms of the subcontract, costs incurred are a factor in determining the amount payable to the subcontractor.

(h) *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 or subcontractor'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.

(3) Nothing in this contract shall be deemed to preclude an audit by the Government Accountability Office of any transaction under this contract.

(i) *Internal audit.* The Contractor agrees to design and maintain an internal audit plan and an internal audit organization.

(1) Upon contract award, the exercise of any contract option, or the extension of the contract, the Contractor must submit to the Contracting Officer for approval an Internal Audit Implementation Design to include the

overall strategy for internal audits. The Audit Implementation Design must describe—

(i) The internal audit organization's placement within the Contractor's organization and its reporting requirements;

(ii) The audit organization's size and the experience and educational standards of its staff;

(iii) The audit organization's relationship to the corporate entities of the Contractor;

(iv) The standards to be used in conducting the internal audits;

(v) The overall internal audit strategy of this contract, considering particularly the method of auditing costs incurred in the performance of the contract;

(vi) The intended use of external audit resources;

(vii) The plan for audit of subcontracts, both pre-award and post-award; and

(viii) The schedule for peer review of internal audits by other contractor internal audit organizations, or other independent third party audit entities approved by the DOE Contracting Officer.

(2) By each January 31 of the contract performance period, the Contractor must submit an annual audit report, providing a summary of the audit activities undertaken during the previous fiscal year. That report shall reflect the results of the internal audits during the previous fiscal year and the actions to be taken to resolve weaknesses identified in the contractor's system of business, financial, or management controls.

(3) By each June 30 of the contract performance period, the Contractor must submit to the Contracting Officer an annual audit plan for the activities to be undertaken by the internal audit organization during the next fiscal year that is designed to test the costs incurred and contractor management systems described in the internal audit design.

(4) The Contracting Officer may require revisions to documents submitted under paragraphs (i)(1), (i)(2), and (i)(3) of this clause, including the design plan for the internal audits, the annual report, and the annual internal audits.

(j) *Remedies.* If at any time during contract performance, the Contracting Officer determines that unallowable costs were claimed by the Contractor to the extent of making the contractor's management controls suspect, or the contractor's management systems that validate costs incurred and claimed suspect, the Contracting Officer may, in his or her sole discretion, require the Contractor to cease using the special financial institution account in whole or with regard to specified accounts, requiring reimbursable costs to be claimed by periodic vouchering. In addition, the Contracting Officer, where he or she deems it appropriate, may: Impose a penalty under 48 CFR 970.5242–1, Penalties for Unallowable Costs; require a refund; reduce the contractor's otherwise earned fee; and take such other action as authorized in law, regulation, or this contract.

(End of clause)

Alternate I (DEC 2000). As prescribed in 970.3270(a)(2), if the contract includes the clause at 48 CFR 52.215–11, Price Reduction for Defective Cost or Pricing Data—Modifications, the basic clause shall be modified as follows:

(a) Paragraph (a) of the basic clause shall be modified by adding the words ''or anticipated to be incurred'' after the words ''allowable costs incurred.''

(b) Paragraph (g) of the basic clause shall be modified by adding the following:

The Contractor further agrees to include an ''Audit'' clause, the substance of which is the ''Audit'' clause set forth at 48 CFR 52.215–2, in each subcontract which does not include provisions similar to those in paragraph (a) through paragraph (g) and paragraph (h) of this clause, but which contains a ''defective cost or pricing data'' clause.

[65 FR 81009, Dec. 22, 2000, as amended at 72 FR 29081, May 24, 2007; 74 FR 36376, 36378, 36380, July 22, 2009; 75 FR 68220, 68221, Nov. 5, 2010]

970.5232–4 Obligation of funds.

As prescribed in 970.3270(a)(3), insert the following clause:

OBLIGATION OF FUNDS (DEC 2000)

(a) *Obligation of funds.* The amount presently obligated by the Government with respect to this contract is ____ dollars ($____). Such amount may be increased unilaterally by DOE by written notice to the Contractor and may be increased or decreased by written agreement of the parties (whether or not by formal modification of this contract). Estimated collections from others for work and services to be performed under this contract are not included in the amount presently obligated. Such collections, to the extent actually received by the Contractor, shall be processed and accounted for in accordance with applicable requirements imposed by the Contracting Officer pursuant to the Laws, regulations, and DOE directives clause of this contract. Nothing in this paragraph is to be construed as authorizing the Contractor to exceed limitations stated in financial plans established by DOE and furnished to the Contractor from time to time under this contract.

(b) *Limitation on payment by the Government.* Except as otherwise provided in this

contract and except for costs which may be incurred by the Contractor pursuant to the Termination clause of this contract or costs of claims allowable under the contract occurring after completion or termination and not released by the Contractor at the time of financial settlement of the contract in accordance with the clause entitled ''Payments and Advances,'' payment by the Government under this contract on account of allowable costs shall not, in the aggregate, exceed the amount obligated with respect to this contract, less the Contractor's fee and any negotiated fixed amount. Unless expressly negated in this contract, payment on account of those costs excepted in the preceding sentence which are in excess of the amount obligated with respect to this contract shall be subject to the availability of—

(1) Collections accruing to the Contractor in connection with the work under this contract and processed and accounted for in accordance with applicable requirements imposed by the Contracting Officer pursuant to the Laws, regulations, and DOE directives clause of this contract; and

(2) Other funds which DOE may legally use for such purpose, provided DOE will use its best efforts to obtain the appropriation of funds for this purpose if not otherwise available.

(c) *Notices—Contractor excused from further performance.* The Contractor shall notify DOE in writing whenever the unexpended balance of available funds (including collections available under paragraph (a) of this clause), plus the Contractor's best estimate of collections to be received and available during the ____ day period hereinafter specified, is in the Contractor's best judgment sufficient to continue contract operations at the programmed rate for only ____ days and to cover the Contractor's unpaid fee and any negotiated fixed amounts, and outstanding encumbrances and liabilities on account of costs allowable under the contract at the end of such period. Whenever the unexpended balance of available funds (including collections available under paragraph (a) of this clause), less the amount of the Contractor's fee then earned but not paid and any negotiated fixed amounts, is in the Contractor's best judgment sufficient only to liquidate outstanding encumbrances and liabilities on account of costs allowable under this contract, the Contractor shall immediately notify DOE and shall make no further encumbrances or expenditures (except to liquidate existing encumbrances and liabilities), and, unless the parties otherwise agree, the Contractor shall be excused from further performance (except such performance as may become necessary in connection with termination by the Government) and the performance of all work hereunder will be deemed to have been terminated for the convenience of the Government in accordance with the provisions of the Termination clause of this contract.

(d) *Financial plans; cost and encumbrance limitations.* In addition to the limitations provided for elsewhere in this contract, DOE may, through financial plans, such as Approved Funding Programs, or other directives issued to the Contractor, establish controls on the costs to be incurred and encumbrances to be made in the performance of the contract work. Such plans and directives may be amended or supplemented from time to time by DOE. The Contractor agrees—

(1) To comply with the specific limitations (ceilings) on costs and encumbrances set forth in such plans and directives;

(2) To comply with other requirements of such plans and directives; and

(3) To notify DOE promptly, in writing, whenever it has reason to believe that any limitation on costs and encumbrances will be exceeded or substantially underrun.

(e) *Government's right to terminate not affected.* The giving of any notice under this clause shall not be construed to waive or impair any right of the Government to terminate the contract under the provisions of the Termination clause of this contract.

(End of clause)

Alternate I (DEC 2000). As prescribed in 970.3270(a)(3), paragraph (d) of the clause may be omitted in contracts which, expressly or otherwise, provide a contractual basis for equivalent controls in a separate clause.

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36378, 36380, July 22, 2009]

970.5232–5 Liability with respect to cost accounting standards.

As prescribed in 970.3270(a)(5), insert the following clause:

LIABILITY WITH RESPECT TO COST ACCOUNTING STANDARDS (DEC 2000)

(a) The Contractor is not liable to the Government for increased costs or interest resulting from its failure to comply with the clauses of this contract entitled, ''Cost Accounting Standards,'' and ''Administration of Cost Accounting Standards,'' if its failure to comply with the clauses is caused by the Contractor's compliance with published DOE financial management policies and procedures or other requirements established by the Department's Chief Financial Officer or Senior Procurement Executive.

(b) The Contractor is not liable to the Government for increased costs or interest resulting from its subcontractors' failure to comply with the clauses at 52.230–2, ''Cost

Accounting Standards,'' and 52.230–6, ''Administration of Cost Accounting Standards,'' if the Contractor includes in each covered subcontract a clause making the subcontractor liable to the Government for increased costs or interest resulting from the subcontractor's failure to comply with the clauses; and the Contractor seeks the subcontract price adjustment and cooperates with the Government in the Government's attempts to recover from the subcontractor.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36376, 36378, July 22, 2009; 75 FR 68221, Nov. 5, 2010]

970.5232–6 Strategic partnership project funding authorization.

As prescribed in 970.3270(a)(6), insert the following clause:

STRATEGIC PARTNERSHIP PROJECT FUNDING AUTHORIZATION (APRIL 23, 2015)

Any uncollectible receivables resulting from the Contractor utilizing contractor corporate funding for reimbursable work shall be the responsibility of the Contractor, and the United States Government shall have no liability to the Contractor for the Contractor's uncollected receivables. The Contractor is permitted to provide advance payment utilizing contractor corporate funds for reimbursable work to be performed by the Contractor for a non-Federal entity in instances where advance payment from that entity is required under the Laws, regulations, and DOE directives clause of this contract and such advance cannot be obtained. The Contractor is also permitted to provide advance payment utilizing contractor corporate funds to continue reimbursable work to be performed by the Contractor for a Federal entity when the term or the funds on a Federal interagency agreement required under the Laws, regulations, and DOE directives clause of this contract have elapsed. The Contractor's utilization of contractor corporate funds does not relieve the Contractor of its responsibility to comply with all requirements for Strategic Partnership Projects applicable to this contract.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36376, 36378, July 22, 2009; 80 FR 15520, Mar. 24, 2015]

970.5232–7 Financial management system.

As prescribed in 970.3270(b)(1), insert the following clause:

FINANCIAL MANAGEMENT SYSTEM (DEC 2000)

The Contractor shall maintain and administer a financial management system that is suitable to provide proper accounting in accordance with DOE requirements for assets, liabilities, collections accruing to the Contractor in connection with the work under this contract, expenditures, costs, and encumbrances; permits the preparation of accounts and accurate, reliable financial and statistical reports; and assures that accountability for the assets can be maintained. The Contractor shall submit to DOE for written approval an annual plan for new financial management systems and/or subsystems and major enhancements and/or upgrades to the currently existing financial systems and/or subsystems. The Contractor shall notify DOE thirty (30) days in advance of any planned implementation of any substantial deviation from this plan and, as requested by the Contracting Officer, shall submit any such deviation to DOE for written approval before implementation.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36376, 36378, 36380, July 22, 2009]

970.5232–8 Integrated accounting.

As prescribed in 970.3270(b)(2), insert the following clause:

INTEGRATED ACCOUNTING (DEC 2000)

Integrated accounting procedures are required for use under this contract. The Contractor's financial management system shall include an integrated accounting system that is linked to DOE's accounts through the use of reciprocal accounts and that has electronic capability to transmit monthly and year-end self-balancing trial balances to the Department's Primary Accounting System for reporting financial activity under this contract in accordance with requirements imposed by the Contracting Officer pursuant to the Laws, regulations, and DOE directives clause of this contract.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36376, 36378, 36380, July 22, 2009]

970.5235–1 Federally funded research and development center sponsoring agreement.

As prescribed in 970.3501–4, the contracting officer shall insert the following clause:

FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTER SPONSORING AGREEMENT (DEC 2010)

(a) Pursuant to 48 CFR 35.017–1, this contract constitutes the sponsoring agreement between the Department of Energy (DOE) and the Contractor, which establishes the relationship for the operation of a Department of Energy sponsored Federally Funded Research and Development Center (FFRDC).

(b) In the operation of this FFRDC, the Contractor may be provided access beyond that which is common to the normal contractual relationship, to Government and supplier data, including sensitive and proprietary data, and to Government employees and facilities needed to discharge its responsibilities efficiently and effectively. Because of this special relationship, it is essential that the FFRDC be operated in the public interest with objectivity and independence, be free from organizational conflicts of interest, and have full disclosure of its affairs to the Department of Energy.

(c) Unless otherwise provided by the contract, the Contractor may accept work from a nonsponsor (as defined in 48 CFR 35.017) in accordance with the requirements and limitations of the clause 48 CFR 970.5217–1, Strategic Partnership Projects Program.

(d) As an FFRDC, the Contractor shall not use its privileged information or access to government facilities to compete with the private sector. Specific guidance on restricted activities is contained in DOE Order 481.1C, Strategic Partnership Projects (Formerly Known as Work for Others (Non-Department of Energy Funded Work)), or successor version.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36376, 36378, July 22, 2009; 75 FR 68220, Nov. 5, 2010; 80 FR 15520, Mar. 24, 2015]

970.5236–1 Government facility subcontract approval.

As prescribed at 48 CFR 970.3605–2, insert the following clause:

GOVERNMENT FACILITY SUBCONTRACT APPROVAL (DEC 2000)

Upon request of the Contracting Officer and acceptance thereof by the Contractor, the Contractor shall procure, by subcontract, the construction of new facilities or the alteration or repair of Government-owned facilities at the plant. Any subcontract entered into under this paragraph shall be subject to the written approval of the Contracting Officer and shall contain the provisions relative to labor and wages required by law to be included in contracts for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36378, 36380, July 22, 2009]

970.5237–2 [Reserved]

970.5242–1 Penalties for unallowable costs.

As prescribed in 970.4207–03–70, insert the following clause:

PENALTIES FOR UNALLOWABLE COSTS (AUG 2009)

(a) Contractors which include unallowable cost in a submission for settlement for cost incurred, may be subject to penalties.

(b) If, during the review of a submission for settlement of cost incurred, the Contracting Officer determines that the submission contains an expressly unallowable cost or a cost determined to be unallowable prior to the submission, the Contracting Officer shall assess a penalty.

(c) Unallowable costs are either expressly unallowable or determined unallowable.

(1) An expressly unallowable cost is a particular item or type of cost which, under the express provisions of an applicable law, regulation, or this contract, is specifically named and stated to be unallowable.

(2) A cost determined unallowable is one which, for that Contractor—

(i) Was subject to a Contracting Officer's final decision and not appealed;

(ii) The Civilian Board of Contract Appeals or a court has previously ruled as unallowable; or

(iii) Was mutually agreed to be unallowable.

(d) If the Contracting Officer determines that a cost submitted by the Contractor in its submission for settlement of cost incurred is—

(1) Expressly unallowable, then the Contracting Officer shall assess a penalty in an amount equal to the disallowed cost allocated to this contract plus interest on the paid portion of the disallowed cost. Interest shall be computed from the date of overpayment to the date of repayment using the interest rate specified by the Secretary of the Treasury pursuant to Pub. L. 92–41 (85 Stat. 97); or

(2) Determined unallowable, then the Contracting Officer shall assess a penalty in an amount equal to two times the amount of the disallowed cost allocated to this contract.

(e) The Contracting Officer may waive the penalty provisions when—

(1) The Contractor withdraws the submission before the formal initiation of an audit

of the submission and submits a revised submission;

(2) The amount of the unallowable costs allocated to covered contracts is $10,000 or less; or

(3) The Contractor demonstrates to the Contracting Officer's satisfaction that—

(i) It has established appropriate policies, personnel training, and an internal control and review system that provides assurances that unallowable costs subject to penalties are precluded from the Contractor's submission for settlement of costs; and

(ii) The unallowable costs subject to the penalty were inadvertently incorporated into the submission.

(End of clause)

[74 FR 36376, July 22, 2009]

970.5243–1 Changes.

As prescribed in 970.4302–1, the contracting officer shall insert the following clause in all management and operating contracts:

CHANGES (DEC 2000)

(a) *Changes and adjustment of fee.* The Contracting Officer may at any time and without notice to the sureties, if any, issue written directions within the general scope of this contract requiring additional work or directing the omission of, or variation in, work covered by this contract. If any such direction results in a material change in the amount or character of the work described in the ''Statement of Work,'' an equitable adjustment of the fee, if any, shall be made in accordance with the agreement of the parties and the contract shall be modified in writing accordingly. Any claim by the Contractor for an adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change; provided, however, that the Contracting Officer, if it is determined that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under this contract. A failure to agree on an equitable adjustment under this clause shall be deemed to be a dispute within the meaning of the clause entitled ''Disputes.''

(b) *Work to continue.* Nothing contained in this clause shall excuse the Contractor from proceeding with the prosecution of the work in accordance with the requirements of any direction hereunder.

(End of clause)

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36376, 36378, 36380, July 22, 2009]

970.5244–1 Contractor purchasing system.

As prescribed in 970.4403 insert the following clause:

CONTRACTOR PURCHASING SYSTEM (AUG 2016)

(a) *General.* The Contractor shall develop, implement, and maintain formal policies, practices, and procedures to be used in the award of subcontracts consistent with this clause and 48 CFR subpart 970.44. The Contractor's purchasing system and methods shall be fully documented, consistently applied, and acceptable to the Department of Energy (DOE) in accordance with 48 CFR 970.4401–1. The Contractor shall maintain file documentation which is appropriate to the value of the purchase and is adequate to establish the propriety of the transaction and the price paid. The Contractor's purchasing performance will be evaluated against such performance criteria and measures as may be set forth elsewhere in this contract. DOE reserves the right at any time to require that the Contractor submit for approval any or all purchases under this contract. The Contractor shall not purchase any item or service, the purchase of which is expressly prohibited by the written direction of DOE, and shall use such special and directed sources as may be expressly required by the DOE Contracting Officer. DOE will conduct periodic appraisals of the Contractor's management of all facets of the purchasing function, including the Contractor's compliance with its approved system and methods. Such appraisals will be performed through the conduct of Contractor Purchasing System Reviews in accordance with 48 CFR subpart 44.3, or, when approved by the Contracting Officer, through the Contractor's participation in the conduct of the Balanced Scorecard performance measurement and performance management system. The Contractor's approved purchasing system and methods shall include the requirements set forth in paragraphs (b) through (y) of this clause.

(b) *Acquisition of utility services.* Utility services shall be acquired in accordance with the requirements of 48 CFR subpart 970.41.

(c) *Acquisition of real property.* Real property shall be acquired in accordance with 48 CFR subpart 917.74.

(d) *Advance notice of proposed subcontract awards.* Advance notice shall be provided in accordance with 48 CFR 970.4401–3.

(e) *Audit of subcontractors.* (1) The Contractor shall provide for—

(i) Periodic post-award audit of cost-reimbursement subcontractors at all tiers; and

(ii) Audits, where necessary, to provide a valid basis for pre-award or cost or price analysis.

(2) Responsibility for determining the costs allowable under each cost-reimbursement subcontract remains with the contractor or

next higher-tier subcontractor. The Contractor shall provide, in appropriate cases, for the timely involvement of the Contractor and the DOE Contracting Officer in resolution of subcontract cost allowability.

(3) Where audits of subcontractors at any tier are required, arrangements may be made to have the cognizant Federal agency perform the audit of the subcontract. These arrangements shall be made administratively between DOE and the other agency involved and shall provide for the cognizant agency to audit in an appropriate manner in light of the magnitude and nature of the subcontract. In no case, however, shall these arrangements preclude determination by the DOE Contracting Officer of the allowability or unallowability of subcontractor costs claimed for reimbursement by the Contractor.

(4) Allowable costs for cost reimbursable subcontracts are to be determined in accordance with the cost principles of 48 CFR Part 31, appropriate for the type of organization to which the subcontract is to be awarded, as supplemented by 48 CFR part 931. Allowable costs in the purchase or transfer from contractor-affiliated sources shall be determined in accordance with 48 CFR 970.4402–3 and 48 CFR 31.205–26(e).

(f) *Bonds and insurance.* (1) The Contractor shall require performance bonds in penal amounts as set forth in 48 CFR 28.102–2(a) for all fixed-priced and unit-priced construction subcontracts in excess of $150,000. The Contractor shall consider the use of performance bonds in fixed-price non-construction subcontracts, where appropriate.

(2) For fixed-price, unit-priced and cost reimbursement construction subcontracts in excess of $150,000, a payment bond shall be obtained on Standard Form 25A modified to name the Contractor as well as the United States of America as obligees. The penal amounts shall be determined in accordance with 48 CFR 28.102–2(b).

(3) For fixed-price, unit-priced and cost-reimbursement construction subcontracts greater than $25,000, but not greater than $100,000, the Contractor shall select two or more of the payment protections at 48 CFR 28.102–1(b), giving particular consideration to the inclusion of an irrevocable letter of credit as one of the selected alternatives.

(4) A subcontractor may have more than one acceptable surety in both construction and other subcontracts, provided that in no case will the liability of any one surety exceed the maximum penal sum for which it is qualified for any one obligation. For subcontracts other than construction, a co-surety (two or more sureties together) may reinsure amounts in excess of their individual capacity, with each surety having the required underwriting capacity that appears on the list of acceptable corporate sureties.

(g) *Buy American.* The Contractor shall comply with the provisions of the Buy American Act as reflected in 48 CFR 52.225–1 and 48 CFR 52.225–9. The Contractor shall forward determinations of non-availability of individual items to the DOE Contracting Officer for approval. Items in excess of $500,000 require the prior concurrence of the Head of Contracting Activity. If, however, the Contractor has an approved purchasing system, the Head of the Contracting Activity may authorize the Contractor to make determinations of non-availability for individual items valued at $500,000 or less.

(h) *Construction and architect-engineer subcontracts.* (1) *Independent Estimates.* A detailed, independent estimate of costs shall be prepared for all construction work to be subcontracted.

(2) *Specifications.* Specifications for construction shall be prepared in accordance with the DOE publication entitled ''General Design Criteria Manual.''

(3) *Prevention of conflict of interest.* (i) The Contractor shall not award a subcontract for construction to the architect-engineer firm or an affiliate that prepared the design. This prohibition does not preclude the award of a ''turnkey'' subcontract so long as the subcontractor assumes all liability for defects in design and construction and consequential damages.

(ii) The Contractor shall not award both a cost-reimbursement subcontract and a fixed-price subcontract for construction or architect-engineer services or any combination thereof to the same firm where those subcontracts will be performed at the same site.

(iii) The Contractor shall not employ the construction subcontractor or an affiliate to inspect the firm's work. The contractor shall assure that the working relationships of the construction subcontractor and the subcontractor inspecting its work and the authority of the inspector are clearly defined.

(i) *Contractor-affiliated sources.* Equipment, materials, supplies, or services from a contractor-affiliated source shall be purchased or transferred in accordance with 48 CFR 970.4402–3.

(j) *Contractor-subcontractor relationship.* The obligations of the Contractor under paragraph (a) of this clause, including the development of the purchasing system and methods, and purchases made pursuant thereto, shall not relieve the Contractor of any obligation under this contract (including, among other things, the obligation to properly supervise, administer, and coordinate the work of subcontractors). Subcontracts shall be in the name of the Contractor, and shall not bind or purport to bind the Government.

(k) *Government Property.* The Contractor shall establish and maintain a property management system that complies with criteria in 48 CFR 970.5245–1, Property, and 48 CFR 52.245–1, Government Property.

(l) *Indemnification.* Except for Price-Anderson Nuclear Hazards Indemnity, no subcontractor may be indemnified except with the prior approval of the Senior Procurement Executive.

(m) *Leasing of motor vehicles.* Contractors shall comply with 48 CFR subpart 8.11 and 48 CFR subpart 908.11.

(n) [Reserved]

(o) *Management, acquisition and use of information resources.* Requirements for automatic data processing resources and telecommunications facilities, services, and equipment, shall be reviewed and approved in accordance with applicable DOE Orders and regulations regarding information resources.

(p) *Priorities, allocations and allotments.* Priorities, allocations and allotments shall be extended to appropriate subcontracts in accordance with the clause or clauses of this contract dealing with priorities and allocations.

(q) *Purchase of special items.* Purchase of the following items shall be in accordance with the following provisions of 48 CFR subpart 8.5, 48 CFR subpart 908.71, Federal Management Regulation 41 CFR part 102, and the Federal Property Management Regulation 41 CFR chapter 101:

(1) Motor vehicles—48 CFR 908.7101
(2) Aircraft—48 CFR 908.7102
(3) Security Cabinets—48 CFR 908.7106
(4) Alcohol—48 CFR 908.7107
(5) Helium—48 CFR subpart 8.5
(6) Fuels and packaged petroleum products—48 CFR 908.7109
(7) Coal—48 CFR 908.7110
(8) Arms and Ammunition—48 CFR 908.7111
(9) Heavy Water—48 CFR 908.7121(a)
(10) Precious Metals—48 CFR 908.7121(b)
(11) Lithium—48 CFR 908.7121(c)
(12) Products and services of the blind and severely handicapped—41 CFR 101–26.701
(13) Products made in Federal penal and correctional institutions—41 CFR 101–26.702.

(r) *Purchase versus lease determinations.* Contractors shall determine whether required equipment and property should be purchased or leased, and establish appropriate thresholds for application of lease versus purchase determinations. Such determinations shall be made—

(1) At time of original acquisition;
(2) When lease renewals are being considered; and
(3) At other times as circumstances warrant.

(s) *Quality assurance.* Contractors shall provide no less protection for the Government in its subcontracts than is provided in the prime contract.

(t) *Setoff of assigned subcontractor proceeds.* Where a subcontractor has been permitted to assign payments to a financial institution, the assignment shall treat any right of setoff in accordance with 48 CFR 932.803.

(u) *Strategic and critical materials.* The Contractor may use strategic and critical materials in the National Defense Stockpile.

(v) *Termination.* When subcontracts are terminated as a result of the termination of all or a portion of this contract, the Contractor shall settle with subcontractors in conformity with the policies and principles relating to settlement of prime contracts in 48 CFR subparts 49.1, 49.2 and 49.3. When subcontracts are terminated for reasons other than termination of this contract, the Contractor shall settle such subcontracts in general conformity with the policies and principles in 48 CFR subparts 49.1, 49.2, 49.3 and 49.4. Each such termination shall be documented and consistent with the terms of this contract. Terminations which require approval by the Government shall be supported by accounting data and other information as may be directed by the Contracting Officer.

(w) *Unclassified controlled nuclear information.* Subcontracts involving unclassified uncontrolled nuclear information shall be treated in accordance with 10 CFR part 1017.

(x) *Subcontract flowdown requirements.* In addition to terms and conditions that are included in the prime contract which direct application of such terms and conditions in appropriate subcontracts, the Contractor shall include the following clauses in subcontracts, as applicable:

(1) Davis-Bacon clauses prescribed in 48 CFR 22.407.
(2) Foreign Travel clause prescribed in 48 CFR 952.247–70.
(3) Counterintelligence clause prescribed in 48 CFR 970.0404–4(a).
(4) Service Contract Act clauses prescribed in 48 CFR 22.1006.
(5) State and local taxes clause prescribed in 48 CFR 970.2904–1.
(6) Cost or pricing data clauses prescribed in 48 CFR 970.1504–3–1(b).

(y) *Legal services.* Contractor purchases of litigation and other legal services are subject to the requirements in 10 CFR part 719 and the requirements of this clause.

(End of clause)

[74 FR 36375, July 22, 2009, as amended at 77 FR 74389, Dec. 14, 2012; 81 FR 45978, July 15, 2016]

970.5245–1 Property.

As prescribed in 970.4501–1(a), insert the following clause:

PROPERTY (AUG 2016)

(a) *Furnishing of Government property.* The Government reserves the right to furnish any property or services required for the performance of the work under this contract.

(b) *Title to property.* Except as otherwise provided by the Contracting Officer, title to

all materials, equipment, supplies, and tangible personal property of every kind and description purchased by the Contractor, for the cost of which the Contractor is entitled to be reimbursed as a direct item of cost under this contract, shall pass directly from the vendor to the Government. The Government reserves the right to inspect, and to accept or reject, any item of such property. The Contractor shall make such disposition of rejected items as the Contracting Officer shall direct. Title to other property, the cost of which is reimbursable to the Contractor under this contract, shall pass to and vest in the Government upon (1) issuance for use of such property in the performance of this contract, or (2) commencement of processing or use of such property in the performance of this contract, or (3) reimbursement of the cost thereof by the Government, whichever first occurs. Property furnished by the Government and property purchased or furnished by the Contractor, title to which vests in the Government, under this paragraph are hereinafter referred to as Government property. Title to Government property shall not be affected by the incorporation of the property into or the attachment of it to any property not owned by the Government, nor shall such Government property or any part thereof, be or become a fixture or lose its identity as personality by reason of affixation to any realty.

(c) *Identification.* To the extent directed by the Contracting Officer, the Contractor shall identify Government property coming into the Contractor's possession or custody, by marking and segregating in such a way, satisfactory to the Contracting Officer, as shall indicate its ownership by the Government.

(d) *Disposition.* The Contractor shall make such disposition of Government property which has come into the possession or custody of the Contractor under this contract as the Contracting Officer may direct during the progress of the work or upon completion or termination of this contract. The Contractor may, upon such terms and conditions as the Contracting Officer may approve, sell, or exchange such property, or acquire such property at a price agreed upon by the Contracting Officer and the Contractor as the fair value thereof. The amount received by the Contractor as the result of any disposition, or the agreed fair value of any such property acquired by the Contractor, shall be applied in reduction of costs allowable under this contract or shall be otherwise credited to account to the Government, as the Contracting Officer may direct. Upon completion of the work or the termination of this contract, the Contractor shall render an accounting, as prescribed by the Contracting Officer, of all government property which had come into the possession or custody of the Contractor under this contract.

(e) *Protection of government property—management of high-risk property and classified materials.* (1) The Contractor shall take all reasonable precautions, and such other actions as may be directed by the Contracting Officer, or in the absence of such direction, in accordance with sound business practice, to safeguard and protect government property in the Contractor's possession or custody.

(2) In addition, the Contractor shall ensure that adequate safeguards are in place, and adhered to, for the handling, control and disposition of high-risk property and classified materials throughout the life cycle of the property and materials consistent with the policies, practices and procedures for property management contained in the Federal Property Management Regulations (41 CFR chapter 101), the Department of Energy (DOE) Property Management Regulations (41 CFR chapter 109), and other applicable Regulations.

(3) High-risk property is property, the loss, destruction, damage to, or the unintended or premature transfer of which could pose risks to the public, the environment, or the national security interests of the United States. High-risk property includes proliferation sensitive, nuclear related dual use, export controlled, chemically or radioactively contaminated, hazardous, and specially designed and prepared property, including property on the militarily critical technologies list.

(f) *Risk of loss of Government property.* (1)(i) The Contractor shall not be liable for the loss or destruction of, or damage to, Government property unless such loss, destruction, or damage was caused by any of the following—

(A) Willful misconduct or lack of good faith on the part of the Contractor's managerial personnel;

(B) Failure of the Contractor's managerial personnel to take all reasonable steps to comply with any appropriate written direction of the Contracting Officer to safeguard such property under paragraph (e) of this clause; or

(C) Failure of contractor managerial personnel to establish, administer, or properly maintain an approved property management system in accordance with paragraph (i)(1) of this clause.

(ii) If, after an initial review of the facts, the Contracting Officer informs the Contractor that there is reason to believe that the loss, destruction of, or damage to the government property results from conduct falling within one of the categories set forth above, the burden of proof shall be upon the Contractor to show that the Contractor should not be required to compensate the government for the loss, destruction, or damage.

(2) In the event that the Contractor is determined liable for the loss, destruction or

damage to Government property in accordance with (f)(1) of this clause, the Contractor's compensation to the Government shall be determined as follows:

(i) For damaged property, the compensation shall be the cost of repairing such damaged property, plus any costs incurred for temporary replacement of the damaged property. However, the value of repair costs shall not exceed the fair market value of the damaged property. If a fair market value of the property does not exist, the Contracting Officer shall determine the value of such property, consistent with all relevant facts and circumstances.

(ii) For destroyed or lost property, the compensation shall be the fair market value of such property at the time of such loss or destruction, plus any costs incurred for temporary replacement and costs associated with the disposition of destroyed property. If a fair market value of the property does not exist, the Contracting Officer shall determine the value of such property, consistent with all relevant facts and circumstances.

(3) The portion of the cost of insurance obtained by the Contractor that is allocable to coverage of risks of loss referred to in paragraph (f)(1) of this clause is not allowable.

(g) *Steps to be taken in event of loss.* In the event of any damage, destruction, or loss to Government property in the possession or custody of the Contractor with a value above the threshold set out in the Contractor's approved property management system, the Contractor —

(1) Shall immediately inform the Contracting Officer of the occasion and extent thereof,

(2) Shall take all reasonable steps to protect the property remaining, and

(3) Shall repair or replace the damaged, destroyed, or lost property in accordance with the written direction of the Contracting Officer. The Contractor shall take no action prejudicial to the right of the Government to recover therefore, and shall furnish to the Government, on request, all reasonable assistance in obtaining recovery.

(h) *Government property for Government use only.* Government property shall be used only for the performance of this contract.

(i) *Property Management*—(1) *Property Management System.* (i) The Contractor shall establish, administer, and properly maintain an approved property management system of accounting for and control, utilization, maintenance, repair, protection, preservation, and disposition of Government property in its possession under the contract. The Contractor's property management system shall be submitted to the Contracting Officer for approval and shall be maintained and administered in accordance with sound business practice, applicable Federal Property Management Regulations and Department of Energy Property Management Regulations, and such directives or instructions which the Contracting Officer may from time to time prescribe.

(ii) In order for a property management system to be approved, it must provide for—

(A) Comprehensive coverage of property from the requirement identification, through its life cycle, to final disposition;

(B) [Reserved]

(C) Full integration with the Contractor's other administrative and financial systems; and

(D) A method for continuously improving property management practices through the identification of best practices established by ''best in class'' performers.

(iii) Approval of the Contractor's property management system shall be contingent upon the completion of the baseline inventory as provided in subparagraph (i)(2) of this clause.

(2) *Property Inventory.* (i) Unless otherwise directed by the Contracting Officer, the Contractor shall within six months after execution of the contract provide a baseline inventory covering all items of Government property.

(ii) If the Contractor is succeeding another contractor in the performance of this contract, the Contractor shall conduct a joint reconciliation of the property inventory with the predecessor contractor. The Contractor agrees to participate in a joint reconciliation of the property inventory at the completion of this contract. This information will be used to provide a baseline for the succeeding contract as well as information for closeout of the predecessor contract.

(j) The term ''contractor's managerial personnel'' as used in this clause means the Contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of—

(1) All or substantially all of the Contractor's business; or

(2) All or substantially all of the Contractor's operations at any one facility or separate location to which this contract is being performed; or

(3) A separate and complete major industrial operation in connection with the performance of this contract; or

(4) A separate and complete major construction, alteration, or repair operation in connection with performance of this contract; or

(5) A separate and discrete major task or operation in connection with the performance of this contract.

(k) The Contractor shall include this clause in all cost reimbursable subcontracts.

(End of clause)

Alternate I (AUG 2016).As prescribed in 970.4501–1(b), when the award is to a

nonprofit contractor, replace paragraph (j) of the basic clause with the following paragraph (j):

(j) The term ''contractor's managerial personnel'' as used in this clause means the Contractor's directors, officers and any of its managers, superintendents, or other equivalent representatives who have supervision or direction of all or substantially all of—

(1) The Contractor's business; or

(2) The Contractor's operations at any one facility or separate location at which this contract is being performed; or

(3) The Contractor's Government property system and/or a Major System Project as defined in DOE Order 413.3B, or successor version (Version in effect on effective date of contract).

[65 FR 81009, Dec. 22, 2000, as amended at 74 FR 36378, 36380, July 22, 2009; 77 FR 74389, Dec. 14, 2012; 81 FR 45978, July 15, 2016]

PARTS 971–999 [RESERVED]

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SUBCHAPTER A—GENERAL

PART 1000 [RESERVED]

PART 1001—DEPARTMENT OF THE TREASURY ACQUISITION REGULATION (DTAR) SYSTEM

Subpart 1001.1—Purpose, Authority, Issuance

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Subpart 1001.6—Career Development, Contracting Authority and Responsibilities

1001.670 Contract clause.

AUTHORITY: 41 U.S.C. 1707.

SOURCE: 76 FR 42057, July 18, 2011, unless otherwise noted.

Subpart 1001.1—Purpose, Authority, Issuance

1001.101 Purpose.

This subpart establishes Chapter 10, the Department of the Treasury Acquisition Regulation (DTAR), within Title 48 of the Federal Acquisition Regulation (FAR) System. The DTAR contains policies and procedures that supplement FAR coverage and directly affect the contractual relationship between the Department of the Treasury and its business partners (e.g., prospective offerors/bidders and contractors). When FAR coverage is adequate, there will be no corresponding DTAR coverage.

1001.104 Applicability.

The DTAR applies to all acquisitions of supplies and services, which obligate appropriated funds. For acquisitions made from non-appropriated funds, the Senior Procurement Executive will determine the rules and procedures that will apply. The DTAR does not apply to the acquisitions of the U.S. Mint.

1001.105 Issuance.

1001.105–1 Publication and code arrangement.

The DTAR and its subsequent changes will be published in the FEDERAL REGISTER and codified in the Code of Federal Regulations (CFR). The DTAR will be issued as 48 CFR Chapter 10.

1001.105–2 Arrangement of regulations.

(a) *References and citations.* The DTAR is divided into the same parts, subparts, sections, subsections, and paragraphs as the FAR except that 10 or 100 will precede the DTAR citation so that there are four numbers to the left of the first decimal. Reference to DTAR material must be made in a manner similar to that prescribed by FAR 1.105–2(c).

1001.105–3 Copies.

Copies of the DTAR in FEDERAL REGISTER or CFR form may be purchased from the Superintendent of Documents, Government Printing Office (GPO), Washington, DC 20402.

1001.106 OMB Approval under the Paperwork Reduction Act.

OMB has assigned the following control numbers that must appear on the upper right corner of the face page of each solicitation, contract, modification, and order: OMB Control No. 1505–0081 (Offeror submissions), OMB Control No. 1505–0080 (Contractor submissions), OMB Control No. 1505–0107 (Protests). OMB regulations and OMB's approval and assignment of control numbers are conditioned upon Treasury bureaus not requiring more than three copies (including the original) of any

document of information. OMB has granted a waiver to permit the Department to require up to eight copies of proposal packages, including proprietary data, for solicitations, provided that contractors who submit only an original and two copies will not be placed at a disadvantage.

Subpart 1001.3—Agency Acquisition Regulations

1001.301 Policy.

(a)(1) The DTAR (48 CFR Chapter 10) is issued for Treasury implementation in accordance with the authority cited in FAR 1.301(b). The DTAR supplements the Federal Acquisition Regulation by establishing uniform policies for all acquisition activities throughout the Department of the Treasury, except for the United States Mint.

1001.304 Agency control and compliance procedures.

(a) The DTAR is under the direct oversight and control of Treasury's Office of the Procurement Executive (OPE), which is responsible for the evaluation, review, and issuance of all Department-wide acquisition regulations and guidance.

Subpart 1001.4—Deviations from the FAR

1001.403 Individual deviations.

The SPE is authorized to approve individual contract FAR and DTAR deviations.

1001.404 Class deviations.

(a) The SPE is authorized to approve class FAR and DTAR deviations.

Subpart 1001.6—Career Development, Contracting Authority and Responsibilities

1001.670 Contract clause.

Contracting Officers must insert a clause substantially similar to the clause in section 1052.201–70, Contracting Officer's Representative (COR) Appointment and Authority, in all solicitations and contracts. Exceptions to the requirement for inclusion of the COR clause and the appointment of a COR may be made at the discretion of the BCPO.

[76 FR 42057, July 18, 2011, as amended at 80 FR 11595, Mar. 4, 2015]

PART 1002—DEFINITIONS OF WORDS AND TERMS

Subpart 1002.1—Definitions

Sec.
1002.101 Definitions.
1002.70 Abbreviations.

AUTHORITY: 41 U.S.C. 1707.

SOURCE: 76 FR 42057, July 18, 2011, unless otherwise noted.

Subpart 1002.1—Definitions

1002.101 Definitions.

Bureau means any one of the following Treasury organizations:

(1) Alcohol and Tobacco Tax and Trade Bureau (TTB);

(2) Bureau of Engraving & Printing (BEP);

(3) Bureau of the Fiscal Service (formerly Bureau of Public Debt and Financial Management Service);

(4) Departmental Offices (DO);

(5) Financial Crimes Enforcement Network (FinCEN);

(6) Office of the Inspector General (OIG);

(7) Internal Revenue Service (IRS);

(8) Office of the Comptroller of the Currency (OCC);

(9) Special Inspector General for the Troubled Asset Relief Program (SIGTARP);

(10) Treasury Inspector General for Tax Administration (TIGTA); or

(11) United States Mint.

[80 FR 11595, Mar. 4, 2015]

1002.70 Abbreviations.

BCPO Bureau Chief Procurement Officer
COR Contracting Officer's Representative
HCA Head of the Contracting Activity
IPP Invoice Processing Platform
OPE Office of the Procurement Executive
OSDBU Office of Small and Disadvantaged Business Utilization

SPE Senior Procurement Executive

[76 FR 42057, July 18, 2011, as amended at 77 FR 40304, July 9, 2012; 80 FR 11595, Mar. 3, 2015]

SUBCHAPTER B—ACQUISITION PLANNING

PART 1009—CONTRACTOR QUALIFICATIONS

Subpart 1009.1—Responsible Prospective Contractors

Sec.
1009.104 Standards.
1009.104–5 Representation and certifications regarding responsibility matters.

Subpart 1009.2—Qualifications Requirements

1009.204–70 Contractor publicity.

Subpart 1009.70—Tax Check Requirements

1009.7000 Scope of subpart.
1009.7001 Definition.
1009.7003 Policy.
1009.7004 Procedure.
1009.7005 Solicitation provision.

AUTHORITY: 41 U.S.C. 418b.

SOURCE: 76 FR 42057, July 18, 2011, unless otherwise noted.

Subpart 1009.1—Responsible Prospective Contractors

SOURCE: 82 FR 53428, Nov. 16, 2017, unless otherwise noted.

1009.104 Standards.

1009.104–5 Representation and certifications regarding responsibility matters.

(b) Internal Revenue Service (IRS) contracting officers shall comply with the requirements of subpart 1009.70 once an offeror has been identified as the apparent successful offeror.

Subpart 1009.2—Qualifications Requirements

1009.204–70 Contractor publicity.

31 U.S.C. 333(a) prohibits the use of Treasury names, abbreviations, or symbols, in connection with, or as a part of, any advertisement, solicitation, business activity, or product, in a manner that may imply endorsement by Treasury. Bureaus shall insert a clause substantially the same as 1052.210–70 Contractor Publicity in all solicitations and contracts.

Subpart 1009.70—Tax Check Requirements

SOURCE: 82 FR 53429, Nov. 16, 2017, unless otherwise noted.

1009.7000 Scope of subpart.

This subpart prescribes the IRS policies and procedures for performing a tax check on the apparent successful offeror to determine eligibility to receive an award.

1009.7001 Definition.

As used in this subpart—

Authorized representative(s) of the offeror means the person(s) identified to the Internal Revenue Service (IRS) within the consent to disclosure by the offeror as authorized to represent the offeror in disclosure matters pertaining to the offer.

Delinquent Federal tax liability means 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.

Tax check means an IRS process that accesses and uses taxpayer return information to support the Government's determination of an offeror's eligibility to receive an award, including but not limited to implementation of the statutory prohibition of making an award to corporations that have a delinquent Federal tax liability (see FAR 9.104–5(b)).

1009.7003 Policy.

(a) There are various Federal laws and regulations that in aggregate prohibit the Federal Government from entering into a contract with an entity where the awarding agency is aware of an unpaid Federal tax liability (see FAR subpart 9.1) unless the agency has considered suspension or debarment and has made a determination that

this further action is not necessary to protect the interests of the Government.

(b) IRS contracting officers shall include a provision in all solicitations regardless of dollar value, which contains a consent to disclosure to be signed and dated by a person authorized to act on behalf of the offeror as defined in 26 CFR 301.6103(c)–1(e)(4). The consent to disclosure will authorize officers and employees of the Department of the Treasury, including the IRS, to disclose the results of the tax check to the authorized representative(s) of the offeror. In the absence of a signed and dated consent to disclosure in an offer, taxpayer return information of the offeror may not be disclosed, which subsequently may remove the offeror from eligibility to receive an award.

1009.7004 Procedure.

IRS contracting officers shall not proceed with award, at any dollar value, until a tax check has been performed on the apparent successful offeror. See IRS Procedures, Guidance, and Information (PGI) 9.1.

(a) The contracting officer, regardless of an offeror's response in paragraph (a)(1) of the provision 52.209–5, Certification Regarding Responsibility Matters, paragraph (b)(1) of the provision at FAR 52.209–11, or paragraphs (h) and (q)(2)(i) of the provision at FAR 52.212–3 (see FAR 9.104–5(b)), shall request a tax check through the IRS designated point of contact. The request shall include only the information required for purposes of conducting the tax check.

(b) If the result of the tax check demonstrates the offeror as having a delinquent Federal tax liability, the contracting officer shall—

(1) Confirm the offer includes a signed and dated consent to disclosure (see 1052.209–70, Notice and Consent to Disclose and Use of Taxpayer Return Information), the absence of which may remove the offeror from eligibility to receive an award under the solicitation because taxpayer return information of the offeror may not be disclosed.

(2) If the consent to disclosure is completed in the offer, notify the authorized representative(s) of the offeror that a delinquent Federal tax liability exists and therefore the offeror is ineligible for award.

(i) If upon notification the offeror provides the contracting officer with documentation, within the timeframe specified by the contracting officer, that demonstrates the offeror's tax status as being paid-in-full or that an approved payment agreement is in place, the contracting officer will coordinate with the appropriate office within IRS to validate the tax status. If the offeror is found to be tax compliant, the contracting officer will notify the offeror of such. Assuming the offeror meets all other standards of responsibility, the offeror is eligible for award.

(3) Notify, in accordance with IRS PGI 9.1, the Department of the Treasury official responsible for suspension and debarment for purposes of requesting a determination in accordance with FAR 9.104–5(a)(2) and FAR 9.104–5(b)(3) respectively before an award to that contractor can be made.

(c) If the result of the tax check demonstrates the offeror as tax compliant then the offeror is eligible for award, assuming all other standards of responsibility have been met.

(d) The contracting officer shall include in the contract file documentation that verifies the tax check was conducted and if the results confirm a delinquent Federal tax liability existed at the time of award, confirmation that the offeror was notified of such.

1009.7005 Solicitation provision.

(a) The contracting officer shall insert the provision 1052.209–70, Notice and Consent to Disclose and Use of Taxpayer Return Information, in all IRS solicitations regardless of dollar value, including solicitations for acquisition of commercial items (including Commercially Available Off-The-Shelf items).

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 1016—TYPES OF CONTRACTS

AUTHORITY: 41 U.S.C. 1707.

SOURCE: 76 FR 42057, July 18, 2011, unless otherwise noted.

Subpart 1016.5—Indefinite-Delivery Contracts

1016.505 Ordering.

(b)(8) The HCA shall designate a task and delivery order ombudsman in accordance with bureau procedures and provide a copy of the designation to the agency task and delivery order ombudsman. Bureau task and delivery order ombudsmen shall review complaints from contractors concerning task and delivery orders placed by the contracting activity and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract. In the absence of a designation, the Bureau advocate for competition will serve in that capacity.

[80 FR 1159, Mar. 4, 2015]

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 1019—SMALL BUSINESS PROGRAMS

Subpart 1019.2—Policies

Sec.
1019.202 Specific policies.
1019.202–70 Treasury's Mentor-Protégé Program

Subpart 1019.7—The Small Business Subcontracting Program

1019.705 Responsibilities of the Contracting Officer Under the Subcontracting Assistant Program.
1019.705–4 Reviewing the Subcontracting Plan.

Subpart 1019.8—Contracting With the Small Business Administration (The 8(a) Program)

1019.81 Preparing the contracts.
1019.811 Preparing the contracts.
1019.811–3 Contract clauses.

AUTHORITY: 41 U.S.C. 1707.

SOURCE: 76 FR 42057, July 18, 2011, unless otherwise noted.

Subpart 1019.2—Policies

1019.202 Specific policies.

1019.202–70 The Treasury Mentor Protégé Program.

(a)–(b) [Reserved]

(c) *Non-affiliation.* For purposes of the Small Business Act, a protégé firm may not be considered an affiliate of a mentor firm solely on the basis that the protégé firm is receiving developmental assistance referred to in paragraph (m) of this section, from such mentor firm under the Mentor-Protégé Program.

(d) *General policy.* (1) Eligible contractors, not included on the ''System for Award Management Exclusions'' that are approved as mentors will enter into agreements with eligible protégés. Mentors provide appropriate developmental assistance to enhance the capabilities of protégés to perform as contractors or subcontractors.

(2) A firm's status as a protégé under a Treasury contract shall not have an effect on the firm's eligibility to seek other contracts or subcontracts.

(e) *Incentives for contractor participation.* (1) Under the Small Business Act, 15 U.S.C. 637(d)(4)(E), Treasury is authorized to provide appropriate incentives in negotiated contractual actions to encourage subcontracting opportunities consistent with the efficient and economical performance of the contract. Proposed mentor-protégé efforts will be considered during the evaluation of such negotiated, competitive offers. Contracting Officers may provide, as an incentive, a bonus score, not to exceed 5% of the relative importance assigned to the non-price factors. If this incentive is used, the Contracting Officer shall include language in the solicitation indicating that this adjustment may occur.

(2) Before awarding a contract that requires a subcontracting plan, the existence of a mentor-protégé arrangement, and performance (if any) under such an existing arrangement, will be considered by the Contracting Officer in:

(i) Evaluating the quality of a proposed subcontracting plan under FAR 19.705–4; and,

(ii) Evaluating the contractor compliance with the subcontracting plans submitted in previous contracts as a factor in determining contractor responsibility under FAR 19.705–5(a)(1).

(3) The Office of Small and Disadvantaged Business Utilization (OSDBU) Mentoring Award is a non-monetary award that will be presented (annually on a fiscal year basis or as often as is appropriate) to the mentoring firm providing the most effective developmental support of a protégé. The Mentor-Protégé Program Manager will recommend an award winner to the Director, OSDBU.

(f) [Reserved]

(g) *Mentor firms.* A mentor firm may be either a large or small business, eligible for award of a Government contract that can provide developmental assistance to enhance the capabilities of protégés to perform as subcontractors. Mentors will be encouraged to enter into arrangements with protégés

in addition to firms with whom they have established business relationships.

(h) *Protégé firms.* (1) For selection as a protégé, a firm must be:

(i) A small business, women-owned small business, small disadvantaged business, small business owned and controlled by veteran or service disabled veteran, or qualified HUBZone small business, or a qualified 8(a) concern;

(ii) Qualified as a small business under the NAICS code for the services or supplies to be provided by the protégé under its subcontract to the mentor; and

(iii) Eligible for award of Government contracts.

(2) Except small disadvantaged businesses and qualified HUBZone small business firms, a protégé firm may self-certify to a mentor firm that it meets the requirements set forth in paragraph (h)(1) of this section. Mentors may rely in good faith on written representations by potential protégés that they meet the specified eligibility requirements. The h(1)(i), small disadvantaged business, or qualified HUBZone small business status eligibility and documentation requirements are determined according to FAR 19.304 and 19.1303, respectively.

(3) Protégés may not have multiple mentors unless approved, in writing, by the Director, OSDBU. Protégés participating in other agency mentor protégé programs in addition to the Treasury Mentor-Protégé Program should maintain a system for preparing separate reports of mentoring activity for each agency's program.

(i) *Selection of protégé firms.* (1) Mentor firms will be solely responsible for selecting protégé firms. The mentor is encouraged to identify and select the types of protégé firms listed in 1019.202–70(h). Mentor firms may have multiple protégés.

(2) The selection of protégé firms by mentor firms may not be protested. Any question regarding the size or eligibility status of an entity selected by a mentor to be a protégé must be referred solely to Treasury's OSDBU for resolution. Treasury, at its discretion, may seek an advisory opinion from the Small Business Administration (SBA).

(j) *Application process for mentor firms to participate in the program.* (1) Firms interested in becoming a mentor firm may apply in writing to Treasury's OSDBU. The application will be evaluated based upon the description of the nature and extent of technical and managerial support proposed as well as the extent of other developmental assistance in the form of equity investment, loans, joint-venture support and traditional subcontracting support.

(k) *OSDBU review and approval process of agreement.* (1) OSDBU will review the information specified in 1019.202–70(l). The OSDBU review will be completed no later than 30 calendar days after receipt.

(2) Upon completion of the review, the mentor may implement the developmental assistance program.

(3) An approved agreement will be incorporated into the mentor firm's contract(s) with Treasury.

(4) If OSDBU disapproves the agreement, the mentor may provide additional information for reconsideration. Upon finding deficiencies that OSDBU considers correctable, OSDBU will notify the mentor and provide a list of defects. Any additional information or corrections requested will be provided within 30 calendar days. The review of any supplemental material will be completed within 30 calendar days after receipt by OSDBU. When submission of additional data is required during a proposal evaluation for a new contract award, shorter timeframes for submission, review and re-evaluation for approval may be authorized by OSDBU.

(5) The agreement defines the relationship between the mentor and protégé firms only. The agreement itself does not create any privity of contract between the mentor or protégé and Treasury.

(l) *Agreement contents.* The contents of the agreement will contain:

(1) Names and addresses of mentor and protégé firms and a point of contact within both firms who will oversee the agreement;

(2) Procedures for the mentor firm to notify the protégé firm, OSDBU and the Contracting Officer, in writing, at least 30 days in advance of the mentor

firm's intent to voluntarily withdraw from the Mentor-Protégé Program;

(3) Procedures for a protégé firm to notify the mentor firm in writing at least 30 days in advance of the protégé firm's intent to voluntarily terminate the mentor-protégé agreement. The mentor must notify OSDBU and the Contracting Officer immediately upon receipt of such notice from the protégé;

(4) Each proposed mentor-protégé relationship must include information on the mentor's ability to provide developmental assistance to the protégé and how that assistance will potentially increase contracting and subcontracting opportunities for the protégé firm;

(5) A description of the type of developmental program that will be provided by the mentor firm to the protégé firm, to include a description of the potential subcontract work, and a schedule for providing assistance and criteria for evaluation of the protégés developmental success;

(6) A listing of the types and dollar amounts of subcontracts that may be awarded to the protégé firm;

(7) Program participation term;

(8) Termination procedures;

(9) Plan for accomplishing work should the agreement be terminated; and

(10) Other terms and conditions, as appropriate.

(m) *Developmental assistance.* The forms of developmental assistance a mentor can provide to a protégé include:

(1) Management guidance relating to financial management, organizational management, overall business management/planning, business development, and technical assistance.

(2) Loans;

(3) Rent-free use of facilities and/or equipment;

(4) Property;

(5) Temporary assignment of personnel to protégé for purpose of training; and

(6) Any other types of mutually beneficial assistance.

(n) *Obligation.* (1) Mentor or protégé firms may voluntarily withdraw from the Mentor-Protégé Program. However, such withdrawal shall not excuse the contractor from compliance with contract requirements.

(2) At the conclusion of each year in the Mentor-Protégé Program, the contractor and protégé must formally brief the Department of the Treasury team regarding program accomplishments as they pertain to the approved agreement. Individual briefings may be conducted, at the request of either party. Treasury will consider the following:

(i) Specific actions taken by the mentor, during the evaluation period, to increase the participation of protégés as suppliers to the Federal government and to commercial entities;

(ii) Specific actions taken by the mentor, during the evaluation period, to develop the technical and corporate administrative expertise of a protégé as defined in the agreement;

(iii) To what extent the protégé has met the developmental objectives in the agreement; and

(iv) To what extent the mentor firm's participation in the Mentor-Protégé Program resulted in the protégé receiving contract(s) and subcontract(s) from private firms and agencies other than the Department of the Treasury.

(v) Mentor and protégé firms must submit an evaluation to OSDBU at the conclusion of the mutually agreed upon program period, the conclusion of the contract, or the voluntary withdrawal by either party from the Mentor-Protégé Program, whichever comes first.

(vi) Protégé firms shall submit a post completion report 24 months after exiting the Mentor-Protégé Program. The post completion report will assist the Department of the Treasury in assessing the progress of Protégé firms upon completion of the program.

(o) [Reserved]

(p) *Solicitation provisions and contract clauses* (1) Insert the provision at 1052.219–73, Department of the Treasury Mentor-Protégé Program, in all unrestricted solicitations exceeding $650,000 ($1,500,000 for construction) that offer subcontracting possibilities.

(2) Insert the clause at 1052.219–75, Mentor Requirements and Evaluation, in solicitations and contracts where the contractor is a participant in the Treasury Mentor-Protégé Program.

[76 FR 42057, July 18, 2011, as amended at 80 FR 11596, Mar. 4, 2015]

Subpart 1019.8—Contracting With the Small Business Administration (The 8(a) Program)

1019.81 Preparing the contracts.

1019.811–3 Contract clauses.

(d)(3) Insert the clause at 1052.219–18, Notification of Competition Limited to Eligible 8(a) Concerns—Alternate III (Deviation), for paragraph (c) of FAR 52.219–18, Notification of Competition Limited to Eligible 8(a) Concerns, in all solicitations and contracts that exceed $100,000 and are processed under FAR 19.8.

(f) Insert the clause at 1052.219–72, Section 8(a) Direct Awards, in solicitations and contracts that exceed $100,000 and are processed under FAR 19.8 for paragraph (c) of FAR 52.219–11, Special 8(a) Contract Conditions; FAR 52.219–12, Special 8(a) Subcontract Conditions; and FAR 52.219–17, Section 8(a) Award.

[76 FR 42057, July 18, 2011, as amended at 80 FR 11596, Mar. 4, 2015]

PART 1022—MINORITY AND WOMEN INCLUSION

AUTHORITY: 12 U.S.C. 5452.

SOURCE: 79 FR 15554, Mar. 20, 2014, unless otherwise noted.

Subpart 1022.70—Fair inclusion of minorities and women

1022.7000 Contract clause.

Insert the clause at 1052.222–70, Minority and Women Inclusion, in all solicitations and contracts in support of Departmental Offices for services that exceed the simplified acquisition threshold.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 1028—BONDS AND INSURANCE

Subpart 1028.3—Insurance

Sec.
1028.307 Insurance under cost-reimbursement contracts.
1028.307–1 Group insurance plans.
1028.310 Contract clause for work on a Government installation.
1028.310–70 Agency contract clause for work on a Government installation.
1028.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.
1028.311–2 Agency solicitation provisions and contract clauses.

AUTHORITY: 41 U.S.C. 1707.

SOURCE: 76 FR 42057, July 18, 2011, unless otherwise noted.

Subpart 1028.3—Insurance

1028.307 Insurance under cost-reimbursement contracts.

1028.307–1 Group insurance plans.

(a) Plans shall be submitted to the CO.

1028.310 Contract clause for work on a Government installation.

1028.310–70 Agency contract clause for work on a Government installation.

(a) Insert a clause substantially similar to 1052.228–70, Insurance requirements, in all solicitations and contracts that contain the clause at FAR 52.228–5.

[80 FR 11596, Mar. 4, 2015]

1028.311 Solicitation provision and contract clause on liability insurance under cost reimbursement contracts.

1028.311–2 Agency solicitation provisions and contract clauses.

Insert a clause substantially similar to 1052.228–70, Insurance requirements, in all solicitations and contracts that contain the clause at FAR 52.228–7.

[80 FR 11596, Mar. 4, 2015]

PART 1032—CONTRACT FINANCING

Subpart 1032.1—Non-Commercial Item Purchase Financing

Sec.
1032.113 Customary contract financing.

Subpart 1032.2—Commercial Item Purchase Financing

1032.202 General.
1032.202–1 Policy.

Subpart 1032.7—Contract Funding

1032.770 Incremental funding during a Continuing Resolution.
1032.770–1 Scope of section.
1032.770–2 Definition.
1032.770–3 General.
1032.770–4 Policy.
1032.770–5 Limitations.
1032.770–6 Procedures.
1032.770–7 Clause.

Subpart 1032.70—Electronic Submission and Processing of Payment Requests

1032.7000 Scope of subpart.
1032.7001 Definitions.
1032.7002 Policy.
1032.7003 Contract clause.

AUTHORITY: 41 U.S.C. 1707.

SOURCE: 76 FR 42057, July 18, 2011, unless otherwise noted.

Subpart 1032.1—Non-Commercial Item Purchase Financing

1032.113 Customary contract financing.

The specified arrangements are considered customary within Treasury.

Subpart 1032.2—Commercial Item Purchase Financing

1032.202 General.

1032.202–1 Policy.

(b)(2) Commercial interim payments and commercial advance payments may also be made when the contract price is at or below the simplified acquisition threshold.

Subpart 1032.7—Contract Funding

SOURCE: 81 FR 80609, Nov. 16, 2016, unless otherwise noted.

1032.770 Incremental funding during a Continuing Resolution.

1032.770–1 Scope of section.

This section provides policy and procedure for using incremental funding for fixed-price, time-and-material and labor-hour contracts during a period in which funds are provided to Treasury Departmental Offices or Bureaus, under a continuing resolution (CR). HCAs may develop necessary supplemental internal procedures as well as guidance to advise potential offerors, offerors and contractors of these policies and procedures. Additionally, Bureaus who receive non-appropriated funds may utilize and tailor these policies and procedures to fit their needs.

1032.770–2 Definition.

''Continuing Resolution'' means an appropriation, in the form of a joint resolution, that provides budget authority for federal agencies, specific activities, or both to continue operation until the regular appropriations are enacted. Typically, a continuing resolution is used when legislative action on appropriations is not completed by the beginning of a fiscal year.

1032.770–3 General.

The Anti-Deficiency Act, 31 U.S.C. 1341 and FAR 32.702, states that no officer or employee of the Government may create or authorize an obligation in excess of the funds available, or in advance of appropriations unless otherwise authorized by law. A CR provides funding for continuing projects or activities that were conducted in the prior fiscal year for which appropriations, funds, or other authority was previously made available. Each CR is governed by the specific terms in that specific CR (*e.g.* duration of the CR) and under certain CRs, the funding amounts available for award of contract actions are inadequate to fund the entire amounts needed for some contract actions.

1032.770–4 Policy.

(a) A fixed-price, time-and-materials or labor-hour contract or order for commercial or non-commercial supplies or severable or non-severable services may be incrementally funded when—

(1) Funds are provided to a Treasury Departmental Office or Bureau under a CR. This includes funds appropriated to a bureau, funds appropriated to another entity that will be directly obligated on a Treasury contract, and funds in a revolving fund or similar account that will be reimbursed by a customer agency funded by a CR;

(2) Sufficient funds are not being allocated from the responsible fiscal authority to fully fund the contract action that is otherwise authorized to be issued;

(3) There is no statutory restriction that would preclude the proposed use of funds;

(4) Funds are available and unexpired, as of the date the funds are obligated;

(5) Assurance is provided by the responsible financial authority that full funding is anticipated once an Appropriation Act is enacted; and

(6) The clause prescribed by 1032.770–7 is incorporated into the contract or order.

(b) Incremental funding may be limited to individual line item(s) or a particular order(s).

1032.770–5 Limitations.

(a) This policy does not apply to contract actions that are not covered by the CR.

(b) If this policy is applied to non-severable services or to supplies, the contracting officer shall take into consideration the business risk to the Government if funding does not become available to fully fund the contract. If the contracting officer determines the use of incremental funding for non-severable services or supplies is in the best interest of the Government the contracting officer shall ensure the contractor fully understands how the limitations of the Government's liabilities under the contract might impact its ability to perform within the prescribed contract schedule.

1032.770–6 Procedures.

(a) An incrementally funded fixed-price, time-and-materials or labor-hour contract shall be fully funded once funds are available.

(b) The contracting officer shall ensure that sufficient funds are allotted to the contract to cover the total amount payable to the contractor in the event of termination of convenience by the Government.

(c) Upon receipt of the contractor's notice under paragraph (c) of the clause at 1052.232–90, Limitation of Government's Obligation, the contracting officer shall promptly provide written notice to the contractor that the Government is—

(i) Obligating additional funds for continued performance and increasing the Government's limitation of obligation in a specified amount;

(ii) Obligating the full amount of funds needed;

(iii) Terminating for convenience, as applicable, the affected line items or contract; or

(iv) Considering whether to allot additional funds; and

(A) The contractor is entitled by the contract terms to stop work when the Government's limitation of obligation is reached; and

(B) Any costs expended beyond the Government's limitation of obligation are at the contractor's risk.

(d) Upon learning that the contract will receive no further funds by the date provided in the notice under paragraph (c) of the clause at 1052.232–70, Limitation of Government's Obligation, the contracting officer shall promptly give the contractor written notice of the Government's decision and terminate the affected line items or contract, as applicable, for the convenience of the Government.

1032.770–7 Clause.

The contracting officer shall insert the clause at 1052.232–70, Limitation of Government's Obligation, in

(a) Solicitations and resultant contracts when incremental funding of fixed-price, time-and-material or labor-hour contract via a CR is anticipated; or

(b) Contracts or orders when incremental funding of a fixed-price, time-and-material or labor-hour contract is authorized and the Treasury Departmental Office or Bureau is operating under a CR (see 1032.770–4); and

(c) The CO shall insert the information required in paragraphs (a) and (c) of the clause.

Subpart 1032.70—Electronic Submission and Processing of Payment Requests

SOURCE: 77 FR 40304, July 9, 2012, unless otherwise noted.

1032.7000 Scope of subpart.

This subpart prescribes policies and procedures for electronic submission and processing of payment requests.

1032.7001 Definitions.

''Payment request,'' as used in this subpart, is defined in the clause at 1052.232–7003, Electronic Submission of Payment Requests.

1032.7002 Policy.

(a) Contracts shall require the electronic submission of payment requests, except for—

(1) Purchases paid for with a Government-wide commercial purchase card;

(2) Classified contracts or purchases when electronic submission and processing of payment requests could compromise classified information or national security;

(b) Where a contract otherwise requires the electronic submission of invoices, the Contracting Officer may authorize alternate procedures only if the Contracting Officer makes a written determination that:

(1) The Department of the Treasury is unable to receive electronic payment requests or provide acceptance electronically;

(2) The contractor has demonstrated that electronic submission would be unduly burdensome; or

(3) The contractor is in the process of transitioning to electronic submission of payment requests, but needs additional time to complete such transition. Authorizations granted on this basis must specify a date by which the contractor will transition to electronic submission.

(c) Except as provided in paragraphs (a) and (b) of this section, Treasury officials shall process electronic payment submissions through the Treasury Invoice Processing Platform or successor system.

(d) If the requirement for electronic submission of payment requests is waived under paragraph (a)(2) or paragraph (b) of this section, the contract or alternate payment authorization, as applicable, shall specify the form and method of payment request submission.

[76 FR 42057, July 18, 2011, as amended at 80 FR 11596, Mar. 4, 2015]

1032.7003 Contract clause.

Except as provided in 1032.7002(a), use the clause at 1052.232–7003, Electronic Submission of Payment Requests, in all solicitations and contracts.

[80 FR 11596, Mar. 3, 2015]

PART 1033—PROTESTS, DISPUTES, AND APPEALS

AUTHORITY: 41 U.S.C. 418b.

SOURCE: 76 FR 42057, July 18, 2011, unless otherwise noted.

Subpart 1033.2—Disputes and Appeals

1033.201 Definitions.

Agency Board of Contract Appeals means the Civilian Board of Contract Appeals (CBCA). The CBCA is the authorized representative of the Secretary of the Treasury in hearing, considering, and determining all appeals of decisions of Contracting Officers filed by contractors pursuant to FAR Subpart 33.2. Appeals are governed by the Rules of Procedure of the CBCA.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 1034—MAJOR SYSTEM ACQUISITION

Subpart 34.0—General

Sec.
1034.001 Definitions.
1034.004 Acquisition strategy.

AUTHORITY: 41 U.S.C. 1707.

Subpart 34.0—General

1034.001 Definitions.

As used in this part—

Development, Modernization, Enhancement (DME) is the portion of an IT investment/project which deals with developing and implementing new or enhanced technology in support of an agency's mission.

Major acquisitions for development are defined as contracts, awarded in support of one or more Major IT investments with DME activities, which meet the contract threshold for fully applying FAR 34.2 procedures.

Performance-based acquisition management means a documented, systematic process for program management, which includes integration of program scope, schedule and cost objectives, establishment of a baseline plan for accomplishment of program objectives, and use of earned value techniques for performance measurement during execution of the program. A performance-based acquisition (as defined in FAR 37.101) or an acquisition with a defined quality assurance plan that includes performance standards/measures should be the basis for monitoring the contractor.

[76 FR 42057, July 18, 2011, as amended at 80 FR 11596, Mar. 4, 2015]

1034.004 Acquisition strategy.

(a) A program manager's acquisition strategy written at the system or investment level in accordance with FAR 7.103(e) shall include at a minimum:

(1) The relationship of each individual acquisition (Contract, Delivery Order, Task Order, or Interagency Agreement) to the overall investment requirements and management structure;

(2) What work is being performed in-house (by government personnel) versus contracted out for the investment;

(3) A description of the effort, by acquisition, and the plans to include required clauses in the acquisitions;

(4) A timetable of major acquisition award and administration activities, including plans for contract transitions;

(5) An investment/system surveillance plan;

(6) Financial and human resource requirements to manage the acquisition processes through the investment lifecycle;

(7) Consideration of optimal contract types, including considerations of performance based approaches, small business utilization, Section 508, etc.; and

(8) Assurances that the acquisition strategy section and supporting acquisition plans will maximize competition, including enabling downstream competition through avoidance of vendor ''lock in''.

(b) The acquisition strategy shall be approved by a chartered interdisciplinary acquisition team that includes a representative of the procurement organization designated in accordance with bureau procedures.

PART 1036—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

AUTHORITY: 41 U.S.C. 418b.

SOURCE: 76 FR 42057, July 18, 2011, unless otherwise noted.

Subpart 1036.6—Architect-Engineer Services

1036.602–5 Short selection process for contracts not to exceed the simplified acquisition threshold.

Bureaus are authorized to use either process.

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 1042—CONTRACT ADMINISTRATION AND AUDIT SERVICES

AUTHORITY: 41 U.S.C. 1707.

SOURCE: 76 FR 42057, July 18, 2011, unless otherwise noted.

1042.1500 [Reserved]

SUBCHAPTER H—CLAUSES AND FORMS

PART 1052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 1052.2—Texts of Provisions and Clauses

Sec.

1052.201–70 Contracting Officer's Representative (COR) appointment and authority.
1052.209–70 Notice and consent to disclose and use of taxpayer return information.
1052.210–70 Contractor publicity.
1052.219–18 Notification of competition limited to eligible 8(a) Concerns—Alternate III (Deviation).
1052.219–72 Section 8(a) direct awards.
1052.219–73 Department of the Treasury Mentor-Protégé Program.
1052.219–75 Mentor requirements and evaluation.
1052.222–70 Minority and Women Inclusion.
1052.228–70 Insurance requirements.
1052.232–70 Limitation of Government's obligation.
1052.232–7003 Electronic submission of payment requests.

AUTHORITY: 41 U.S.C. 1707.

SOURCE: 76 FR 42057, July 18, 2011, unless otherwise noted.

Subpart 1052.2—Texts of Provisions and Clauses

EDITORIAL NOTE: At 79 FR 15554, Mar. 20, 2014, subpart 1052.2 was added, however, the amendment could not be incorporated due to inaccurate amendatory instruction.

1052.201–70 Contracting Officer's Representative (COR) appointment and authority.

As prescribed in 1001.670–6, insert the following clause:

CONTRACTING OFFICER'S REPRESENTATIVE (COR) APPOINTMENT AND AUTHORITY (APR 2015)

(a) The COR is _____ [insert name, address and telephone number].

(b) Performance of work under this contract is subject to the technical direction of the COR identified above, or a representative designated in writing. The term ''technical direction'' includes, without limitation, direction to the contractor that directs or redirects the labor effort, shifts the work between work areas or locations, and/or fills in details and otherwise serves to ensure that tasks outlined in the work statement are accomplished satisfactorily.

(c) Technical direction must be within the scope of the contract specification(s)/work statement. The COR does not have authority to issue technical direction that:

(1) Constitutes a change of assignment or additional work outside the contract specification(s)/work statement;

(2) Constitutes a change as defined in the clause entitled ''Changes'';

(3) In any manner causes an increase or decrease in the contract price, or the time required for contract performance;

(4) Changes any of the terms, conditions, or specification(s)/work statement of the contract;

(5) Interferes with the contractor's right to perform under the terms and conditions of the contract; or

(6) Directs, supervises or otherwise controls the actions of the Contractor's employees.

(d) Technical direction may be oral or in writing. The COR must confirm oral direction in writing within five workdays, with a copy to the Contracting Officer.

(e) The Contractor shall proceed promptly with performance resulting from the technical direction issued by the COR. If, in the opinion of the Contractor, any direction of the COR or the designated representative falls within the limitations of (c) above, the Contractor shall immediately notify the Contracting Officer no later than the beginning of the next Government work day.

(f) Failure of the Contractor and the Contracting Officer to agree that technical direction is within the scope of the contract shall be subject to the terms of the clause entitled ''Disputes.''

(End of clause)

[76 FR 42057, July 18, 2011, as amended at 80 FR 11596, Mar. 4, 2015; 81 FR 2760, Jan. 19, 2016]

1052.209–70 Notice and Consent to Disclose and Use of Taxpayer Return Information.

As prescribed in 1009.7005, insert the following provision:

NOTICE AND CONSENT TO DISCLOSE AND USE OF TAXPAYER RETURN INFORMATION (NOV 2017)

(a) *Definitions.* As used in this provision—

Authorized representative(s) of the offeror means the person(s) identified to the Internal Revenue Service (IRS) within the consent to disclose by the offeror as authorized

to represent the offeror in disclosure matters pertaining to the offer.

Delinquent Federal tax liability means 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.

Tax check means an IRS process that accesses and uses taxpayer return information to support the Government's determination of an offeror's eligibility to receive an award, including but not limited to implementation of the statutory prohibition of making an award to corporations that have an unpaid Federal tax liability (see FAR 9.104–5(b)).

(b) *Notice.* Pursuant to 26 U.S.C. 6103(a) taxpayer return information, with few exceptions, is confidential. Under the authority of 26 U.S.C. 6103(h)(1), officers and employees of the Department of the Treasury, including the IRS, may have access to taxpayer return information as necessary for purposes of tax administration. The Department of the Treasury has determined that an IRS contractor's compliance with the tax laws is a tax administration matter and that the access to and use of taxpayer return information is needed for determining an offeror's eligibility to receive an award, including but not limited to implementation of the statutory prohibition of making an award to corporations that have an unpaid Federal tax liability (see FAR 9.104–5).

(1) The performance of a tax check is one means that will be used for determining an offeror's eligibility to receive an award in response to this solicitation (see FAR 9.104). As a result, the offeror may want to take steps to confirm it does not have a delinquent Federal tax liability prior to submission of its response to this solicitation. If the offeror recently settled a delinquent Federal tax liability, the offeror may want to take steps to obtain information in order to demonstrate the offeror's responsibility to the contracting officer (see FAR 9.104–5).

(c) The offeror shall execute the consent to disclosure provided in paragraph (d) of this provision and include it with the submission of its offer. The consent to disclosure shall be signed by an authorized person as required and defined in 26 U.S.C. 6103(c) and 26 CFR 301.6103(c)–1(e)(4).

(d) Consent to disclosure. I hereby consent to the disclosure of taxpayer return information (as defined in 26 U.S.C. 6103(b)(2)) as follows:

The Department of the Treasury, Internal Revenue Service, may disclose the results of the tax check conducted in connection with the offeror's response to this solicitation, including taxpayer return information as necessary to resolve any matters pertaining to the results of the tax check, to the authorized representatives of [*insert OFFEROR NAME*] on this offer.

I am aware that in the absence of this authorization, the taxpayer return information of [*insert OFFEROR NAME*] is confidential and may not be disclosed, which subsequently may remove the offer from eligibility to receive an award under this solicitation.

I consent to disclosure of taxpayer return information to the following person(s):

I am aware that in the absence of this authorization, the taxpayer return information of [*insert OFFEROR NAME*] is confidential and may not be disclosed, which subsequently may remove the offer from eligibility to receive an award under this solicitation.

I consent to disclosure of taxpayer return information to the following person(s):

[*insert PERSON(S) NAME AND CONTACT INFORMATION*]: _____

_____

_____

I certify that I have the authority to execute this consent on behalf of [*insert OFFEROR NAME*].

Offeror Name: _____

Offeror Taxpayer Identification Number: ____

Offeror Address: _____

Name of Individual Executing Consent: ____

_____

Title of Individual Executing Consent: _____

_____

Signature: _____

Date: _____

(End of provision)

[82 FR 53429, Nov. 16, 2017]

1052.210–70 Contractor publicity.

As prescribed in 1009.204–70, insert the following clause:

CONTRACTOR PUBLICITY (APR 2015)

The Contractor, or any entity or representative acting on behalf of the Contractor, shall not refer to the supplies or services furnished pursuant to the provisions of this contract in any news release or commercial advertising, or in connection with any news release or commercial advertising, without first obtaining explicit written consent to do so from the Contracting Officer. Should any reference to such supplies or services appear in any news release or commercial advertising issued by or on behalf of the Contractor without the required consent, the Government shall consider institution of all

remedies available under applicable law, including 31 U.S.C. 333, and this contract. Further, any violation of this clause may be considered as part of the evaluation of past performance.

(End of clause)

[80 FR 11596, Mar. 4, 2015]

1052.219–18 Notification of competition limited to eligible 8(a) concerns—Alternate III (Deviation) (MAY 1998).

In accordance with 1019.811–3(d)(3), substitute the following for the paragraph (c) in FAR 52.219–18:

(c) Any award resulting from this solicitation will be made directly by the contracting officer to the successful 8(a) offeror selected through the evaluation criteria set forth in this solicitation.

1052.219–72 Section 8(a) direct awards.

As prescribed in 1019.811–3(f), insert the following clause:

8(a) BUSINESS DEVELOPMENT PROGRAM AWARDS (JUN 2003)

(a) This purchase/delivery/task order or contract is issued by the contracting activity directly to the 8(a) program participant/contractor pursuant to the Partnership Agreement between the Small Business Administration (SBA) and the Department of the Treasury. However, the Small Business Administration is the prime contractor and retains responsibility for 8(a) certification, 8(a) eligibility determinations and related issues, and provides counseling and assistance to the 8(a) contractor under the 8(a) Business Development program. The cognizant SBA district office is:
[*To be completed by the contracting officer at the time of award*]

(b) The contracting officer is responsible for administering the purchase/delivery/task order or contract and taking any action on behalf of the Government under the terms and conditions of the purchase/delivery/task order or contract, to include providing the cognizant SBA district office with a signed copy of the purchase/delivery/task order or contract award within 15 days of the award. However, the contracting officer shall give advance notice to the SBA before it issues a final notice terminating performance, either in whole or in part, under the purchase order or contract. The contracting officer shall also coordinate with SBA prior to processing any novation agreement. The contracting officer may assign contract administration functions to a contract administration office.

(c) The contractor agrees:

(1) to notify the contracting officer, simultaneously with its notification to SBA (as required by SBA's 8(a) regulations), when the owner or owners upon whom 8(a) eligibility is based, plan to relinquish ownership or control of the concern. Consistent with 15 U.S.C. 637(a)(21), transfer of ownership or control shall result in termination of the contract for convenience, unless SBA waives the requirement for termination prior to the actual relinquishing of control; and,

(2) to adhere to the requirements of FAR 52.219–14, Limitations on Subcontracting.

(End of clause)

1052.219–73 Department of the Treasury Mentor-Protégé Program.

As prescribed in 1019.202–70.(p), insert the following clause:

DEPARTMENT OF THE TREASURY MENTOR-PROTÉGÉ PROGRAM (JUN 2003)

(a) Large and small businesses are encouraged to participate in the Department of the Treasury Mentor-Protégé Program. Mentor firms provide small business protégés with developmental assistance to enhance their capabilities and ability to obtain Federal contracts.

(b) Mentor firms are large prime contractors or eligible small businesses capable of providing developmental assistance. Protégé firms are small businesses as defined in 13 CFR parts 121, 124, and 126.

Developmental assistance includes technical, managerial, financial, and other mutually beneficial assistance to aid protégé. Contractors interested in participating in the Program are encouraged to contact the Department of the Treasury Office of Small and Disadvantaged Business Utilization for further information.

(End of provision)

1052.219–75 Mentor Requirements and Evaluation.

As prescribed in 1019.202–70(p), insert the following clause:

MENTOR REQUIREMENTS AND EVALUATION (AUG 2011)

(a) Mentor and protégé firms shall submit an evaluation to the Department of the Treasury's Office of Small and Disadvantaged Business Utilization (OSDBU) at the conclusion of the mutually agreed upon Program period, or the voluntary withdrawal by either party from the Program, whichever occurs first. At the conclusion of each year in the Mentor-Protégé Program, the prime contractor and protégé will formally brief the Department of the Treasury Mentor-

Protégé Program Manager regarding program accomplishments under their mentor-protégé agreements.

(b) A mentor or protégé must notify the OSDBU and the contracting officer, in writing, at least 30 calendar days in advance of the effective date of the firm's withdrawal from the Program. A mentor firm must notify the OSDBU and the contracting officer upon receipt of a protégé's notice of withdrawal from the Program.

(c) Contracting officers may provide, as an incentive, a bonus score, not to exceed 5% of the relative importance assigned to the non-price factors. If this incentive is used, the contracting officer shall include language in the solicitation indicating that this adjustment may occur.

(End of clause)

1052.222–70 Minority and Women Inclusion.

As prescribed in 1022.7000, insert the following clause:

MINORITY AND WOMEN INCLUSION (JAN 2016)

(a) Contractor confirms its commitment to equal opportunity in employment and contracting. To implement this commitment, the Contractor shall ensure, to the maximum extent possible consistent with applicable law, the fair inclusion of minorities and women in its workforce. The Contractor shall insert the substance of this clause in all subcontracts awarded under this contract whose dollar value exceeds $150,000. Within ten business days of a written request from the Contracting Officer, or such longer time as the Contracting Officer determines, and without any additional consideration required from the Agency, the Contractor shall provide documentation, satisfactory to the Agency, of the actions it (and as applicable, its subcontractors) has undertaken to demonstrate its good faith effort to comply with the aforementioned provisions. For purposes of this contract, ''good faith effort'' may include actions by the Contractor intended to identify and, if present, remove barriers to minority and women employment or expansion of employment opportunities for minorities and women within its workforce. Efforts to remove such barriers may include, but are not limited to, recruiting minorities and women, providing job-related training, or other activity that could lead to those results.

(b) The documentation requested by the Contracting Officer to demonstrate ''good faith effort'' may include, but is not limited to, one or more of the following—

(1) The total number of Contractor's employees, and the number of minority and women employees, by race, ethnicity, and gender (*e.g.*, an EEO–1);

(2) A list of subcontract awards under the contract that includes: Dollar amount, date of award, and subcontractor's race, ethnicity, and/or gender ownership status;

(3) Information similar to that required in paragraph (b)(1) of this clause, with respect to each subcontractor; and/or

(4) The Contractor's plan to ensure that minorities and women have appropriate opportunities to enter and advance within its workforce, including outreach efforts.

(c) Consistent with Section 342(c)(3) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Pub. L. 111–203) (Dodd-Frank Act), a failure to demonstrate to the Director of the Agency's Office of Minority and Women Inclusion such good faith efforts to include minorities and women in the Contractor's workforce (and as applicable, the workforce of its subcontractors), may result in termination of the contract for default, other contractual remedies, or referral to the Office of Federal Contract Compliance Programs (OFCCP). Compliance with this clause does not, however, necessarily satisfy the requirements of Executive Order 11246, as amended, nor does it preclude OFCCP compliance evaluations and/or enforcement actions undertaken pursuant to that Executive Order.

(d) For purposes of this clause, the terms ''minority,'' ''minority-owned business,'' and ''women-owned business'' shall have the meanings set forth in Section 342(g) of the Dodd-Frank Act.

[81 FR 2761, Jan. 19, 2016]

1052.228–70 Insurance requirements.

As prescribed in 1028.310–70 and 1028.311–2, insert a clause substantially as follows: The contracting officer may require additional kinds of insurance (*e.g.*, aircraft public and passenger liability, vessel liability) or higher limits of coverage.

INSURANCE (APR 2015)

In accordance with FAR clause 52.228–5, entitled ''Insurance—Work on a Government Installation'' [or FAR clause 52.228–7 entitled, ''*Insurance—Liability to Third Persons*''], insurance of the following kinds and minimum amounts shall be provided and maintained during the period of performance of this contract:

(a) *Worker's compensation and employer's liability.* The Contractor shall, as a minimum, meet the requirements specified at FAR 28.307–2(a).

(b) *General liability.* The Contractor shall, at a minimum, meet the requirements specified at FAR 28.307–2(b).

(c) *Automobile liability.* The Contractor shall, at a minimum, meet the requirements specified at FAR 28.307–2(c).

(End of clause)

[80 FR 11597, Mar. 4, 2015]

1052.232–70 Limitation of Government's obligation.

As prescribed in 1032.770–7, insert the following clause. Contracting officers are authorized, in appropriate cases, to revise paragraph (a) of this clause to specify the work required under the contract, in lieu of using contract line item numbers as well as revise paragraph (c) of this clause to specify a different notification period and percentage. The 30-day period may be varied from 45, 60 to 90 days, and the 75 percent from 75 to 85 percent:

LIMITATION OF GOVERNMENT'S OBLIGATION
(NOV 2016)

(a) Funding is not currently available to fully fund this contract due to the Government operating under a continuing resolution (CR). The item(s) listed in the table below are being incrementally funded as described below. The funding allotted to these item(s) is presently available for payment and allotted to this contract. This table will be updated by a modification to the contract when additional funds are made available, if any, to this contract.

Contract line item number (CLIN)	CLIN total price	Funds allotted to the CLIN	Funds required for complete funding of the CLIN
	$	$	$
	$	$	$
	$	$	$
	$	$	$
Totals	$	$	$

(b) For the incrementally funded item(s) identified in paragraph (a) of this clause, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including any invoice payments to which the Contractor is entitled and reimbursement of authorized termination costs in the event of termination of those item(s) for the Government's convenience, does not exceed the total amount currently obligated to those item(s). The Contractor is not authorized to continue work on these item(s) beyond that point. The Government will not be obligated in any event to reimburse the Contractor in excess of the amount allotted to the line items of the contract regardless of anything to the contrary in any other clause, including but not limited to the clause entitled ''Termination for Convenience of the Government'' or paragraph (1) entitled ''Termination for the Government's Convenience'' of the clause at FAR 52.212–4, ''Commercial Terms and Conditions Commercial Items.''

(c) Notwithstanding paragraph (h) of this clause, the Contractor shall notify the Contracting Officer in writing at least thirty days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the item(s) identified in paragraph (a) of this clause. The notification shall state the estimated date when that point will be reached and an estimate of additional funding, if any, needed to continue performance. The notification shall also advise the Contracting Officer of the estimated amount of additional funds required for the timely performance of the item(s) funded pursuant to this contract. If after such notification additional funds are not allotted by the date identified in the Contractor's notification, or by an agreed upon substitute date, the Contracting Officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the terms of this contract authorizing termination for the convenience of the Government. Failure to make the notification required by this paragraph, whether for reasons within or beyond the Contractor's control, will not increase the maximum amount payable to the Contractor under paragraphs (a) and (b) of this clause.

(d) The Government may at any time prior to termination allot additional funds for the performance of the item(s) identified in paragraph (a) of this clause.

(e) The termination provisions of paragraphs (a) through (h) of this clause do not limit the rights of the Government under the clause entitled ''Default'' or ''Termination for Cause.'' The provisions of this clause are limited to the work and allotment of funds for the item(s) set forth in paragraph (a) of this clause. This clause no longer applies once the contract is fully funded.

(f) Nothing in this clause affects the right of the Government to terminate this contract pursuant to the Government's termination for convenience terms set forth in this contract.

(g) Nothing in this clause shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342.

(h) The parties contemplate that the Government will allot funds to this contract from time to time as the need arises and as funds become available. There is no fixed schedule for providing additional funds.

(End of clause)

[81 FR 80609, Nov. 16, 2016]

1052.232–7003 Electronic submission of payment requests.

As prescribed in 1032.7003, use the following clause:

ELECTRONIC SUBMISSION OF PAYMENT REQUESTS (APR 2015)

(a) *Definitions.* As used in this clause—

(1) ''*Payment request*'' means a bill, voucher, invoice, or request for contract financing payment with associated supporting documentation. The payment request must comply with the requirements identified in FAR 32.905(b), ''Content of Invoices'' and the applicable Payment clause included in this contract.

(b) Except as provided in paragraph (c) of this clause, the Contractor shall submit payment requests electronically using the Invoice Processing Platform (IPP). Information regarding IPP, including IPP Customer Support contact information, is available at *www.ipp.gov* or any successor site.

(c) The Contractor may submit payment requests using other than IPP only when the Contracting Officer authorizes alternate procedures in writing in accordance with Treasury procedures.

(d) If alternate payment procedures are authorized, the Contractor shall include a copy of the Contracting Officer's written authorization with each payment request.

(End of clause)

[80 FR 11597, Mar. 4, 2015]

PARTS 1053–1099 [RESERVED]

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SUBCHAPTER A—GENERAL

PART 1200 [RESERVED]

PART 1201—FEDERAL ACQUISITION REGULATIONS SYSTEM

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AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1201.1—Purpose, Authority, Issuance

1201.101 Purpose.

The Department of Transportation (DOT), Transportation Acquisition Regulation (TAR), establishes uniform acquisition policies and procedures that implement and supplement the Federal Acquisition Regulation (FAR). The TAR provides regulatory or policy instruction when coverage is needed for DOT-specific subject matter not covered in the FAR. The TAR also includes policy statements that DOT considers important to both internal and external TAR audiences. The Transportation Acquisition Manual (TAM) contains internal operating procedures, providing supplementary guidance and instructions for carrying out FAR and TAR requirements.

1201.102–70 DOT statement of guiding principles for the Department of Transportation Acquisition System.

(a) *Vision.* The TAR applies to all Department acquisitions unless otherwise excluded by statute. DOT strives to make its acquisition process effective, efficient, and transparent, and to ensure that the process embodies fairness and Governmentwide best practices.

(b) *Mission.* The TAR is a key component of DOT's acquisition process and is designed to provide clear and current regulatory and policy oversight to supplement or support implementation of the FAR.

(c) *Role of the Office of the Senior Procurement Executive.* The Office of the Senior Procurement Executive (OSPE) applies leadership and best-in-industry acquisition practices to establish acquisition policies and procedures. The OSPE supports the DOT's mission by providing timely, effective, and ethical business policies, practices, products, innovative programs, strategies, and services.

1201.104 Applicability.

(a) Applicable statutes, the FAR, 48 CFR chapter 1, and the TAR, in this chapter, apply to all acquisitions within the Department unless otherwise specifically excluded by statute, the FAR, or the TAR.

(b) The following order of precedence applies to resolve any question of applicability concerning an acquisition regulation or a procedure found within the TAR, or the TAM which comprises the Department's internal operating procedures and guidance—

(1) U.S. Statutes;

(2) The FAR;

(3) The TAR;

(4) DOT Orders; and

(5) The TAM.

(c) The Maritime Administration may depart from the requirements of the FAR and TAR as authorized by 40 U.S.C. 113(e)(15), but shall adhere to those regulations to the maximum extent practicable. Deviations from the FAR or TAR requirements shall be documented according to Maritime Administration procedures or in each contract file, as appropriate.

(d) The FAR, TAR, and TAM do not apply to the Federal Aviation Administration as provided by 49 U.S.C. 40110(d).

(e) For purposes of the FAR, TAR, and TAM, the Office of the Assistant Secretary for Research and Technology shall have the same authority as an Operating Administration as defined in 1202.1, and the Assistant Secretary for Research and Technology shall have the same authority as a Head of the Operating Administration as defined in 1202.1.

1201.105 Issuance.

1201.105–1 Publication and code arrangement.

(a) The TAR is published or available in—

(1) The FEDERAL REGISTER;

(2) Cumulative form in the CFR; and

(3) Online via the internet at *https://www.acquisition.gov/tar*.

(b) The TAR is issued as this chapter.

1201.105–2 Arrangement of regulations.

(a) *General.* The TAR, which encompasses both Department and Operating Administration (OA)/Office of the Assistant Secretary for Research and Technology (OST–R)-specific guidance (*see* subpart 1201.3), conforms with the arrangement and numbering system prescribed by FAR 1.104. Guidance that is OA-specific contains the OA's acronym directly after the heading.

(b) *Numbering*—(1) *Department-wide guidance.* (i) The numbering illustrations at FAR 1.105–2(b) apply to the TAR.

(ii) Coverage within the TAR is identified by the prefix ''12'' followed by the complete TAR citation. For example, 1201.201–1(b).

(iii) Coverage in the TAR that supplements the FAR will use part, subpart, section, and subsection numbers ending in ''70'' through ''89'' (*e.g.*, 1201.301–70). A series of numbers beginning with ''70'' is used for provisions and clauses.

(iv) Coverage in the TAR, other than that identified with a ''70'' or higher number, that implements the FAR uses the identical number sequence and caption of the FAR segment being implemented, which may be to the paragraph level. Paragraph numbers and letters are not always shown sequentially, but may be shown by the specific FAR paragraph implemented. For example, TAR 1201.201–1 contains only paragraph (b) because only this paragraph, correlated with the FAR, is implemented in the TAR.

(2) *Operating Administration-unique guidance.* Supplementary material for which there is no counterpart in the FAR or TAR shall be identified using chapter, part, subpart, section, or subsection numbers of ''90'' and higher.

(c) *References and citations.* The Department of Transportation Acquisition Regulation may be referred to as the TAR. Cross reference to the FAR in the TAR will be cited by ''FAR'' followed by the FAR numbered citation, and cross reference to the TAM in the TAR will be cited by ''TAM'' followed by the TAM numbered citations. References to specific citations within the TAR will be referenced by the numbered citation only, *e.g.*, 1201.105–3.

(3) Using the TAR coverage at 1201.105–2(b) as a typical illustration, reference to the—

(i) Part would be ''TAR part 1201'' outside the TAR and ''part 1201'' within the TAR.

(ii) Subpart would be ''TAR subpart 1201.1'' outside the TAR and ''subpart 1201.1'' within the TAR.

(iii) Section would be ''TAR 1201.105'' outside the TAR and ''1201.105'' within the TAR.

(iv) Subsection would be ''TAR 1201.105–2'' outside the TAR and ''1201.105–2'' within the TAR.

(v) Paragraph would be ''TAR 1201.105–2(b)'' outside the TAR and ''1201.105–2(b)'' within the TAR.

1201.105–3 Copies.

(a) Copies of the TAR as published in FEDERAL REGISTER and as set forth in the CFR may be purchased from the Government Publishing Office (GPO), U.S. Government Online Bookstore on the internet at *https://bookstore.gpo.gov/*.

(b) The TAR and Transportation Acquisition Circulars (TACs) are available on the internet at *https://www.acquisition.gov*.

1201.106 OMB approval under the Paperwork Reduction Act.

The information collection and recordkeeping requirements contained in the TAR have been approved by the Office of Management and Budget (OMB). Details concerning any TAR- related OMB approved control numbers are specified in the TAM.

Subpart 1201.2—Administration

1201.201 Maintenance of the FAR.

1201.201–1 The two councils.

(b) The Senior Procurement Executive is responsible for providing a DOT representative to the Civilian Agency Acquisition Council (CAAC).

Subpart 1201.3—Agency Acquisition Regulations

1201.301 Policy.

(a)(1) *Acquisition regulations*—(i) *Department-wide acquisition regulations.* The Department of Transportation's (DOT's) Senior Procurement Executive (SPE) is the individual having authority to issue or authorize the issuance of agency regulations that implement or supplement the FAR to include agency-unique policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process. This authority is re-delegated from the Assistant Secretary for Administration to the SPE.

(ii) *Operating Administration (OA) acquisition regulations.* OA supplemental acquisition regulations proposed to be inserted in the TAR as a TAR supplement regulation shall be reviewed and approved by the SPE. If approved by the SPE, the Office of the Senior Procurement Executive will prepare the rule for publication in the FEDERAL REGISTER in accordance with FAR 1.501. OA regulations may be more restrictive or require higher approval levels than those required by the TAR unless otherwise specified.

(2) *Acquisition procedures.* The SPE issues or authorizes the issuance of internal agency guidance at any organizational level. DOT internal operating procedures are contained in the TAM. OA procedures necessary to implement or supplement the FAR, TAR, or TAM may be issued by the head of the contracting activity (HCA), who may delegate this authority to any organizational level deemed appropriate. OA procedures may be more restrictive or require higher approval levels than those permitted by the TAM unless otherwise specified.

(b) The authority of the agency head under FAR 1.301(b) to establish procedures to ensure that agency acquisition regulations are published for comment in the FEDERAL REGISTER in conformance with the procedures in FAR subpart 1.5 is delegated to the Office of the General Counsel, Assistant General Counsel for Regulation.

1201.301–70 Amendment of the Transportation Acquisition Regulation.

(a) Changes to the TAR may be the result of recommendations from internal DOT personnel, other Government agencies, or the public. Proposed changes shall be submitted in the following format to the Office of the Senior Procurement Executive (OSPE),

1200 New Jersey Avenue, SE, Washington, DC 20590 or *DOTAcquisitionPolicy@dot.gov* and must include the following elements:

(1) *Problem.* Succinctly state the problems created by current TAR language and describe the factual or legal reasons necessitating regulatory change.

(2) *Recommendation.* Identify the recommended change by using the current language (if applicable) and striking through the proposed deleted words with a horizontal line. Insert proposed language in bold and brackets. If the change is extensive, reflect proposed deleted language in strikethrough and proposed new or revised language with complete paragraphs in bold and brackets.

(3) *Discussion.* Explain why the change is necessary and how it will solve the problem. Address any cost or administrative impact on Government activities, offerors, and contractors, to include potential impact to small businesses. Provide any other information and documents, such as statutes, legal decisions, regulations, and reports, that may be helpful.

(4) *Point of contact.* Provide a point of contact who can answer questions regarding the recommendation.

(b) The TAR is maintained by the SPE through the TAR/TAM change process. This process consists of input from various DOT elements including representatives from DOT OAs specifically designated to formulate Departmental acquisition policies and procedures.

(c) Transportation Acquisition Circulars (TACs) (*see* 1201.301–72) will be used to publish the TAR throughout DOT.

1201.301–71 Effective dates for Transportation Acquisition Circulars (TACs).

(a) *Effective dates set forth in TACs.* Unless otherwise stated in the body of TACs, statements to the effect that the policy or procedures are ''effective upon receipt,'' or ''upon a specified date,'' or that changes set forth in the document are ''to be used upon receipt,'' mean that any new or revised provisions, clauses, procedures, or forms must be included in solicitations, contracts, or modifications issued thereafter.

(b) *Effective dates for in-process acquisitions.* Unless expressly directed by statute or regulation, solicitations in process or negotiations that are completed when a TAC is issued are not required to include or insert new requirements, forms, clauses, or provisions, as may be set forth in a TAC. However, the chief of the contracting office must determine that it is in the best interest of the Government to exclude the new information and the determination and findings must be included in the contract file.

1201.301–72 Transportation Acquisition Circular numbering.

Transportation Acquisition Circulars (TACs) will be numbered consecutively on a fiscal year basis beginning with number ''01'' prefixed by the last two digits of the fiscal year (*e.g.*, TACs 21–01 and 21–02 indicate the first two TACs issued in fiscal year 2021).

1201.304 Agency control and compliance procedures.

(a) DOT shall control the proliferation of acquisition regulations and any revisions thereto (except as noted in paragraph (b) of this section) by using an internal TAR change process.

(b) Specific OA-unique regulations will not be processed through the TAR/TAM change process but shall be reviewed by OA legal counsel and submitted to the OSPE for review and approval. (*See* 1252.101 for additional instructions pertaining to provisions and clauses.)

Subpart 1201.470—Deviations From the FAR and TAR

1201.403 Individual deviations.

The head of the contracting activity (HCA), or designee with a rank that is no lower than that of a Senior Executive Service (SES) official, may authorize individual deviations to the FAR and TAR, unless FAR 1.405(e) applies.

1201.404 Class deviations.

The SPE may authorize and approve class deviations from the FAR and TAR, unless FAR 1.405(e) applies.

Subpart 1201.6—Career Development, Contracting Authority, and Responsibilities

1201.602 Contracting officers.

1201.602–2 Responsibilities.

(d) Each DOT OA is responsible for establishing Contracting Officer's Representative (COR) nomination and appointment procedures consistent with the DOT Acquisition Workforce Career Development Program.

1201.602–3 Ratification of unauthorized commitments.

(b) *Policy*. DOT policy requires that all procurement decisions shall be made only by Government officials having authority to carry out such acquisitions. Procurement decisions made by other than authorized personnel are contrary to Departmental policy and may be considered matters of serious misconduct on the part of the employee making an unauthorized commitment. Disciplinary action against an employee who makes an unauthorized commitment may be considered.

1201.603 Selection, appointment, and termination of appointment for contracting officers.

1201.603–1 General.

Each DOT OA is responsible for appointing its contracting officers. Each HCA shall appoint one Chief of the Contracting Office (COCO) for each OA. Individuals designated as COCOs are considered contracting officers and shall be appointed by their respective HCA. The HCA may select, appoint, and terminate the appointment of contracting officers. The HCA may re-delegate this authority to a level no lower than that of the COCO.

1201.604 Contracting Officer's Representative (COR).

1201.604–70 Contract clause.

The contracting officer shall insert the clause at 1252.201–70, Contracting Officer's Representative, in solicitations and contracts that are identified as other than firm-fixed-price, and for firm-fixed-price solicitations and contracts when appointment of a contracting officer's representative is anticipated.

PART 1202—DEFINITIONS OF WORDS AND TERMS

Subpart 1202.1—Definitions

Sec.
1202.101 Definitions.

Subpart 1202.70—Abbreviations

1202.7000 General.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1202.1—Definitions

1202.101 Definitions.

Agency Advocate for Competition means the Deputy Assistant Secretary for Administration.

Agency, *Federal agency*, or *Executive agency*, as used in the TAR, means the Department of Transportation (DOT).

Chief Financial Officer (CFO) is the principal fiscal advisor to the Secretary of DOT responsible for providing leadership, advice, and guidance in the development, implementation, and administration of DOT's budget, financial management, and performance management.

Chief Information Officer is the principal information technology (IT), cyber security, privacy, and records management advisor to the Secretary, and is the final authority on these matters within the Department.

Chief of the Contracting Office (COCO) means the individual(s) responsible for managing the contracting office(s) within an Operating Administration.

Contracting activity includes all the contracting offices within an Operating Administration and is the same as the term ''procuring activity.''

Contracting officer means an individual authorized by virtue of their position or by appointment to perform the functions assigned by the Federal Acquisition Regulation (FAR), the Transportation Acquisition Regulation (TAR), and Transportation Acquisition Manual (TAM).

Department of Transportation (DOT) means, when referring to the various suborganizations and components of DOT, all of the Operating Administrations, as defined in the TAR/TAM, included within DOT.

Head of the agency or *Agency head* for Departmental procurement means the Deputy Secretary except for acquisition actions that, by the terms of a statute or delegation, must be done specifically by the Secretary of Transportation.

Head of the contracting activity (HCA) means the individual responsible for managing the contracting offices within an Operating Administration who is a member of the Senior Executive Service except for the HCA within the Great Lakes St. Lawrence Seaway Development Corporation (GLS), which shall be an individual no lower than one level above the COCO. The term HCA is the same as the term ''head of the procuring activity.''

Head of the Operating Administration (HOA) means the individual appointed by the President to manage the DOT operating administration.

Operating Administration (OA) means the following components of DOT—

(1) Federal Aviation Administration (FAA) (FAA is exempt from FAR, TAR, and TAM pursuant to the Department of Transportation and Related Agencies Appropriations Act, 1996 (Pub. L. 104–50));

(2) Federal Highway Administration (FHWA);

(3) Federal Motor Carrier Safety Administration (FMCSA);

(4) Federal Railroad Administration (FRA);

(5) Federal Transit Administration (FTA);

(6) Maritime Administration (MARAD);

(7) National Highway Traffic Safety Administration (NHTSA);

(8) Office of the Secretary of Transportation (OST);

(9) Pipeline and Hazardous Materials Safety Administration (PHMSA);

(10) Great Lakes St. Lawrence Seaway Development Corporation (GLS); and

(11) Office of the Assistant Secretary for Research and Technology (OST–R).

Small Business Specialist (SBS) means the individual appointed by each HCA to assist the Director, Office of Small and Disadvantaged Business Utilization in carrying out the purpose of the Small Business Act.

Senior Procurement Executive (*SPE*) means the Director of the Office of the Senior Procurement Executive.

Subpart 1202.70—Abbreviations

1202.7000 General.

The following abbreviations or acronyms may be used throughout the TAR and the agency's associated internal policies and procedures in the TAM—

TABLE 1 TO 1202.7000—ABBREVIATIONS AND ACRONYMS

CFO	Chief Financial Officer.
CIO	Chief Information Officer.
COCO	Chief of the Contracting Office.
COR	Contracting Officer's Representative.
D&F	Determination and Findings.
FOIA	Freedom of Information Act.
HCA	Head of the Contracting Activity.
HOA	Head of the Operating Administration.
J&A	Justification and Approval.
OA	Operating Administration.
OIG	Office of the Inspector General.
OSDBU	Office of Small and Disadvantaged Business Utilization.
PCR	Procurement Center Representative.
RFP	Request for Proposal.
SBA	Small Business Administration.
SBS	Small Business Specialist.
SPE	Senior Procurement Executive.

PART 1203—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 1203.1—Safeguards

Sec.
1203.101–3 Agency regulations.

Subpart 1203.2—Contractor Gratuities to Government Personnel

1203.203 Reporting suspected violations of the Gratuities clause.
1203.204 Treatment of violations.

Subpart 1203.3—Reports of Suspected Antitrust Violations

1203.301 General.
1203.303 Reporting suspected antitrust violations.

Subpart 1203.4—Contingent Fees

1203.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

Subpart 1203.5—Other Improper Business Practices

1203.502–2 Subcontractor kickbacks.

Subpart 1203.7—Voiding and Rescinding Contracts

1203.703 Authority.

Subpart 1203.9—Whistleblower Protections for Contractor Employees

1203.906 Remedies.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1203.1—Safeguards

1203.101–3 Agency regulations.

(a) Standards of Ethical Conduct for Employees of the Executive Branch, 5 CFR part 2635, and the Supplemental Standards of Ethical Conduct for Employees of the Department of Transportation, 5 CFR part 6001, apply to all DOT employees.

Subpart 1203.2—Contractor Gratuities to Government Personnel

1203.203 Reporting suspected violations of the Gratuities clause.

(a) Suspected violations of the Gratuities clause shall be reported to the contracting officer responsible for the acquisition (or the Chief of the Contracting Office (COCO) if the contracting officer is suspected of the violation). The contracting officer (or COCO) shall obtain from the person reporting the violation, and any witnesses to the violation, the following information—

(1) The date, time, and place of the suspected violation;

(2) The name and title (if known) of the individual(s) involved in the violation; and

(3) The details of the violation (*e.g.*, the gratuity offered or intended) to obtain a contract or favorable treatment under a contract.

(b) The person reporting the violation and witnesses (if any) should be requested to sign and date the information certifying that the information furnished is true and correct. The COCO shall report suspected violations to the Office of the Inspector General (OIG), 1200 New Jersey Avenue SE, Washington, DC 20590, with a copy to General Counsel and the OA's Chief Counsel.

1203.204 Treatment of violations.

(a) The HCA is authorized to determine whether a Gratuities clause violation has occurred. If the HCA has been personally and substantially involved in the procurement, DOT legal counsel advice should be sought to determine if a substitute for the HCA should be designated.

(b) The COCO shall ensure that the contractor is afforded the hearing procedures required by FAR 3.204(b). Government legal counsel should be consulted regarding the appropriateness of the hearing procedures.

(c) If the HCA determines that the alleged gratuities violation occurred during the ''conduct of an agency procurement'', the COCO shall consult with

DOT legal counsel regarding the approach for appropriate processing of either the Procurement Integrity Act violation and/or the Gratuities violation.

Subpart 1203.3—Reports of Suspected Antitrust Violations

1203.301 General.

(b) The same procedures contained in 1203.203 shall be followed for suspected antitrust violations, except reports of suspected antitrust violations shall be coordinated with DOT legal counsel for referral to the Department of Justice, if deemed appropriate.

1203.303 Reporting suspected antitrust violations.

(b) The same procedures contained in 1203.203 shall be followed for suspected antitrust violations, except reports of suspected antitrust violations shall be coordinated with legal counsel for referral to the Department of Justice, if deemed appropriate.

Subpart 1203.4—Contingent Fees

1203.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

(a) The same procedures contained in 1203.203 shall be followed for reporting the attempted or actual exercise of improper influence, misrepresentation of a contingent fee arrangement, or other violation of the Covenant Against Contingent Fees (*see* FAR 52.203–5), except reports of misrepresentation or violations of the Covenant Against Contingent Fees shall be coordinated with DOT legal counsel for referral to the Department of Justice, if deemed appropriate.

Subpart 1203.5—Other Improper Business Practices

1203.502–2 Subcontractor kickbacks.

(g) The same procedures contained in 1203.203 shall be followed for reporting a violation of 41 U.S.C. chapter 87, Kickbacks.

Subpart 1203.7—Voiding and Rescinding Contracts

1203.703 Authority.

(a) The head of the contracting activity (HCA) is authorized by the Secretary of Transportation to declare void and rescind contracts and other transactions listed in Public Law 87–849 (18 U.S.C. 218), in which there has been a final conviction for bribery, conflict of interest, or any other violation of 18 U.S.C. 201–224.

(b) The Head of the Operating Administration (HOA) is authorized to make determinations, in accordance with FAR 3.703(b)(2).

Subpart 1203.9—Whistleblower Protections for Contractor Employees

1203.906 Remedies.

(a) The HCA is authorized to make determinations and take actions under FAR 3.906(a).

(b) The HCA is authorized to take actions under FAR 3.906(b).

PART 1204—ADMINISTRATIVE AND INFORMATION MATTERS

Subpart 1204.1—Contract Execution

Sec.
1204.103 Contract clause.

Subpart 1204.5—Electronic Commerce in Contracting

1204.502 Policy.

Subpart 1204.8—Government Contract Files

1204.801 General.
1204.804 Closeout of contract files.
1204.804–5 Procedures for closing out contract files.
1204.804–570 Supporting closeout documents.

Subpart 1204.9—Taxpayer Identification Number Information

1204.903 Reporting contract information to the IRS.

Subpart 1204.13—Personal Identity Verification

1204.1301 Policy.
1204.1303 Contract clause.

Subpart 1204.17—Service Contracts Inventory

1204.1703 Reporting requirements.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1204.1—Contract Execution

1204.103 Contract clause.

The contracting officer shall insert the clause at FAR 52.204–1, Approval of Contract, filled in as appropriate, in solicitations and contracts when approval to award the resulting contract must be obtained from an official at a level above the contracting officer.

Subpart 1204.5—Electronic Commerce in Contracting

1204.502 Policy.

(c) DOT's preferred policy is to use electronic signatures, records and communication methods in lieu of paper transactions whenever practicable. Before using electronic commerce, the HOA and OA shall ensure that the OA systems are capable of ensuring authentication and confidentiality commensurate with the risk of unauthorized access to or modification of the information.

Subpart 1204.8—Government Contract Files

1204.801 General.

(a) The COCO is designated as the head of each office performing contracting and contract administration functions. The Chief Financial Officer (CFO) of the OA is designated as the head of the office performing paying functions.

1204.804 Closeout of contract files.

1204.804–5 Procedures for closing out contract files.

1204.804–570 Supporting closeout documents.

(a) When applicable and prior to contract closeout, the contracting officer shall obtain the listed DOT and Department of Defense (DOD) forms (*see* paragraphs (a)(1) through (4) of this section) from the contractor to facilitate contract closeout. See part 1253 for links to forms.

(1) Form DOT F 4220.4, Contractor's Release, *see* FAR 52.216–7;

(2) Form DOT F 4220.45, Contractor's Assignment of Refunds, Rebates, Credits and Other Amounts, *see* FAR 52.216–7;

(3) Form DOT F 4220.46, Cumulative Claim and Reconciliation Statement, *see* FAR 4.804–5(a)(13); and

(4) Department of Defense (DD) Form 882, Report of Inventions and Subcontracts, *see* FAR 52.227–14.

(b) The forms listed in paragraph (a) of this section are used primarily for the closeout of cost-reimbursement, time-and-materials, and labor-hour contracts. However, the forms may also be used for closeout of other contract types or when necessary to protect the Government's interest.

Subpart 1204.9—Taxpayer Identification Number Information

1204.903 Reporting contract information to the IRS.

(a) The SPE is authorized to report certain information, including Taxpayer Identification Number (TIN) data, to the Internal Revenue Service (IRS).

Subpart 1204.13—Personal Identity Verification

1204.1301 Policy.

(a) DOT follows National Institute of Standards and Technology (NIST) Federal Information Processing Standards (FIPS) Publication (PUB) Number 201–2, Personal Identity Verification (PIV) of Federal Employees and Contractors, and OMB implementation guidance for personal identity verification, for all affected contractor and subcontractor personnel when contract performance requires contractors to have routine physical access to a federally-controlled facility and/or routine physical and logical access to a federally-controlled information system.

(c) OAs must designate an official responsible for verifying contractor employees' personal identity.

1204.1303 Contract clause.

The contracting officer shall insert the clause at 1252.204–70, Contractor Personnel Security and Agency Access, in solicitations and contracts (including task orders, if appropriate), exceeding the micro-purchase threshold, when contract performance requires contractors to have routine physical access to a federally-controlled facility and/or routine physical and logical access to a Departmental/federally-controlled information system.

Subpart 1204.17—Service Contracts Inventory

1204.1703 Reporting requirements.

(b)(2) The OSPE is responsible for compiling and submitting the DOT annual inventory to OMB and for posting and publishing the inventory consistent with FAR 4.1703(b)(2).

SUBCHAPTER B—ACQUISITION PLANNING

PART 1205—PUBLICIZING CONTRACT ACTIONS

Subpart 1205.1—Dissemination of Information

Sec.
1205.101 Methods of disseminating information.

Subpart 1205.4—Release of Information

1205.402 General public.
1205.403 Requests from Members of Congress.

Subpart 1205.6—Publicizing Multi-Agency Use Contracts

1205.601 Governmentwide database of contracts.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1205.1—Dissemination of Information

1205.101 Methods of disseminating information.

(a) The DOT Office of Small and Disadvantaged Business Utilization, 1200 New Jersey Avenue SE, Washington, DC 20590 publishes a Procurement Forecast of planned procurements each fiscal year on their website at *https://www.transportation.gov/osdbu/procurement-forecast/summary/*.

Subpart 1205.4—Release of Information

1205.402 General public.

(a) Upon request, and consistent with DOT Freedom of Information Act rules and regulations in 49 CFR part 7 and 1224.203, DOT will furnish the general public with the following information on proposed contracts and contract awards—

(1) After the opening of sealed bids, names of firms that submitted bids; and

(2) After contract award, the names of firms that submitted proposals.

(b) DOT will process requests for other specific information in accordance with the DOT Freedom of Information Act rules and regulations in 49 CFR part 7 and 1224.203.

1205.403 Requests from Members of Congress.

The HCA is authorized to approve the release of certain contract information to Members of Congress under FAR 5.403.

Subpart 1205.6—Publicizing Multi-Agency Use Contracts

1205.601 Governmentwide database of contracts.

(b) The OA HCA is responsible for complying with the requirements of FAR 5.601(b).

PART 1206—COMPETITION REQUIREMENTS

Subpart 1206.2—Full and Open Competition After Exclusion of Sources

Sec.
1206.202 Establishing or maintaining alternative sources.

Subpart 1206.3—Other Than Full and Open Competition

1206.302 Circumstances permitting other than full and open competition.
1206.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.
1206.302–7 Public interest.

Subpart 1206.5—Advocates for Competition

1206.501 Requirement.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1206.2—Full and Open Competition After Exclusion of Sources

1206.202 Establishing or maintaining alternative sources.

(a) The head of the contracting activity (HCA) is delegated authority to exclude a particular source from a contract action in order to establish or maintain an alternative source under the conditions listed in FAR 6.202(a).

(b) The HCA is also delegated authority to approve a Determination and Findings (D&F) in support of a contract action awarded under the authority of FAR 6.202(a).

Subpart 1206.3—Other Than Full and Open Competition

1206.302 Circumstances permitting other than full and open competition.

1206.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.

(b)(4) The HCA is authorized to determine that only specified makes and models of technical equipment and parts will satisfy the agency's needs under FAR 6.302–1(b)(4).

1206.302–7 Public interest.

(a)(2) The authority under FAR 6.302–7 whereby full and open competition need not be provided for when determined that it is not in the public interest in a particular acquisition is reserved by the Secretary and may not be delegated. A written determination made and signed by the Secretary shall be included in the contract file.

(c)(3) The contracting officer shall prepare a justification to support the determination under FAR 6.302–7(c)(3).

Subpart 1206.5—Advocates for Competition

1206.501 Requirement.

The DOT Agency Advocate for Competition is the Deputy Assistant Secretary for Administration.

PART 1207—ACQUISITION PLANNING

Subpart 1207.3—Contractor Versus Government Performance

Sec.
1207.305 Solicitation provisions and contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1207.3—Contractor Versus Government Performance

1207.305 Solicitation provisions and contract clause.

The contracting officer may insert clause 1252.237–73, Key Personnel, in solicitations and contracts when the acquisition is conducted pursuant to OMB Circular A–76 and meets the clause prescription requirements at 1237.110–70(b).

PART 1209—CONTRACTOR QUALIFICATIONS

Subpart 1209.4—Debarment, Suspension, and Ineligibility

Sec.
1209.400 Scope of subpart.
1209.403 Definitions.
1209.405 Effect of listing.
1209.405–1 Continuation of current contracts.
1209.405–2 Restrictions on subcontracting.
1209.406 Debarment.
1209.406–1 General.
1209.406–3 Procedures.
1209.406–4 Period of debarment.
1209.407 Suspension.
1209.407–1 General.
1209.407–3 Procedures.
1209.470 Fact-finding procedures.
1209.471 Appeals.

Subpart 1209.5—Organizational and Consultant Conflicts of Interest

1209.507 Solicitation provisions and contract clause.
1209.507–270 Contract clauses.

Subpart 1209.6—Contractor Team Arrangements

1209.602 General.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1209.4—Debarment, Suspension, and Ineligibility

1209.400 Scope of subpart.

This subpart provides DOT's policy and procedures for the debarment and suspension of contractors.

1209.403 Definitions.

As used in this subpart—

DOT Order 4200.5G means the DOT order establishing DOT's internal procedures for Suspension and Debarment, and Ineligibility Policies.

Senior Accountable Official (SAO) for Suspension and Debarment means the Senior Procurement Executive (SPE), as delegated by the Secretary of DOT, for all suspensions and debarments within DOT. The SAO sets forth standards for suspension and debarment policies and procedures for the Department of Transportation, excluding the Office of Inspector General (OIG).

Suspension and Debarment Coordinator (SDC) means the program manager for the Suspension and Debarment Program at each OA and Office of the Secretary of Transportation. The SDC advises the Suspending and Debarring Official (SDO). The SDC coordinates all materials for presentation to the SDO for proposed suspension or debarment activities, enters information regarding any administrative agreement into the Federal Awardee Performance and Integrity Information System (FAPIIS), and enters information regarding suspensions and debarments into *SAM.gov*.

Suspending and Debarring Official (SDO) means the individual designated responsibility as authorized by the Secretary of DOT to impose procurement suspensions and debarments, exclusions, and other related matters pursuant to FAR part 9. Each OA and the OST has separately appointed SDOs. The SPE serves as the SDO for OST. A list of the OA-appointed SDOs is maintained on the OSPE website at *https://www.transportation.gov/assistant-secretary-administration/procurement/suspension-and-debarment*.

1209.405 Effect of listing.

(a) The SDO is authorized to make a written determination of compelling reasons to solicit offers from, award contracts to, or consent to subcontract with contractors debarred, suspended, or proposed for debarment and that has an active exclusion record in the System for Award Management (SAM) in accordance with FAR 9.405.

(e)(2) The SDO is authorized to make a written determination of compelling reasons to consider a bid or offer from a contractor whose name or company is included on the listing.

(3) The SDO is authorized to make a written determination of compelling reasons for a contracting officer to consider proposals, quotations, or offers received from any listed contractor that have an active exclusion record in SAM, and that such proposals, quotations, or offers may be evaluated for award or included in the competitive range, and, if applicable, discussions conducted with a listed offeror as set forth in FAR 9.405(e)(3).

1209.405–1 Continuation of current contracts.

(a) Notwithstanding the suspension, proposed debarment, or debarment of a contractor, contracting officers may continue contracts or subcontracts in existence at the time the contractor was suspended, proposed for debarment, or debarred, if authorized by the SDO and the SDO makes a written determination, consistent with the procedures described in FAR 9.405–1(a) setting forth the compelling reasons for continuing such contract(s) and placing order(s).

(b) The SDO is delegated the authority on behalf of the Secretary of DOT to make the written determination required under FAR 9.405–1(b).

1209.405–2 Restrictions on subcontracting.

(a) The SDO is delegated the authority on behalf of the Secretary of DOT to authorize contracting officers to consent to subcontracts with contractors debarred, suspended, or proposed for debarment as required by FAR 9.405–2(a).

1209.406 Debarment.

1209.406–1 General.

(c) The OST Suspending and Debarring Official (SDO) and each OA-appointed SDO (*see* 1209.403) is authorized to continue business dealings between the agency and a contractor that is debarred or proposed for debarment under FAR 9.406–1(c), except under FAR 23.506(e) if the SDO has made a written determination of compelling reasons justifying the continued business dealings.

(d)(1) The SDO's authority includes debarments from contracts for the purchase of Federal personal property pursuant to the Federal Management Regulation at 41 CFR 102–117.295 (*see* FAR 9.406–1(d)(1) through (2)).

1209.406–3 Procedures.

Contracting officers and contracting activities shall comply with DOT Order 4200.5G, Suspension and Debarment, and Ineligibility Policies, and this subpart to include the following procedures—

(a) *Investigation and referral.* Any individual may submit a referral to debar an individual or contractor to the cognizant SDO (the debarring official) (*see* 1209.403). The referral for debarment shall be supported with evidence of a cause for debarment listed in FAR 9.406–2 and this subpart. The contracting officer shall promptly report a proposed debarment action directly to the SDO. Upon review by the SDO, if the matter involves possible criminal or fraudulent activities, the SDO shall also refer the matter to the DOT Office of Inspector General to ensure coordination of appropriate activity. The report shall contain the following information:

(1) The DOT official OA code to identify the OA taking action is as follows: DOT (general) (DOT–OST); Federal Aviation Administration (DOT–FAA); Federal Highway Administration (DOT–FHWA); Federal Motor Carrier Safety Administration (DOT–FMCSA); Federal Railroad Administration (DOT–FRA); Federal Transit Administration (DOT–FTA); Maritime Administration (DOT–MARAD); National Highway Traffic Safety Administration (DOT–NHTSA); Pipeline and Hazardous Materials Safety Administration (DOT–PHMSA); Office of the Assistant Secretary for Research and Technology (OST–R); and Great Lakes St. Lawrence Development Corporation (GLS).

(2) Name, address, and telephone number for the point of contact for the activity making the report.

(3) Name and address of the contractor.

(4) Names and addresses of the members of the board, principal officers, partners, owners, and managers.

(5) Names and addresses of all known affiliates, subsidiaries, or parent firms, and the nature of the business relationship.

(6) For each contract affected by the conduct being reported—

(i) The contract number;

(ii) Description of supplies or services;

(iii) The amount;

(iv) The percentage of completion;

(v) The amount paid to the contractor;

(vi) Whether the contract is assigned under the Assignment of Claims Act and, if so, to whom; and

(vii) The amount due to the contractor.

(7) For any other contracts outstanding with the contractor or any of its affiliates—

(i) The contract number(s);

(ii) The amount(s);

(iii) The amounts paid to the contractor;

(iv) Whether the contract(s) is assigned under the Assignment of Claims Act and, if so, to whom; and

(v) The amount(s) due the contractor.

(8) A complete summary of all pertinent evidence and the status of any legal proceedings involving the contractor.

(9) An estimate of any damages sustained by the Government as a result of the contractor's action (explain how the estimate was calculated).

(10) The comments and recommendations of the contracting officer and each higher-level contracting review authority regarding—

(i) Whether to suspend or debar the contractor;

(ii) Whether to apply limitations to the suspension or debarment;

(iii) The period of any recommended debarment; and

(iv) Whether to continue any current contracts with the contractor (explain why a recommendation regarding current contract is not included).

(11) When appropriate, as an enclosure to the report—

(i) A copy or extracts of each pertinent contract;

(ii) Witness statements or affidavits;

(iii) Copies of investigative reports;

(iv) Certified copies of indictments, judgments, and sentencing actions; and

(v) Any other appropriate exhibits or documents.

(b) *Decisionmaking process.* When the SDO finds preponderance of the evidence for a cause for debarment, as listed in FAR 9.406–2 or this subpart, the contracting officer in conjunction with the SDC shall prepare a recommendation and draft notice of proposed debarment for the SDO's consideration. The contractor (and any specifically named affiliates) are provided an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment as set forth in paragraph (d) of this section.

(c) *Notice of proposal to debar.* DOT shall send the notice of proposed debarment to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery to include by mail, to the last known street address, to the last known facsimile numbers, or to the last known email address. In the case of a contractor, DOT may send the notice of proposed debarment to the contractor, any partner, principal, officer, director, owner or co-owner, or joint venture; to the contractor's identified counsel for purposes of administrative proceedings; or to the contractor's agent for the service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. Additionally, for each specifically named affiliate, the notice shall be sent to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agency for service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. The SDO shall also ensure that the appropriate parties are listed as excluded in the System for Award Management (SAM) in accordance with FAR 9.404.

(d) *Debarring official's decision.* (1) If DOT does not receive a reply from the contractor within 30 calendar days after sending the notice of proposed debarment, the SDC shall prepare a recommendation in conjunction with the cognizant contracting officer, and refer the case to the SDO for a decision on whether to debar based on the information available. If DOT receives a reply from the contractor within 30 calendar days after sending the notice of proposed debarment, the SDC in conjunction with the cognizant contracting officer shall consider the information in the reply before the SDC makes their recommendation to the SDO.

(2) The SDO reviews submittals and case documents, and acts in accordance with DOT Order 4200.5G and the General DOT Guidelines for Suspension and Debarment, paragraph 12c.

(i) The SDO, upon the request of the contractor proposed for debarment, shall, as soon as practicable, allow the contractor an opportunity to appear before the SDO to present information or argument, in person or through a representative. The contractor may supplement the oral presentation with written information and argument. This information submitted by a contractor proposed for debarment is known as a Presentation of Matters in Opposition as set forth in DOT Order 4200.5G. DOT shall conduct the proceeding in an informal manner and without requirement for a transcript. The SDO may use flexible procedures to allow a contractor to present matters in opposition via telephone or internet. If so, the debarring official should change the notice in paragraph (c) of this section to include those flexible procedures.

(ii) If the SDO finds the contractor's or individual's submission in opposition to the proposed debarment raises a genuine dispute over facts material to the proposed debarment and the debarment action is not based on a conviction or civil judgment, the SDC shall

submit to the SDO the information establishing the dispute of material facts. If the SDO agrees there is a genuine dispute of material facts, the SDO shall conduct a fact-finding proceeding or shall refer the dispute to a designee for resolution pursuant to 1209.470. The SDC shall provide the contractor or individual the disputed material fact(s).

(iii) If the proposed debarment action is based on a conviction or civil judgment, or if there are no disputes over material facts, or if any disputes over material facts have been resolved pursuant to 1209.470, the SDO shall make a decision on the basis of all information available including any written findings of fact submitted by the designated fact finder, and oral or written arguments presented or submitted to the SDC by the contractor.

(e) *Notice of debarring official's decision.* In actions processed under FAR 9.406 where no suspension is in place and where a fact-finding proceeding is not required, DOT shall make the final decision on the proposed debarment within 30 business days after receipt of any information and argument submitted by the contractor by the means of delivery set forth in paragraph (c) of this section, unless the SDO extends this period for good cause.

1209.406–4 Period of debarment.

(b) The SDC, in conjunction with the contracting officer, may submit a recommendation to the SDO to extend or reduce the period of debarment, or amend the scope of the debarment, imposed under FAR 9.406.

1209.407 Suspension.

1209.407–1 General.

(b) For the purposes of FAR 9.407–1, the SDO is the suspending official under the Federal Management Regulation at 41 CFR 102–117.295.

(d) The SDO is authorized to make a written determination of compelling reasons justifying continuing business dealings between the agency and a contractor that is suspended. However, in accordance with FAR 23.506(e), only the Secretary of Transportation may waive the suspension of contract payments, termination of a contract for default, or suspension of a contractor for actions under FAR subpart 23.5 and FAR 23.506.

1209.407–3 Procedures.

Contracting officers and contracting activities shall comply with DOT Order 4200.5G, Suspension and Debarment, and Ineligibility Policies, and this subpart to include the following procedures—

(a) *Investigation and referral.* Any individual may submit a referral to suspend an individual or contractor to the SDC or SDO (the debarring official) (*see* 1209.403). The SDC shall promptly report, in writing, a proposed suspension action directly to the SDO. Upon review by the SDO, if the matter involves possible criminal or fraudulent activities, the SDO shall also refer the matter to the DOT OIG to ensure coordination of appropriate activity.

(b) *Decisionmaking process.* When the SDC finds adequate evidence of a cause for suspension, as listed in FAR 9.407–2, the SDC shall prepare a recommendation and draft notice of suspension for the SDO's consideration. After receipt of the report from the SDC, the SDO may request from interested parties, including the contractor if deemed appropriate, a meeting or additional supporting information to assist in the suspension decision. The SDC creates a case in the DOT Suspension and Debarment Tracking System as set forth in DOT Order 4200.5G. The contractor (and any specifically named affiliates) are provided an opportunity to submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment as set forth in paragraph (d) of this section.

(c) *Notice of suspension.* DOT shall send the notice of suspension to the last known address of the individual or contractor, the individual or contractor's counsel, or agent for service of process, by certified mail, return receipt requested, or any other means that allows for confirmation of delivery to include by mail, to the last known street address, to the last known facsimile numbers, or to the last known email address. In the case of a contractor, DOT may send the notice of suspension to the contractor, any partner, principal, officer, director,

owner or co-owner, or joint venture; to the contractor's identified counsel for purposes of administrative proceedings; or to the contractor's agent for the service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. Additionally, for each specifically named affiliate, the notice shall be sent to the affiliate itself, the affiliate's identified counsel for purposes of the administrative proceedings, or the affiliate's agency for service of process. If sent by email, it shall be sent to the last known email addresses for all three, if known. The SDO shall also ensure that the appropriate parties are listed as excluded in SAM in accordance with FAR 9.404. After reviewing the SDC's report, and any additional information received in accordance with paragraph (b) of this section, the SDO shall prepare and coordinate with legal counsel a written notice of suspension.

(5) The SDO, upon the request of the contractor suspended, shall, as soon as practicable, allow the contractor an opportunity to appear before the SDO to present information or argument, in person or through a representative. The contractor may supplement the oral presentation with written information and argument. DOT shall conduct the proceeding in an informal manner and without requirement for a transcript.

(6)(i) If the SDC finds the contractor's or individual's submission in opposition to the suspension raises a genuine dispute over facts material to the suspension, or for the purposes of FAR 9.407–3(b)(2), in actions not based on an indictment, the SDC shall submit to the SDO the information establishing the dispute of material facts. If the SDO agrees there is a genuine dispute of material facts, the SDO shall conduct a fact-finding proceeding or refer the dispute to a designee for resolution pursuant to 1209.470. The SDC shall provide the contractor or individual the information that established the dispute of material fact(s) in advance of the fact-finding proceeding, in the event the contractor would like to add to the facts prior to the decision of the SDO.

(ii) If the suspension is based on a conviction or civil judgment, or if there are no disputes over material facts, or if any disputes over material facts have been resolved pursuant to 1209.470, the SDO shall make a decision on the basis of all information available including any written findings of fact submitted by the designated fact finder, and oral or written arguments presented or submitted by the contractor. The contractor may supplement the oral presentation with written information and argument. The proceeding will be conducted in an informal manner and without requirement for a transcript.

(d) *Suspending official's decision*. The SDO shall notify the contractor of the decision whether to impose a suspension. The SDO shall then forward the original signed decision to the contracting officer for inclusion in the contract file. The SDO reviews submittals and case documents, and acts in accordance with DOT Order 4200.5G and the General DOT Guidelines for Suspension and Debarment, paragraph 12c. The SDO may use flexible procedures to allow a contractor to present matters in opposition via telephone of internet. If so, the debarring official should change the notice in paragraph (c) of this section to include those flexible procedures.

1209.470 Fact-finding procedures.

The provisions of this section constitute the procedures to be used to resolve genuine disputes of material fact pursuant to 1209.406–3 and 1209.407–3. The SDC shall establish the date for the fact-finding hearing, normally to be held within 30 business days after notifying the contractor or individual that the SDO has determined a genuine dispute of material fact(s) exists.

(a) The Government's representative and the contractor shall each have an opportunity to present evidence relevant to the genuine dispute(s) of material fact identified by the SDO. The contractor or individual may appear in person or through counsel at the fact-finding hearing and should address all defenses, contested facts, admissions, remedial actions taken, and, if a proposal to debar is involved, mitigating

and aggravating factors. The contractor or individual may submit documentary evidence, present witnesses, and confront any person the agency presents.

(b) Witnesses may testify in person. Witnesses will be reminded of the official nature of the proceedings and that any false testimony given is subject to criminal prosecution. Witnesses are subject to cross-examination. The fact-finding proceeding is an informal evidentiary hearing, during which the Rules of Evidence and Civil Procedure do not apply. Hearsay evidence may be presented and will be given appropriate weight by the fact-finder.

(c) The proceedings shall be transcribed and a copy of the transcript shall be made available at cost to the contractor upon request, unless the contractor and the factfinder, by mutual agreement, waive the requirement for a transcript.

(d) The fact-finder shall prepare a written finding(s) of fact for the record by a preponderance of the evidence for proposed debarments, and by adequate evidence for suspensions. A copy of the findings of fact shall be provided to the SDO, the Government's representative, and the contractor or individual. The SDO will consider the written findings of fact in the decision regarding the suspension or proposed debarment.

1209.471 Appeals.

Based on the decision by the SDO, the respondent may elect to request reconsideration as provided for in paragraph (a) of this section. If the request for reconsideration is denied, the respondent may seek judicial review as provided for in paragraph (b) of this section.

(a) *Request for reconsideration.* Upon receiving a final decision to debar from the SDO, a debarred individual or entity may ask the SDO to reconsider the debarment decision or to modify the debarment by reducing the time period or narrowing the scope of the debarment. This request must be in writing and supported with documentation.

(b) *Judicial review.* A suspended or debarred individual or entity may seek judicial review upon denial of a request for reconsideration.

Subpart 1209.5—Organizational and Consultant Conflicts of Interest

1209.507 Solicitation provisions and contract clause.

1209.507–270 Contract clauses.

(a) In accordance with FAR 9.507–2, the contracting officer shall insert a clause substantially the same as the clause at 1252.209–70, Organizational and Consultant Conflicts of Interest, as applicable, in solicitations and contracts.

(b) In accordance with FAR 9.507–2, the contracting officer shall insert a clause substantially the same as the clause at 1252.209–71, Limitation of Future Contracting, as applicable, in solicitations and contracts.

Subpart 1209.6—Contractor Team Arrangements

1209.602 General.

(c) Contracting officers shall require offerors to disclose teaming arrangements as a part of any offer. The teaming arrangement shall be evaluated as a part of overall prime contractor responsibility, as well as under the technical and/or management approach evaluation factor where applicable.

PART 1211—DESCRIBING AGENCY NEEDS

Subpart 1211.2—Using and Maintaining Requirements Documents

Sec.

1211.204 Solicitation provisions and contract clauses.
1211.204–70 Contract clauses.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1211.2—Using and Maintaining Requirements Documents

1211.204 Solicitation provisions and contract clauses.

1211.204–70 Contract clauses.

The contracting officer shall insert the clause at 1252.211–70, Index for Specifications, when an index or table of contents may be furnished with the specification.

PART 1212—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

Subpart 1212.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Products and Commercial Services

Sec.

1212.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1212.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Products and Commercial Services

1212.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

(f) The following DOT provisions and clauses are authorized for use in acquisitions of commercial products or commercial services when required by the individual provision or clause prescription:

(1) 1252.201–70, Contracting Officer's Representative.

(2) 1252.204–70, Contractor Personnel Security and Agency Access.

(3) 1252.209–70, Organizational and Consultant Conflicts of Interest.

(4) 1252.209–71, Limitation of Future Contracting.

(5) 1252.211–70, Index for Specifications.

(6) 1252.216–70, Evaluation of Offers Subject to an Economic Price Adjustment Clause.

(7) 1252.216–71, Determination of Award Fee.

(8) 1252.216–72, Award Fee Plan.

(9) 1252.216–73, Distribution of Award Fee.

(10) 1252.216–74, Settlement of Letter Contract.

(11) 1252.222–70, Strikes or Picketing Affecting Timely Completion of the Contract Work.

(12) 1252.222–71, Strikes or Picketing Affecting Access to a DOT Facility.

(13) 1252.223–70, Removal or Disposal of Hazardous Substances—Applicable Licenses and Permits.

(14) 1252.223–71, Accident and Fire Reporting.

(15) 1252.223–73, Seat Belt Use Policies and Programs.

(16) 1252.232–70, Electronic Submission of Payment Requests.

(17) 1252.237–70, Qualifications of Contractor Employees.

(18) 1252.237–71, Certification of Data.

(19) 1252.237–72, Prohibition on Advertising.

(20) 1252.237–73, Key Personnel.

(21) 1252.239–70, Security Requirements for Unclassified Information Technology Resources.

(22) 1252.239–71, Information Technology Security Plan and Accreditation.

(23) 1252.239–72, Compliance with Safeguarding DOT Sensitive Data Controls.

(24) 1252.239–73, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information.

(25) 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting.

(26) 1252.239–75, DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements.

(27) 1252.239–76, Cloud Computing Services.

(28) 1252.239–77, Data Jurisdiction.

(29) 1252.239–78, Validated Cryptography for Secure Communications.

(30) 1252.239–79, Authentication, Data Integrity, and Non-Repudiation.

(31) 1252.239–80, Audit Record Retention for Cloud Service Providers.

(32) 1252.239–81, Cloud Identification and Authentication (Organizational Users) Multi-Factor Authentication.

(33) 1252.239–82, Identification and Authentication (Non-Organizational Users).

(34) 1252.239–83, Incident Reporting Timeframes.

(35) 1252.239–84, Media Transport.

(36) 1252.239–85, Personnel Screening—Background Investigations.

(37) 1252.239–86, Boundary Protection—Trusted Internet Connections.

(38) 1252.239–87, Protection of Information at Rest.

(39) 1252.239–88, Security Alerts, Advisories, and Directives.

(40) 1252.239–89, Technology Modernization.

(41) 1252.239–90, Technology Upgrades/Refreshment.

(42) 1252.239–91, Records Management.

(43) 1252.239–92, Information and Communication Technology Accessibility Notice.

(44) 1252.239–93, Information and Communication Technology Accessibility.

(45) 1252.242–70, Dissemination of Information—Educational Institutions.

(46) 1252.242–71, Contractor Testimony.

(47) 1252.242–72, Dissemination of Contract Information.

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 1213—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 1213.70—Department of Transportation Procedures for Acquiring Training Services

Sec.
1213.7000 Applicability.
1213.7001 Solicitation provision and contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1213.70—Department of Transportation Procedures for Acquiring Training Services

1213.7000 Applicability.

(a) DOT policy at 1237.7000 applies to Standard Form (SF) 182, Request, Authorization, Agreement and Certification of Training, which may be used to acquire training services; however, the policy does not apply to training services acquired by Governmentwide commercial purchase card. The Governmentwide commercial purchase card may only be used to acquire training services valued at the micro-purchase threshold level or less.

(b) As reflected in 1237.7002, this policy does not apply to training attended by DOT employees that is scheduled and conducted by Government sources of supply, educational institutions, or private entities where DOT does not control or sponsor the training. Examples of when the policy does and does not apply include:

(1) When SF 182s are issued for three DOT employees to attend a one-week course at a university or other private entity, the policy does not apply. DOT does not control the course because the university or private entity has a contract in place with the training provider and DOT is placing an order under an existing contract; and

(2) When DOT awards a contract to a university or other private entity to provide training for DOT and/or other Government personnel, the policy applies. DOT controls this course; therefore, no soliciting or advertising of private non-Government training while conducting the contracted-for training is permitted.

1213.7001 Solicitation provision and contract clause.

(a) Contracting officers shall insert the provision as prescribed at 1252.237–71, Certification of Data, in all solicitations and requests for quotations, and the clause as prescribed at 1252.237–72, Prohibition on Advertising, in solicitations, requests for quotations, and all contracts (*e.g.*, purchase orders, SF 182s) for training services when the content and/or presentation of the training is controlled by DOT.

(b) Contracting officers shall incorporate the successful offeror's certified data into any resultant contract(s). Certified data may be adopted by reference, if the contracting officer determines it contains information sufficient to reliably describe the certified data submitted. For example, this type of information includes dated material such as resumes and company or personnel qualifications.

PART 1214 [RESERVED]

PART 1215—CONTRACTING BY NEGOTIATION

Subpart 1215.4—Contract Pricing

Sec.
1215.404 Proposal analysis.
1215.404–470 Payment of profit or fee.

Subpart 1215.6—Unsolicited Proposals

1215.603 General.
1215.604 Agency points of contact.
1215.606 Agency procedures.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1215.4—Contract Pricing

1215.404 Proposal analysis.

1215.404–470 Payment of profit or fee.

The contracting officer shall not pay profit or fee on undefinitized contracts or undefinitized contract modifications. Any profit or fee earned shall be paid after the contract or modification is definitized.

Subpart 1215.6—Unsolicited Proposals

1215.603 General.

DOT will not pay any costs associated with the preparation of unsolicited proposals. Proposals that do not meet the definition and applicable content and marking requirements of FAR subpart 15.6 will not be considered under any circumstances and will be returned to the submitter.

1215.604 Agency points of contact.

(a) Unsolicited proposals should be submitted to the responsible OA contracting office for appropriate handling. Specific information concerning the mission of each DOT OA is available online at *https://www.transportation.gov/*. Offerors are urged to contact these contracting/procurement offices prior to submitting a proposal to ensure that the unsolicited proposal reaches the correct contracting office for action. This action will reduce unnecessary paperwork and wasted time for both the Government and offerors.

1215.606 Agency procedures.

The OA contracting office is the designated point of contact for receipt and handling of unsolicited proposals (*see* 1215.604). The assigned DOT contracting office will review and evaluate the proposal within 30 calendar days, if practicable, in accordance with FAR 15.606–1, Receipt and initial review, to inform the offeror of the reasons for rejection and the proposed disposition of the unsolicited proposal.

PART 1216—TYPES OF CONTRACTS

Subpart 1216.2—Fixed-Price Contracts

Sec.
1216.203 Fixed-price contracts with economic price adjustment.
1216.203–4 Contract clauses.
1216.203–470 Solicitation provision.

Subpart 1216.4—Incentive Contracts

1216.406–70 DOT contract clauses.

Subpart 1216.5—Indefinite-Delivery Contracts

1216.505 Ordering.

Subpart 1216.6—Time-and-Materials, Labor-Hour, and Letter Contracts

1216.603 Letter contracts.
1216.603–4 Contract clauses.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1216.2—Fixed-Price Contracts

1216.203 Fixed-price contracts with economic price adjustment.

1216.203–4 Contract clauses.

1216.203–470 Solicitation provision.

The contracting officer shall insert the provision at 1252.216–70, Evaluation of Offers Subject to an Economic Price Adjustment Clause, in solicitations containing an economic price adjustment clause.

Subpart 1216.4—Incentive Contracts

1216.406–70 DOT contract clauses.

(a) As authorized by FAR 16.406(e), the contracting officer shall insert the clause at 1252.216–71, Determination of Award Fee, in all cost-plus-award-fee solicitations and contracts.

(b) The contracting officer shall insert the clause at 1252.216–72, Award Fee Plan, in all cost-plus-award-fee solicitations and contracts.

(c) The contracting officer shall insert the clause at 1252.216–73, Distribution of Award Fee, in all cost-plus-award-fee solicitations and contracts.

Subpart 1216.5—Indefinite-Delivery Contracts

1216.505 Ordering.

(b)(8) *Task-order and delivery-order ombudsman.* Unless otherwise designated by the Head of the Operating Administration, the Advocate for Competition for the Operating Administration (OA) is designated as the OA Task and Delivery Order Ombudsman. If any corrective action is needed after reviewing complaints from contractors on task and delivery order contracts, the OA Ombudsman shall provide a written determination of such action to the contracting officer. Issues that cannot be resolved within the OA shall be forwarded to the DOT Task and Delivery Order Ombudsman for review and resolution. The DOT Task and Delivery Order Ombudsman is located in the Office of the Senior Procurement Executive.

Subpart 1216.6—Time-and-Materials, Labor-Hour, and Letter Contracts

1216.603 Letter contracts.

1216.603–4 Contract clauses.

The contracting officer shall insert the clause at 1252.216–74, Settlement of Letter Contract, in all definitized letter contracts.

PART 1217—SPECIAL CONTRACTING METHODS

Subpart 1217.70—Fixed-Price Contracts for Vessel Repair, Alteration, or Conversion

Sec.

1217.7000 Definition.
1217.7001 Clauses.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1217.70—Fixed-Price Contracts for Vessel Repair, Alteration, or Conversion

1217.7000 Definition.

Lay Days means time allowed to the master of a vessel for loading and unloading the same.

1217.7001 Clauses.

(a) The clause at 1252.217–70, Guarantee, shall be used where general guarantee provisions are deemed desirable by the contracting officer.

(1) When inspection and acceptance tests will afford full protection to the Government in ascertaining conformance to specifications and the absence of defects and deficiencies, no guarantee clause for that purpose shall be included in the contract.

(2) The customary guarantee period, to be inserted in the first sentence of the clause at 1252.217–70, Guarantee, is 60 days. In certain instances, it may be advisable for the contracting officer to include a contract clause for a guarantee period longer than 60 days. These instances are as follows—

(i) If, as a result of a full inquiry, the contracting officer determines that there will be no increased costs as a result of a longer guarantee period, the contracting officer may substitute guarantee longer than the usual 60 days; or

(ii) When the contracting officer's inquiry discloses that increased costs will result or are expected to result from a longer guarantee period, the contracting officer shall submit a letter to the Chief of the Contracting Office, requesting approval for use of guarantee period in excess of 60 days. The letter must contain sufficient facts to justify the use of a longer guarantee period. Upon approval, the contracting officer may insert a longer period in the first sentence of the clause at 1252.217–70, Guarantee.

(b) The contracting officer shall insert the following clauses in solicitations and contracts for vessel repair, alteration or conversion:

(1) 1252.217–71, Delivery and Shifting of Vessel.

(2) 1252.217–72, Performance.

(3) 1252.217–73, Inspection and Manner of Doing Work.

(4) 1252.217–74, Subcontracts.

(5) 1252.217–76, Liability and Insurance.

(6) 1252.217–77, Title.

(7) 1252.217–78, Discharge of Liens.

(8) 1252.217–79, Delays.

(9) 1252.217–80, Department of Labor Safety and Health Regulations for Ship Repair.

(c) The contracting officer may insert the clause at 1252.217–75, Lay Days, in sealed bid fixed-price solicitations and contracts for vessel repair, alteration, or conversion which are to be performed within the United States, the District of Columbia, and all territories and possessions of the United States. The contracting officer may also insert the clause at 1252.217–75, Lay Days, in negotiated solicitations and contracts to be performed outside the United States.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 1219—SMALL BUSINESS PROGRAMS

Subpart 1219.2—Policies

Sec.
1219.201 General policy.
1219.201–70 Procurement goals for small business.
1219.202 Specific policies.
1219.202–70 Procurement Forecast.

Subpart 1219.4—Cooperation With the Small Business Administration

1219.401 General.

Subpart 1219.5—Set-Asides for Small Business

1219.501 General.
1219.502–8 Rejecting Small Business Administration recommendations.
1219.502–9 Withdrawing or modifying small business set-asides.

Subpart 1219.7—The Small Business Subcontracting Program

1219.705 Responsibilities of the contracting officer under the subcontracting assistance program.
1219.705–6 Postaward responsibilities of the contracting officer.

Subpart 1219.8—Contracting With The Small Business Administration (the 8(a) Program)

1219.800 General.
1219.815 Release for non-8(a) procurement.

Subpart 1219.70—DOT Mentor-Protégé Program

1219.7000 General.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1219.2—Policies

1219.201 General policy.

(c) The Director, Office of Small and Disadvantaged Business Utilization (OSDBU) shall be a member of the Senior Executive Service and appointed by the Secretary of Transportation. (15 U.S.C. 637, 644, and 657)

(d) The responsible HCA for each OA shall appoint a Small Business Specialist (SBS). The SBS will assist the OSDBU Director in carrying out the functions and duties prescribed in FAR 19.201(d). A list of DOT SBS is provided at OSDBU's website at *https://www.transportation.gov/osdbu/procurement-assistance/talk-dot-small-business-specialist*.

1219.201–70 Procurement goals for small business.

As required by the Small Business Act, the Secretary shall establish annual goals for small business participation in DOT contracts and subcontracts. Each contracting activity in consultation with the OSDBU on behalf of the Secretary shall establish annual goals that present, for that activity, the maximum practicable opportunity for small business concerns to participate in the performance of the activity's contracts and subcontracts.

1219.202 Specific policies.

OSDBU is responsible for reviewing procurement strategies and subcontracting efforts, establishing review thresholds and making recommendations to further the implementation of this part. The OSDBU Director may waive review of certain classes of acquisitions that the Director identifies as providing limited or no opportunity for small business participation or may delegate review of such acquisitions to the OA Small Business Specialists.

1219.202–70 Procurement Forecast.

The OSDBU shall prepare and maintain DOT's Procurement Forecast in coordination with DOT Operating Administrations. The forecast will be published every year on or before October 1st and can be found at *https://www.transportation.gov/osdbu/procurement-forecast/summary*. Contracting officers and small business specialists will work with the OSDBU to maintain accurate procurement forecast information.

Subpart 1219.4—Cooperation With the Small Business Administration

1219.401 General.

(a) The OSDBU Director will be the primary point of contact with the U.S. Small Business Administration and facilitate the formulation of policies to ensure maximum practicable opportunities are available to small business concerns in prime and subcontracting opportunities.

Subpart 1219.5—Set-Asides for Small Business

1219.501 General.

(a) Contracting officers shall set aside to small business concerns acquisitions of supplies or services that have an anticipated dollar value above the micro-purchase threshold but not exceeding the simplified acquisition threshold, as prescribed at FAR 13.003(b)(1). Contracting officers shall set aside proposed acquisitions exceeding the simplified acquisition threshold for small business concerns unless it is determined there is not a reasonable expectation of obtaining offers from two or more responsible small business concerns that are competitive in terms of market prices, quality, and delivery (*see* FAR 19.502–2). Contracting officers will document their determination utilizing the DOT Form 4250.1, which will include the results of the market research performed, including justifications.

1219.502–8 Rejecting Small Business Administration recommendations.

(a) If the contracting officer rejects a recommendation of the SBA procurement center representative, the contracting officer will coordinate with the OSDBU to submit a written notice to the SBA within 5 working days of the contracting officer's receipt of the recommendation.

1219.502–9 Withdrawing or modifying small business set-asides.

(a) If the contracting officer makes a determination before contract award that a set-aside is disadvantageous to the public interest, withdrawal of an individual small business set-aside shall be initiated by giving written notice to the small business specialist, the SBA procurement center representative and the OSDBU stating the reasons for withdrawal.

(b) If the agency small business specialist does not agree to a withdrawal or modification, the case shall be referred to the COCO for review prior to consulting with the assigned SBA representative. The contracting officer shall follow the documentation requirements of FAR 19.506(c).

Subpart 1219.7—The Small Business Subcontracting Program

1219.705 Responsibilities of the contracting officer under the subcontracting assistance program.

1219.705–6 Postaward responsibilities of the contracting officer.

(f) The Office of Small and Disadvantaged Business Utilization (S–40) is responsible for acknowledging receipt of, or rejecting, the Summary Subcontract Report (SSR) in the Electronic Subcontracting Reporting System (eSRS).

Subpart 1219.8—Contracting With the Small Business Administration (the 8(a) Program)

1219.800 General.

(e) The Small Business Administration (SBA) and Department of Transportation (DOT) have entered into a Partnership Agreement (PA) delegating SBA's contract execution and administrative functions to DOT. Contracting officers shall follow the alternate procedures in this subpart, as applicable, to award 8(a) contracts under the PA. (*See https://www.transportation.gov/sites/dot.dev/files/docs/Department%20of%20Transportation__Partnership%20Agreement.pdf.*)

(1) The SBA delegates only the authority to sign contracts on its behalf. Consistent with the provisions of the PA, the SBA remains the prime contractor on all 8(a) contracts, continues to determine eligibility of concerns for contract award, and retains appeal rights under FAR 19.810.

(2) The PA sets forth the delegation of authority and establishes the basic procedures for expediting the award of

8(a) contract requirements as reflected in this subpart.

(3) Contracts awarded under the PA may be awarded directly to the 8(a) participant on either a sole source or competitive basis. An SBA signature on the contract is not required. *See* FAR 19.811–3 for contract clauses to use.

1219.815 Release for non-8(a) procurement.

(b) Contracting officers requesting the release of a requirement for a non-8(a) procurement will follow procedures prescribed at FAR 19.815 and submit requests through the DOT OSDBU Director. The OSDBU Director will submit the request to SBA's Associate Administrator for Business Development for consideration.

Subpart 1219.70—DOT Mentor-Protégé Program

1219.7000 General.

(a) The Small Business Administration provides general oversight to Federal mentor-protégé programs. However, DOT has its own program tailored to assist small business concerns in the transportation industry to enhance their capability to compete for Federal procurement opportunities. The program is administered by the DOT Office of Small and Disadvantaged Business Utilization (OSDBU) at *https://www.transportation.gov/osdbu/procurement-assistance/mentor-protege-pilot-program*.

(b) Small business concerns and large DOT prime contractors are encouraged to participate in the Department's Mentor-Protégé Program. Mentor firms provide eligible small business Protégé firms with developmental assistance to enhance their business capabilities and ability to obtain Federal contracts.

(c) Mentor firms are eligible small businesses and large DOT prime contractors or other socioeconomic firms capable of providing developmental assistance. Protégé firms are small businesses as defined in 13 CFR part 121.

(d) Developmental assistance is technical, managerial, financial, and other mutually beneficial assistance that assists Protégé firms. The costs for developmental assistance will not be reimbursed to the Mentor firm.

(e) Mentor and Protégé firms shall submit an evaluation of the overall experience in the program to OSDBU at the conclusion of the agreement or the voluntary withdrawal by either party from the program, whichever occurs first. At the end of each year, the Mentor and Protégé firms will submit a report regarding program accomplishments under their agreement.

(f) Mentor or Protégé firms shall notify OSDBU in writing, at least 30 calendar days in advance of the effective date of the firm's withdrawal from the program.

PART 1222—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 1222.1—Basic Labor Policies

Sec.
1222.101 Labor relations.
1222.101–70 Admittance of union representatives to DOT installations.
1222.101–7 1 Contract clauses.

Subpart 1222.8—Equal Employment Opportunity

1222.808 Complaints.
1222.810–70 Contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1222.1—Basic Labor Policies

1222.101 Labor relations.

1222.101–70 Admittance of union representatives to DOT installations.

(a) It is DOT policy to admit labor union representatives of contractor employees to DOT installations to visit work sites and transact labor union business with contractors, their employees, or union stewards pursuant to existing union collective bargaining agreements. Their presence shall not interfere with the contractor's work progress under a DOT contract, nor violate the safety or security regulations that may be applicable to persons visiting the installation. The union

representatives will not be permitted to conduct meetings, collect union dues, or make speeches concerning union matters while visiting a work site.

(b) Whenever a union representative is denied entry to a work site, the person denying entry shall make a written report to the labor advisor for the applicable Operating Administration or to the DOT labor coordinator, the Office of the General Counsel, Office of General Law, within the Office of the Secretary of Transportation, within two working days after the request for entry is denied. The report shall include the reason(s) for the denial, the name of the representative denied entry, the union affiliation and number, and the name and title of the person that denied the entry.

1222.101–71 Contract clauses.

(a) When applicable, the contracting officer may insert the clause at 1252.222–70, Strikes or Picketing Affecting Timely Completion of the Contract Work, in solicitations and contracts.

(b) When applicable, the contracting officer may insert the clause at 1252.222–71, Strikes or Picketing Affecting Access to a DOT Facility, in solicitations and contracts.

Subpart 1222.8—Equal Employment Opportunity

1222.808 Complaints.

Contractors shall, in good faith, cooperate with the Department of Transportation in investigations of Equal Employment Opportunity (EEO) complaints processed pursuant to 29 CFR part 1614 and in accordance with clause 1252.222–72 as prescribed in this subpart.

1222.810–70 Contract clause.

The contracting officer shall insert the clause at 1252.222–72, Contractor Cooperation in Equal Employment Opportunity and Anti-Harassment Investigations, in solicitations, contracts, and orders that include the clause at FAR 52.222–26, Equal Opportunity.

PART 1223—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG–FREE WORKPLACE

Subpart 1223.3—Hazardous Material Identification and Material Safety Data

Sec.
1223.303 Contract clause.

Subpart 1223.70—Safety Requirements for Selected DOT Contracts

1223.7000 Contract clauses.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1223.3—Hazardous Material Identification and Material Safety Data

1223.303 Contract clause.

The contracting officer shall insert the clause at 1252.223–70, Removal or Disposal of Hazardous Substances—Applicable Licenses and Permits, in solicitations and contracts involving the removal or disposal of hazardous waste material.

Subpart 1223.70—Safety Requirements for Selected DOT Contracts

1223.7000 Contract clauses.

(a) Where all or part of a contract will be performed on Government-owned or leased property, the contracting officer shall insert the clause at 1252.223–71, Accident and Fire Reporting.

(b) For all solicitations and contracts under which human test subjects will be utilized, the contracting officer shall insert the clause at 1252.223–72, Protection of Human Subjects. Contractors can request copies of applicable Operating Administration (OA)-specific policies regarding the protection of human subjects directly from contracting officers.

(c) In all solicitations and contracts exceeding the simplified acquisition

threshold, the contracting officer shall insert the clause at 1252.223–73, Seat Belt Use Policies and Programs.

PART 1224—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 1224.1—Protection of Individual Privacy

Sec.
1224.102–70 General.
1224.103 Procedures.

Subpart 1224.2—Freedom of Information Act

1224.203 Policy.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1224.1—Protection of Individual Privacy

1224.102–70 General.

(a) Records maintained in a Privacy Act system of records shall not be released except by the Government or at the Government's direction regardless of whether the Government or a contractor acting on behalf of the Government is maintaining the records. Examples of systems of records are:

(1) Personnel, payroll and background records about any officer or employee of DOT, or other person, including his or her residential address;

(2) Medical histories and medical records concerning individuals, including applications for licenses; and

(3) Any other record containing information about an individual which includes that individual's name or other personal identifier.

(b) Examples of records to which the Privacy Act does not apply are:

(1) Records that are maintained by a contractor on individuals employed by the contractor in the process of providing goods and services to the Federal government; and

(2) Student records generated in connection with the student's attendance (*e.g.*, admission forms, grade reports) at an educational institution contracted by the agency to provide training to students. These records must be similar to those maintained on other students and must not be commingled with records of other students.

1224.103 Procedures.

DOT rules and regulations implementing the Privacy Act of 1974 are located at 49 CFR part 10.

Subpart 1224.2—Freedom of Information Act

1224.203 Policy.

DOT rules and regulations implementing the Freedom of Information Act (FOIA) and the names and addresses of the OA FOIA offices are located in 49 CFR part 7. The DOT FOIA website can be found at *https://www.transportation.gov/foia*. Specific contract award information shall be requested from the FOIA office of the OA making the contract award.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 1227—PATENTS, DATA, AND COPYRIGHTS

Subpart 1227.3—Patent Rights Under Government Contracts

Sec.
1227.304 Procedures.
1227.304–4 Appeals.
1227.305 Administration of patent rights clauses.
1227.305–4 Protection of invention disclosures.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1227.3—Patent Rights Under Government Contracts

1227.304 Procedures.

1227.304–4 Appeals.

(b) Contractors may appeal agency actions listed at FAR 27.304–4(a)(1), (3), and (4) to the cognizant Head of the Contracting Activity (HCA). Contracting officers shall coordinate actions under this section with the legal counsel of the responsible office. The following procedures apply:

(1) Actions must be appealed within 30 days of receipt of the written statement issued by DOT required by FAR 27.304–4(a). The contractor must present all pertinent arguments in the appeal along with documentary evidence, if any.

(2) The HCA shall issue a determination within 45 days from the date the contractor's appeal is received.

(c) Contractor appeal of decisions rendered under FAR 27.304–4(a)(2) are subject to the following requirements:

(1) Actions must be appealed within 30 days of receipt of the written statement required by FAR 27.304–4(a). The contractor must present all pertinent arguments in the appeal along with documentary evidence, if any.

(2) The HCA may hold an informal hearing if deemed appropriate or at the request of the contractor. The informal hearing shall be held after all fact-finding is completed.

(i) If a hearing is held, DOT shall provide for a transcribed record of the hearing unless transcription is waived as provided for in paragraph (c)(2)(ii) of this section. A copy of the transcript shall be available to the contractor at cost.

(ii) Transcription of the hearing may be waived by agreement of the parties.

(3) The HCA shall designate an impartial fact-finding official. The official conducting the fact-finding shall prepare findings of fact and transmit them to the HCA promptly after the conclusion of the fact-finding proceeding along with a recommended determination.

(i) A copy of the findings of fact shall be sent to the contractor (assignee or exclusive licensee) by mail, to the last known street address, the last known facsimile number, or the last known email address and to the contractor's identified counsel. The contractor (assignee or exclusive licensee) and agency representatives will be given 30 days to submit written arguments to the HCA; and, upon request by the contractor, oral arguments will be held before the HCA as part of an informal hearing. The HCA will make the final determination as to whether the initial agency action was appropriate under the relevant laws and procedures (*see* 1227.304–4(c)).

(ii) Any portion of the informal hearing that involves testimony or evidence shall be closed to the public. Agencies shall not disclose any such information obtained during the appeal to persons outside the Government except when such release is authorized by the contractor (assignee or licensee).

(4) The HCA's final determination shall be based on the findings of facts, together with any other information and written or oral arguments submitted by the contractor (assignee or exclusive licensee) and agency representatives, and any other information in the administrative record. The HCA may reject only those facts that have been found clearly erroneous and must explicitly state the rejection and the basis for the contrary finding. The

HCA shall provide the contractor (assignee or exclusive licensee) a written determination by certified or registered mail no later than 90 days after fact-finding is completed or no later than 90 days after oral arguments, whichever is later.

1227.305 Administration of patent rights clauses.

1227.305–4 Protection of invention disclosures.

Solicitations and contracts that include a patent rights clause must provide the contractor the means to report inventions made during contract performance and at contract completion. This requirement may be fulfilled by requiring the contractor to submit a Department of Defense DD Form 882, Report of Inventions and Subcontracts.

PART 1228—BONDS AND INSURANCE

Subpart 1228.1—Bonds and Other Financial Protections

Sec.
1228.106 Administration.
1228.106–470 Contract clause-notification of payment bond protection.
1228.106–6 Furnishing information.
1228.106–70 Execution and administration of bonds.
1228.106–71 Performance and payment bonds for certain contracts.
1228.106–7100 Waiver.
1228.106–7101 Exception.

Subpart 1228.3—Insurance

1228.306 Insurance under fixed-price contracts.
1228.306–70 Contracts for lease of aircraft.
1228.307–1 Group insurance plans.
1228.311–1 Contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1228.1—Bonds and Other Financial Protections

1228.106 Administration.

1228.106–470 Contract clause-notification of payment bond protection.

The contracting officer must insert the clause at 1252.228–74, Notification of Payment Bond Protection, in solicitations and contracts when payment bonds are required.

1228.106–6 Furnishing information.

(c) When furnishing a copy of a payment bond and contract in accordance with FAR 28.106–6(b), the requirement for a copy of the contract may be satisfied by furnishing a pdf of the contract's first pages which show the contract number and date, the contractor's name and signature, the contracting officer's signature, and the description of the contract work. The contracting officer furnishing the copies shall place the statement ''Certified to be a true and correct copy'' followed by his/her signature, title and name of the Operating Administration using an authenticated electronic signature. The fee for furnishing the requested certified copies shall be determined in accordance with the DOT Freedom of Information Act regulation, 49 CFR part 7, and 1224.203.

1228.106–70 Execution and administration of bonds.

(a) The contracting officer shall notify the surety within 30 days of the contractor's failure to perform in accordance with the terms of the contract.

(b) When a partnership is a principal on a bond, the names of all the members of the firm shall be listed in the bond following the name of the firm, and the phrase ''a partnership composed of.'' If a principal is a corporation, the state of incorporation must also appear on the bond.

(c) Performance or payment bond(s), other than an annual bond, shall not predate the contract to which it pertains.

(d) Bonds may be filed with the original contract to which they apply, or all bonds can be separately maintained and reviewed quarterly for validity. If

separately maintained, each contract file shall cross-reference the applicable bonds.

1228.106–71 Performance and payment bonds for certain contracts.

1228.106–7100 Waiver.

Pursuant to the authority vested in the Secretary of Transportation by the Bond statute at 40 U.S.C. chapter 31, subchapter III, Bonds (historically known as the Miller Act), the requirements of 40 U.S.C. 3131 *et seq.* are waived, to the extent authorized in accordance with 40 U.S.C. 3134(b).

1228.106–7101 Exception.

A performance and payment bond for the contracts described under 1228.106–7100 may be advantageous in view of unusual circumstances arising in connection with such contracts. Requests for the authority to include the requirement for either a performance or payment bond, or both in the contracts described under 1228.106–7100 shall be submitted by the contracting officer to the HCA, before a solicitation is issued.

Subpart 1228.3—Insurance

1228.306 Insurance under fixed-price contracts.

1228.306–70 Contracts for lease of aircraft.

(a) The contracting officer shall insert the clauses at 1252.228–70, Loss of or Damage to Leased Aircraft; 1252.228–71, Fair Market Value of Aircraft; and 1252.228–72, Risk and Indemnities, unless otherwise indicated by the specific instructions for their use, in any contract for the lease of aircraft (including aircraft used in out-service flight training), except in the following circumstances—

(1) When the hourly rental rate does not exceed $250 and the total rental cost for any single transaction is not in excess of $2,500;

(2) When the cost of hull insurance does not exceed 10 percent of the contract rate; or

(3) When the lessor's insurer does not grant a credit for uninsured hours, thereby preventing the lessor from granting the same to the Government.

(b) As codified, 49 U.S.C. 44112, as amended, provides that an aircraft lessor under a lease of 30 days or more is not liable for injury or death of persons, or damage or loss of property, unless the aircraft is in the actual possession or control of the lessor and the damage occurs because of—

(1) The aircraft, engine, or propeller; or

(2) The flight of, or an object falling from, the aircraft, engine, or propeller.

(c) On short-term or intermittent-use leases, however, the owner may be liable for damage caused by operation of the aircraft. It is usual for the aircraft owner to retain insurance covering this liability during the term of such lease. Such insurance can, often for little or no increase in premium, be made to cover the Government's exposure to liability as well. To take advantage of this coverage, the Risks and Indemnities clause at 1252.228–72, prescribed in paragraph (d) of this section, shall be used.

(d) The contracting officer shall insert the clause at 1252.228–72, Risk and Indemnities, in any contract for out-service flight training or for the lease of aircraft when the Government will have exclusive use of the aircraft for a period of less than thirty days.

(e) During the performance of a contract for out-service flight training for DOT, whether the instruction to DOT personnel is in leased, contractor-provided, or Government-provided aircraft, contractor personnel shall always, during the entirety of the course of training and operation of the aircraft, remain in command of the aircraft. At no time shall Government personnel or other personnel be permitted to take command of the aircraft. The contracting officer shall insert the clause at 1252.228–73, Command of Aircraft, in any solicitation and contract for out-service flight training, whether performed utilizing DOT-leased aircraft, contractor-provided aircraft, or Government-provided aircraft.

1228.307–1 Group insurance plans.

(a) *Prior approval requirements.* Contractors shall provide plans required by FAR 28.307–1(a) to the contracting officer for approval.

1228.311–1 Contract clause.

The contracting officer shall insert the clause at FAR 52.228–7, Insurance Liability to Third Persons, as prescribed in FAR 28.311–1 unless it is waived by an official one level above the contracting officer.

PART 1231—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 1231.2—Contracts With Commercial Organizations

Sec.
1231.205 Selected costs.
1231.205–3270 Precontract costs—incurrence of costs.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1231.2—Contracts With Commercial Organizations

1231.205 Selected costs.

1231.205–3270 Precontract costs—incurrence of costs.

(a) The decision to incur precontract costs is the responsibility of the contractor. DOT officials shall not authorize, demand, or require a contractor to incur precontract costs. The contracting officer may advise the prospective contractor that any costs incurred before contract award are at the contractor's sole risk and that if negotiations fail to result in a binding contract, payment of these costs may not be made by the Government.

(b) When the contracting officer determines that incurring precontract costs was necessary to meet the proposed contract delivery schedule of a cost-reimbursement contract, the clause at 1252.231–70, Date of Incurrence of Costs, may be inserted in the resultant contract.

PART 1232—CONTRACT FINANCING

Subpart 1232.7—Contract Funding

Sec.
1232.770 Incremental funding during a Continuing Resolution.
1232.770–1 Scope of section.
1232.770–2 Definition.
1232.770–3 General.
1232.770–4 Policy.
1232.770–5 Limitations.
1232.770–6 Procedures.
1232.770–7 Clause.

Subpart 1232.9—Prompt Payment

1232.905–70 Payment documentation and process—form of invoice.

Subpart 1232.70—Electronic Invoicing Requirements

1232.7000 Scope of subpart.
1232.7001 Definition.
1232.7002 Electronic payment requests—invoices.
1232.7003 Payment system registration.
1232.7003–1 Electronic authentication.
1232.7004 Waivers.
1232.7005 Contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1232.7—Contract Funding

1232.770 Incremental funding during a Continuing Resolution.

1232.770–1 Scope of section.

This section provides policy and procedures for using incremental funding for fixed-price, time-and-material and labor-hour contracts during a period in which funds are provided to the DOT and its operating administrations under a continuing resolution. Heads of the contracting activities may develop necessary supplemental internal procedures and guidance to advise offerors and contractors of these policies and procedures.

1232.770–2 Definition.

Continuing Resolution (CR) means an appropriation, in the form of a joint resolution, that provides budget authority for Federal agencies, specific activities, or both to continue operation until the regular appropriations are enacted. Typically, a continuing resolution is used when legislative action on appropriations is not completed by the beginning of a fiscal year.

1232.770–3 General.

The Anti-Deficiency Act, 31 U.S.C. 1341, and FAR 32.702, state that no officer or employee of the Government may create or authorize an obligation in excess of the funds available, or in advance of appropriations unless otherwise authorized by law. A CR provides funding for continuing projects or activities that were conducted in the prior fiscal year for which appropriations, funds, or other authority was previously made available. Each CR is governed by the specific terms in that specific CR (*e.g.*, duration of the CR) and under certain CRs, the funding amounts available for award of some contract actions are inadequate to fund the entire amounts needed.

1232.770–4 Policy.

(a) A fixed-price, time-and-materials, or labor-hour contract or order for commercial or non-commercial severable services may be incrementally funded when—

(1) Funds are provided to DOT or operating administration under a CR. This includes funds appropriated to DOT or an operating administration, funds appropriated to another entity that will be directly obligated on a DOT contract, and funds in a revolving fund or similar account that will be reimbursed by a customer agency funded by a CR;

(2) The responsible fiscal authority has not allocated sufficient funds to fully fund the contract action that is otherwise authorized to be issued;

(3) There is no statutory restriction that would preclude the proposed use of funds;

(4) Funds are available and unexpired, as of the date the funds are obligated;

(5) Assurance is provided by the responsible financial authority that full funding is anticipated once an appropriations act is enacted; and

(6) The clause prescribed by 1232.770–7 is incorporated into the contract or order.

(b) Incremental funding may be limited to an individual line item(s) or a particular order(s).

1232.770–5 Limitations.

This policy does not apply to contract actions using funds that are not covered by the CR.

1232.770–6 Procedures.

(a) An incrementally funded fixed-price, time-and-materials, or labor-hour contract shall be fully funded once funds are available.

(b) The contracting officer shall ensure that sufficient funds are allotted to the contract to cover the total amount payable to the contractor in the event of termination for convenience by the Government.

(c) Upon receipt of the contractor's notice under paragraph (c) of the clause at 1252.232–71, Limitation of Government's Obligation, the contracting officer shall promptly provide written notice to the contractor that the Government is—

(1) Obligating additional funds for continued performance and increasing the Government's limitation of obligation in a specified amount;

(2) Obligating the full amount of funds needed;

(3) Terminating for convenience, as applicable, the affected line items or contract; or

(4) Considering whether to allot additional funds; and

(i) The contractor is entitled by the contract terms to stop work when the Government's limitation of obligation is reached; and

(ii) Any costs expended beyond the Government's limitation of obligation are at the contractor's risk.

(d) Upon learning that the contract will receive no further funds by the date provided in the notice under paragraph (c) of the clause at 1252.232–71, Limitation of Government's Obligation, the contracting officer shall promptly give the contractor written notice of the Government's decision and terminate the affected line items or contract, as applicable, for the convenience of the Government.

1232.770–7 Clause.

(a) The contracting officer shall insert the clause at 1252.232–71, Limitation of Government's Obligation, in—

(1) Solicitations and contracts for severable services when incremental

funding of a fixed-price, time-and-material, or labor-hour contract due to a CR is anticipated; or

(2) Contracts or orders for severable services when incremental funding of a fixed-price, time-and-material, or labor-hour contract is authorized and DOT or its operating administrations are operating under a CR (*see* 1232.770–4).

(b) The contracting officer shall insert the information required in paragraphs (a) and (c) of clause 1252.232–71. Contracting officers are authorized, in appropriate cases, to revise paragraph (a) of clause 1252.232–71 to specify the work required under the contract, in lieu of using contract line item numbers, as well as revise paragraph (c) of the clause to specify a different notification period and percentage. The 30-day period may be varied up to 90 days, and the 75 percent can be varied from 75 up to 85 percent.

Subpart 1232.9—Prompt Payment

1232.905–70 Payment documentation and process—form of invoice.

(a) Under fixed-price contracts, the contracting officer shall require the contractor to submit an invoice or voucher on any form or format meeting FAR 32.905(b) requirements.

(b) Under other than fixed-price contracts, the contracting officer shall require the contractor to submit the Standard Form (SF) 1034, Public Voucher for Purchases and Services Other Than Personal, and the SF 1035, Public Voucher for Purchases and Services Other Than Personal (Continuation Sheet), to request payments. The forms must be completed as required by figure 1 to this section, Instructions for Completing the SF 1034, and figure 2 to this section, Instructions for Completing the SF 1035.

FIGURE 1 TO 1232.905–70

Instructions for Completing the SF 1034

The SF 1034, Public Voucher for Purchases and Services Other Than Personal, shall be completed in accordance with the below instructions. The numbered items correspond to the entries on the form.

Caption on the SF 1034	Data to be inserted in the block
1. U.S. DEPARTMENT, BUREAU, OR ESTABLISHMENT AND LOCATION.	Name and address of the contracting office which issued the contract.
2. DATE VOUCHER PREPARED	Date voucher submitted to the designated billing office cited under the contract or order.
3. CONTRACT NO. AND DATE	Contract No. and, when applicable, the Order No. and date as shown on the award document.
4. REQUISITION NO. AND DATE	Leave blank or fill-in in accordance with the instructions in the contract.
5. VOUCHER NO	Start with ''1'' and number consecutively. A separate series of consecutive numbers must be used beginning with ''1'' for eachcontract number or order number (when applicable). Note: Insert the word ''FINAL'' if this is the last voucher.
6. SCHEDULE NO.; PAID BY; DATE INVOICE RECEIVED; DISCOUNT TERMS; PAYEE'S ACCOUNT NO.; SHIPPED FROM/TO; WEIGHT; GOVERNMENT B/L.	Leave all these blocks blank.
7. PAYEE'S NAME AND ADDRESS	Name and address of contractor as it appears on the contract. If the contract is assigned to a bank, also show ''CONTRACT ASSIGNED'' below the name and address of the contractor.
8. NUMBER AND DATE OF ORDER	Leave blank. (*See* #3 above.).
9. DATE OF DELIVERY OR SERVICE	The period for which the incurred costs are being claimed (*e.g.,* month and year; beginning and ending date of services, etc.).
10. ARTICLES OR SERVICES	Insert the following: ''For detail, *see* the total amount of the claim transferred from the attached SF 1035, page X of X.'' One space below this line, insert the following: ''COST REIMBURSABLE–PROVISIONAL PAYMENT.''
11. QUANTITY; UNIT PRICE; (COST; PER)	Leave blank.
12. AMOUNT	Insert the total amount claimed from the last page of the SF 1035.
Payee must NOT use the space below	Do NOT write or type below this line.

FIGURE 2 TO 1232.905–70

Instructions for Completing the SF 1035

The SF 1035, Public Voucher for Purchases and Services Other Than Personal (Continuation Sheet), shall be completed in accordance with the below instructions.

1. Use the same basic instructions for the SF 1035 as used for the SF 1034. Ensure that the contract and, if applicable, order number, are shown on each continuation sheet. Use as many sheets as necessary to show the information required by the contract, contracting officer, or responsible audit agency; however, if more than one sheet of SF 1035 is used, each sheet shall be in numerical sequence.

2. The following items are generally entered below the line with Number and Date of Order; Date of Delivery or Service; Articles or Services; Quantity; Unit Price; and Amount (but do not necessarily tie to these captions).

3. Description of data to be inserted as it applies to the contract or order number including the CLIN or SLIN.

a. Show, as applicable, the target or estimated costs, target or fixed-fee, and total contract value, as adjusted by any modifications to the contract or order. The FAR permits the contracting officer to withhold a percentage of fixed fee until a reserve is set aside in an amount that is considered necessary to protect the Government's interest.

b. Show the following costs and supporting data (as applicable) to the contract or order:

(1) *Direct Labor*. List each labor category, rate per labor hour, hours worked, and extended total labor dollars per labor category.

(2) *Premium Pay/Overtime*. List each labor category, rate per labor hour, hours worked, and the extended total labor dollars per labor category. *Note:* Advance written authorization must be received from the contracting officer to work overtime or to pay premium rates; therefore, identify the contracting officer's written authorization to the contractor.

(3) *Fringe Benefits*. If fringe benefits are included in the overhead pool, no entry is required. If the contract allows for a separate fringe benefit pool, cite the formula (rate and base) in effect during the time the costs were incurred. If the contract allows for billing fringe benefits as a direct expense, show the actual fringe benefit costs.

(4) *Materials, Supplies, Equipment*. Show those items normally treated as direct costs. Expendable items need not be itemized and may be grouped into major classifications such as office supplies. However, items valued at $5,000 or more must be itemized. *See* FAR part 45, Government Property, for reporting of property.

(5) *Travel*. List the name and title of traveler, place of travel, and travel dates. If the travel claim is based on the actual costs expended, show the amount for the mode of travel (*i.e.*, airline, private auto, taxi, etc.), lodging, meals, and other incidental expenses separately, on a daily basis. These actual costs must be supported with receipts to substantiate the costs paid. Travel costs for consultants must be shown separately and also supported.

(6) *Other Direct Costs*. Itemize those costs that cannot be placed in categories (1) through (5) above. Categorize these costs to the extent possible.

(7) *Total Direct Costs*. Cite the sum of categories (1) through (6) above.

(8) *Overhead*. Cite the rate, base, and extended amount.

(9) *G&A Expense*. Cite the rate, base, and extended amount.

(10) *Total Costs*. Cite the sum of categories (7) through (9) above.

(11) *Fee*. Cite the rate, base, and extended amount.

(12) *Total Cost and Fee Claimed*. Enter this amount on the SF 1034.

COMPLETION VOUCHER

The completion (final) voucher is the last voucher to be submitted for incurred, allocable, and allowable costs expended to perform the contract or order. This voucher should include all contract reserves, allowable cost withholdings, balance of fixed fee, etc. However, the amount of the completion voucher when added to the total amount previously paid cannot exceed the total amount of the contract.

Subpart 1232.70—Electronic Invoicing Requirements

1232.7000 Scope of subpart.

This subpart prescribes policy and procedures for submitting and processing payment requests in electronic form.

1232.7001 Definition.

Payment request, as used in this subpart, means a bill, voucher, invoice, or request for contract financing payment with associated supporting documentation.

1232.7002 Electronic payment requests—invoices.

(a) *Requirements.* Contracts shall require the electronic submission of payment requests, except for—

(1) Purchases paid for with a Governmentwide commercial purchase card;

(2) Classified contracts or purchases when electronic submission and processing of payment requests could compromise classified information or national security; or

(3) As directed by the contracting officer to submit payment requests by mail.

(b) *Alternate procedures.* Where a contract requires the electronic submission of invoices, the contracting officer may authorize alternate procedures only if the contracting officer makes a written determination that the Department of the Transportation (DOT) is unable to receive electronic payment requests or provide acceptance electronically and it is approved one level above the contracting officer.

(c) *DOT electronic invoicing system.* The Department of Transportation utilizes the DELPHI eInvoicing System. The DELPHI module for submitting invoices is called *iSupplier*. Except as provided in paragraphs (a) and (b) of this section, contracting officers and DOT finance officials shall process electronic payment submissions through the DELPHI System and the DELPHI module for submitting invoices, *iSupplier*. *iSupplier* is also the official system of record for DOT payment requests. If the requirement for electronic submission of payment requests is waived under paragraph (a) or (b) of this section, the contract or alternate payment authorization, as applicable, shall specify the form and method of payment request submission.

1232.7003 Payment system registration.

1232.7003–1 Electronic authentication.

Access to DELPHI is granted with electronic authentication of credentials (name & valid email address) utilizing the General Services Administration (GSA) credentialing platform *login.gov*. Vendors submitting invoices will be required to submit invoices via *iSupplier* (DELPHI) and authenticated via *www.login.gov*.

1232.7004 Waivers.

If a vendor is unable to utilize DOT's DELPHI electronic invoicing system, DOT may consider waivers on a case-by-case basis. Vendors should contact their COR for procedures, or access the DELPHI website at *http://www.dot.gov/cfo/delphi-einvoicing-system.html*.

1232.7005 Contract clause.

The contracting officer shall insert the clause at 1252.232–70, Electronic Submission of Payment Requests, in solicitations and contracts exceeding the micro-purchase threshold, except those for which the contracting officer has directed or approved otherwise under 1232.7002, and those paid with a Governmentwide commercial purchase card.

PART 1233—PROTESTS, DISPUTES, AND APPEALS

Subpart 1233.1—Protests

Sec.
1233.103 Protests to the agency.
1233.104 Protests to GAO.

Subpart 1233.2—Disputes and Appeals

1233.211 Contracting officer's decision.
1233.214 Alternative dispute resolution (ADR).

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1233.1—Protests

1233.103 Protests to the agency.

(c) DOT Operating Administrations (OAs) shall consider the use of alternative dispute resolution (ADR) in all agency protest actions.

1233.104 Protests to GAO.

The protest process at the Government Accountability Office (GAO) may include ADR assistance by GAO. The contracting officer shall, with advice of counsel, explore the possibility of using ADR for all GAO protests.

Subpart 1233.2—Disputes and Appeals

1233.211 Contracting officer's decision.

(a)(4)(v) In accordance with FAR 33.211(a)(4)(i) through (vi), contracting officers shall include in a statement of the contracting officer's decision referenced at FAR 33.211(a)(4)(iv), paragraphs substantially as follows:

''This is the final decision of the Contracting Officer. You may appeal this decision to the Civilian 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 Civilian Board of Contract Appeals as set forth below and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

Where to File: All filings must be submitted to the Clerk of the Board. Filings shall be to Civilian Board of Contract Appeals, 1800 F Street NW, Washington, DC 20405 in any of the ways as set forth at their website at *https://cbca.gov/howto/index.html*.

With regard to appeals to the Civilian Board of Contract Appeals, you may, solely at your election, proceed under the board's—

(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

(2) Accelerated procedure for claims of $100,000 or less.

Instead of appealing to the Civilian 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.''

1233.214 Alternative dispute resolution (ADR).

(c) The Administrative Dispute Resolution Act (ADRA) of 1990, Public Law 101–552, as reauthorized by the Administrative Dispute Resolution Act (ADRA) of 1996, Public Law 104–320, authorizes and encourages agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes, either before or after appeal, and for other purposes. ADR procedures may be used when—

(1) There is mutual consent by the parties to participate in the ADR process (with consent being obtained either before or after an issue in controversy has arisen); and either

(2) Prior to the submission of a claim; or

(3) In resolution of a formal claim.

(d)(1) Use of ADR shall be coordinated with counsel. For all matters filed with the Civilian Board of Contract Appeals (CBCA), the CBCA Alternate Dispute Resolution (ADR) procedures contained in 48 CFR 6101.54 shall be followed.

(2) For other matters, pursuant to the Administrative Dispute Resolution Act (ADRA), DOT has appointed a Dispute Resolution Specialist, who is responsible for the operations of the Center for Alternative Dispute Resolution. The Center may provide an internal DOT neutral agreeable to the parties to conduct any of the alternative means of dispute resolution set forth in the ADRA, 5 U.S.C. 571(3), on a non-reimbursable basis for DOT operating administrations and their contracting partners. Alternative means of dispute resolution include settlement negotiations, conciliation, facilitation, mediation, fact-finding, mini-trials, and arbitration, or any combination of these methods. The Center may also arrange for an external public or private neutral at the parties' expense.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 1234 [RESERVED]

PART 1235—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.
1235.003 Policy.
1235.011–70 Contract clause.
1235.012 Patent rights.
1235.070 Research misconduct.
1235.070–1 Contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

1235.003 Policy.

(b) *Cost sharing*. DOT cost sharing policies that are not otherwise required by law shall be in accordance with FAR 16.303 and 42.707(a) and Operating Administration (OA) procedures.

(c) *Recoupment*. DOT recoupment not otherwise required by law shall be in accordance with OA procedures.

1235.011–70 Contract clause.

The contracting officer shall insert the clause at 1252.235–71, Technology Transfer, in all solicitations and contracts for experimental, developmental, or research work.

1235.012 Patent rights.

Patent rights shall be in accordance with FAR part 27 and any OA implementing procedures in this part.

1235.070 Research misconduct.

(a) *Applicability*. DOT policy on scientific integrity is implemented in the Deputy Secretary's memorandum dated April 10, 2012, Implementation of Departmental Scientific Integrity Policy at *https://www.transportation.gov/administrations/assistant-secretary-research-and-technology/memorandum-implementation-departmental*. The Department is dedicated to preserving the integrity of the research it conducts and funds and will not tolerate misconduct in the performance of these activities. This policy applies to all DOT-funded or DOT-conducted research, including intramural research, research conducted by contractors, and research performed at research institutions, including universities and industry.

(b) *Definition*. *Research misconduct* means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results. Research misconduct does not include honest error or differences of opinion. A finding of research misconduct means a determination based on a preponderance of the evidence that research misconduct has occurred, including a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it was knowingly, intentionally, or recklessly committed.

1235.070–1 Contract clause.

The contracting officer shall insert the clause at 1252.235–70, Research Misconduct, in all solicitations and contracts for research and development.

PART 1236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 1236.5—Contract Clauses

Sec.
1236.570 Special precautions for work at operating airports.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1236.5—Contract Clauses

1236.570 Special precautions for work at operating airports.

Where any acquisition will require work at an operating airport, insert the clause at 1252.236–70, Special Precautions for Work at Operating Airports, in solicitations and contracts.

PART 1237—SERVICE CONTRACTING

Subpart 1237.1—Service Contracts—General

Sec.
1237.110–70 Contract clauses.

Subpart 1237.70—Procedures for Acquiring Training Services

1237.7000 Policy.
1237.7001 Certification of data.
1237.7002 Applicability.
1237.7003 Solicitation provision and contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1237.1—Service Contracts—General

1237.110–70 Contract clauses.

(a) The contracting officer shall insert the clause at 1252.237–70, Qualifications of Contractor Employees, in all solicitations and contracts for services where contractor employees will have access to Government facilities and sensitive information, including proprietary data and/or resources.

(b) The contracting officer shall insert the clause at 1252.237–73, Key Personnel, in solicitations and contracts for services when the selection for award is substantially based on the offeror's possession of special capabilities regarding personnel.

Subpart 1237.70—Procedures for Acquiring Training Services

1237.7000 Policy.

When training services are provided under contract, DOT policy requires that all prospective contractors:

(a) Certify that the data provided concerning company qualifications, background statements, and resumes, for example, is current, accurate, and complete; and

(b) Agree to not solicit or advertise private, non-Government training while conducting a training course.

1237.7001 Certification of data.

Towards fulfilling DOT's policy at 1237.7000(a), contracting officers shall request information from prospective contractors for certification purposes. The type of information requested is dependent upon the criticality of the service and/or any unique or essential qualification requirements.

1237.7002 Applicability.

The policy at 1237.7000 applies to all contracts (as defined in FAR 2.101) awarded by DOT for training services when DOT controls the content and/or presentation of the course. This policy does not apply to courses attended by DOT employees that are offered and sponsored by Government sources of supply, educational institutions, or private entities where DOT does not control the course content or presentation (*see* 1213.7100 for examples).

1237.7003 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 1252.237–71, Certification of Data, in solicitations and the clause at 1252.237–72, Prohibition on Advertising, in solicitations and contracts for training services when the content and/or presentation of the course is controlled by DOT.

(b) The contracting officer shall incorporate the successful offeror's certified data into any resultant contract(s). Certified data may be adopted by reference, if the contracting officer determines it contains sufficient descriptive information (*i.e.*, dated material such as resumes, company and/or personnel qualifications) to reliably describe the certified data submitted.

PART 1239—ACQUISITION OF INFORMATION TECHNOLOGY

Sec.
1239.00 Scope of part.
1239.002 Definitions.

Subpart 1239.1—General

1239.101 Policy.
1239.101–70 Policy—software management and development.
1239.101–71 Scope.
1239.101–72 Definitions.
1239.101–73 Policy.

1239.106–70 Contract clauses.

Subpart 1239.2—Information and Communication Technology

1239.201 Scope of subpart.
1239.203 Applicability.
1239.203–70 Information and communication technology accessibility standards—contract clause and provision.

Subpart 1239.70—Information Security and Incident Response Reporting

1239.7000 Scope of subpart.
1239.7001 Definitions.
1239.7002 Policy.
1239.7003 Contract clauses.

Subpart 1239.71—Protection of Data About Individuals

1239.7100 Scope of subpart.
1239.7101 Definitions.
1239.7102 Policy.
1239.7103 Responsibilities.
1239.7104 Contract clause.

Subpart 1239.72—Cloud Computing

1239.7200 Scope of subpart.
1239.7201 Definitions.
1239.7202 Policy.
1239.7203 DOT FedRAMP specific requirements.
1239.7204 Contract clauses.

Subpart 1239.73—Technology Modernization and Upgrades/Refreshment

1239.7300 Scope of subpart.
1239.7301 Definitions.
1239.7302 Policy.
1239.7303 Contract clauses.

Subpart 1239.74—Records Management

1239.7400 Scope of subpart.
1239.7401 Definition.
1239.7402 Policy.
1239.7403 Contract clause.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

1239.000 Scope of part.

In addition to FAR 39.000, this part prescribes acquisition policies and procedures for use in acquiring information technology and information technology-related supplies, services and systems, including information security, to include—

(a) Software management and development;

(b) Section 508 standards and compliance for contracts;

(c) Information security and incident response reporting;

(d) Protection of data about individuals;

(e) Cloud computing;

(f) Technology modernization and upgrade/refreshment; and

(g) Record management.

1239.002 Definitions.

As used in this part—

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).

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which information is recorded, stored, or printed within an information system.

Subpart 1239.1—General

1239.101 Policy.

1239.101–70 Policy—software management and development.

1239.101–71 Scope.

This subpart applies to all acquisitions of products or services supporting the development or maintenance of software.

1239.101–72 Definitions.

As used in this subpart—

Application means software that resides above system software and includes applications such as database programs, word processors and spreadsheets. Application software may be

bundled with system software or published alone.

Programming software means tools to aid developers in writing programs including compilers, linkers, debuggers, interpreters and text editors.

Software means a set of instructions or programs instructing a computer to do specific tasks including scripts, applications, programs and a set of instructions. Includes System, Programming, and Application software.

System software means a platform comprised of Operating System (OS) programs and services, including settings and preferences, file libraries and functions used for system applications. System software also includes device drivers that run basic computer hardware and peripherals.

1239.101–73 Policy.

The contracting officer will ensure all documents involving the acquisition of products or services supporting the development or maintenance of DOT software applications, systems, infrastructure, and services contain the appropriate clauses as may be required by Federal Acquisition Regulation (FAR) and other Federal authorities, in order to ensure that information system modernization is prioritized accordance with Federal law, OMB Guidance, and DOT policy.

1239.106–70 Contract clauses.

The contracting officer shall insert the clause at 1252.239–70, Security Requirements for Unclassified Information Technology Resources, and the clause at 1252.239–71, Information Technology Security Plan and Accreditation, in all solicitations and contracts exceeding the micro-purchase threshold that include information technology services.

Subpart 1239.2—Information and Communication Technology

1239.201 Scope of subpart.

This subpart applies to the acquisition of Information and Communication Technology (ICT) supplies and services. It concerns the access to and use of information and data, by both Federal employees with disabilities, and members of the public with disabilities in accordance with FAR 39.201. This subpart implements DOT policy on section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d) as it applies to contracts and acquisitions.

1239.203 Applicability.

(a) Solicitations for information and communication technology supplies and services may require submission of a section 508 Checklist available at *https://www.section508.gov/sell/vpat*.

1239.203–70 Information and communication technology accessibility standards—contract clause and provision.

(a) The contracting officer shall insert the provision at 1252.239–92, Information and Communication Technology Accessibility Notice, in all solicitations.

(b) The contracting officer shall insert the clause at 1252.239–93, Information and Communication Technology Accessibility, in all contracts and orders.

Subpart 1239.70—Information Security and Incident Response Reporting

1239.7000 Scope of subpart.

(a) This subpart applies to contracts and subcontracts requiring contractors and subcontractors to safeguard DOT sensitive data that resides in or transits through covered contractor information systems by applying specified network security requirements. It also requires reporting of cyber incidents.

(b) This subpart does not abrogate any other requirements regarding contractor physical, personnel, information, technical, or general administrative security operations governing the protection of unclassified information, nor does it affect requirements of the National Industrial Security Program.

1239.7001 Definitions.

As used in this subpart—

Adequate security means protective measures that are commensurate with the consequences and probability of loss, misuse, or unauthorized access to, or modification of information.

Contractor attributional/proprietary information means information that identifies the contractor(s), whether directly or indirectly, by the grouping of information that can be traced back to the contractor(s) (*e.g.*, program description, facility locations), personally identifiable information, as well as trade secrets, commercial or financial information, or other commercially sensitive information that is not customarily shared outside of the company.

Contractor information system means an unclassified information system that is owned, or operated by or for, a contractor and that processes, stores, or transmits DOT sensitive information.

Cyber incident means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

DOT sensitive data means unclassified information that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies, and is—

(1) Marked or otherwise identified in the contract, task order, or delivery order and provided to the contractor by or on behalf of DOT in support of the performance of the contract; or

(2) Collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract.

Rapidly report means reporting within two (2) hours of discovery of any cyber incident.

Technical information means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information. Examples of technical information include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog-item identifications, data sets, studies and analyses and related information, and computer software executable code and source code.

1239.7002 Policy.

(a) Contractors and subcontractors are required to provide adequate security on all contractor information systems that will collect, use, process, store, or disseminate DOT sensitive data.

(b) Contractors and subcontractors shall report cyber incidents directly to DOT via the DOT Security Operations Center (SOC) 24 hours-a-day, 7 days-a-week, 365 days a year (24x7x365) at phone number: 571–209–3080 (Toll Free: 866–580–1852) within two (2) hours of discovery. Subcontractors will provide to the prime contractor the incident report number automatically assigned by DOT. Lower-tier subcontractors likewise report the incident report number automatically assigned by DOT to their higher-tier subcontractor, until the prime contractor is reached.

(c) If a cyber incident occurs, contractors and subcontractors shall submit to DOT, in accordance with the instructions contained in the clause at 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting—

(1) A cyber incident report;

(2) The malicious software, if detected and isolated; and

(3) The medium or media (or access to covered contractor information systems and equipment) upon request.

(d) Notwithstanding the requirement in this subpart for the reporting of cyber incidents, if existing safeguards have ceased to function or the Government or Contractor discovers new or unanticipated threats or hazards, the discoverer shall immediately bring the situation to the attention of the other party.

(1) Information shared by the contractor may include contractor attributional/proprietary information. The Government will protect against the unauthorized use or release of information that includes contractor attributional/proprietary information.

(2) A cyber incident that is reported by a contractor or subcontractor shall not, by itself, be interpreted as evidence that the contractor or subcontractor has failed to provide adequate security on their covered contractor

information systems, or has otherwise failed to meet the requirements of the clause at 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting. When a cyber incident is reported, the contracting officer shall consult with the DOT component Chief Information Officer/cyber security office prior to assessing contractor compliance (*see* 1239.7003). The contracting officer shall consider such cyber incidents in the context of an overall assessment of a contractor's compliance with the requirements of the clause at 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting.

(3) Support services contractors directly supporting Government activities related to safeguarding DOT sensitive data and cyber incident reporting (*e.g.*, forensic analysis, damage assessment, or other services that require access to data from another contractor) are subject to restrictions on use and disclosure of reported information.

1239.7003 Contract clauses.

(a) The contracting officer shall insert the clause at 1252.239–72, Compliance with Safeguarding DOT Sensitive Data Controls, in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial products and commercial services, except for solicitations solely for the acquisition of commercially available off-the-shelf (COTS) items.

(b) The contracting officer shall insert clause at 1252.239–73, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, for commercial services that include support for the Government's activities related to safeguarding DOT sensitive data and cyber incident reporting.

(c) The contracting officer shall insert clause at 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, except for solicitations and contracts solely for the acquisition of COTS items.

Subpart 1239.71—Protection of Data About Individuals

1239.7100 Scope of subpart.

This subpart includes Privacy Act and data protection considerations for DOT contracts. Data protection requirements are in addition to provisions concerning the general protection of individual privacy (*see* FAR subpart 24.1) and privacy in the acquisition of information technology (*see* FAR 39.105). DOT rules and regulations implementing the Privacy Act of 1974 are located at 49 CFR part 10.

1239.7101 Definitions.

As used in this subpart—

Breach means the disclosure of information to unauthorized persons, or a violation of the security policy of a system, in which unauthorized access, compromise, use, disclosure, modification, destruction, access or loss use of data, or the copying of information to unauthorized media may have occurred.

Data protection means the practice of protecting data and managing risks associated with the collection, display, use, processing, storage, transmission, and disposal of information or data as well as the systems and processes used for those purposes. Data protection uses physical, technical, and administrative controls to protect the integrity, availability, authenticity, non-repudiation, and confidentiality of data by incorporating protection, detection, and reaction capabilities. Data protection encompasses not only digital data, but also data in analog or physical form, and applies to data in transit as well as data at rest.

Information security means the protection of information and information systems from unauthorized access, use, disclosure, disruption, modification, or destruction in order to provide—

(1) *Integrity*, which means guarding against improper information modification or destruction, and includes ensuring information non-repudiation and authenticity;

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

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

Personally Identifiable Information (PII) means the definition as set forth in FAR 24.101.

Privacy incident means the loss of control, compromise, unauthorized disclosure, unauthorized acquisition, or unauthorized access to PII regardless of format.

1239.7102 Policy.

DOT must ensure that data protection is provided for information and information systems in accordance with current policies, procedures, and statutes, including:

(a) The Clinger-Cohen Act.

(b) The E-Government Act.

(c) Federal Information Systems Modernization Act.

(d) Federal Information Processing Standards.

(e) OMB Circular A–130, Managing Information as a Strategic Resource.

(f) 49 CFR part 10, Maintenance of and Access to Records Pertaining to Individuals.

(g) DOT Order 1351.18, Privacy Risk Management Policy.

(h) DOT Order 1351.19, PII Breach Notification Controls.

(i) DOT Order 1351.28, Records Management.

(j) DOT Order 1351.37, Departmental Cyber Security Policy.

1239.7103 Responsibilities.

(a) The contracting officer will include appropriate data protection requirements in all contracts and other acquisition-related documents for DOT information created, collected, displayed, used, processed, stored, transmitted, and disposed of by contractors.

(b) The contracting officer will ensure all contracts with contractors maintaining information systems containing PII contain the appropriate clauses as may be required by the Federal Acquisition Regulation (FAR) and other OMB and agency memorandums and directives, to ensure that PII under the control of the contractor is maintained in accordance with Federal law and DOT policy.

(c) The contracting officer and assigned contracting officer's representatives and program and project managers will obtain contractual assurances from third parties working on official DOT business that third parties will protect PII in a manner consistent with the privacy practices of the Department during all phases of the system development lifecycle.

(d) Program and project managers and requiring activities will address the need to protect information about individuals and/or PII in the statement of work (SOW), performance work statement (PWS) or statement of objectives (SOO). Contracting officers will notify the appropriate organization or office when it intends to issue a solicitation for items or services requiring access to personal information or PII. Contracting officers will identify the Component Privacy Officer as the point of contact for oversight of privacy protection and identify the Component Information Systems Security Manager for the component for oversight of information security to the contractor after award.

(e) See 1252.239–75, DOT Protection of Information about Individuals, PII and Privacy Risk Management Requirements, for additional information regarding the requirements of DOT Order 1351.18, Privacy Risk Management Policy and DOT Order 1351.37, Departmental Cyber Security Policy.

1239.7104 Contract clause.

The contracting officer shall insert the clause at 1252.239–75, DOT Protection of Information About Individuals, PII and Privacy Risk Management Requirements, in solicitations and contracts involving contractor performance of data protection functions and for contracts involving the design, development, or operation of an information system with access to personally identifiable information as described in DOT Order 1351.18, Privacy Risk Management, and DOT Order 1351.37, Departmental Cyber Security Policy.

Subpart 1239.72—Cloud Computing

1239.7200 Scope of subpart.

This subpart prescribes policies and procedures for the acquisition of cloud computing services.

1239.7201 Definitions.

As used in this subpart—

Authorizing official means the senior Federal official or executive with the authority to formally assume responsibility for operating an information system at an acceptable level of risk to organizational operations (including mission, functions, image, or reputation), organizational assets, individuals, other organizations, and the Nation.

Cloud computing means a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (*e.g.*, networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This includes other commercial terms, such as on-demand self-service, broad network access, resource pooling, rapid elasticity, and measured service. It also includes commercial offerings for software-as-a-service, infrastructure-as-a-service, and platform-as-a-service.

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, and other similar records) or data such as operating procedures, software coding, or algorithms that are not uniquely applied to the Government data.

1239.7202 Policy.

(a) *General.* Generally, DOT entities shall acquire cloud computing services using commercial terms and conditions that are consistent with Federal law and the agency's needs, including those requirements specified in this subpart. Some examples of commercial terms and conditions are license agreements, End User License Agreements (EULAs), Terms of Service (TOS), or other similar legal instruments or agreements. Contracting officers shall carefully review commercial terms and conditions and consult counsel to ensure these are consistent with Federal law, regulations, and the agency's needs. Contracting officers shall incorporate any applicable service provider terms and conditions into the contract by attachment or other appropriate mechanism.

(b) *FedRAMP provisional authorization.* Except as provided in paragraph (b)(1) of this section, the contracting officer shall only award a contract to acquire cloud computing services from a cloud service provider (*e.g.*, contractor or subcontractor, regardless of tier) that has been granted provisional authorization by the General Services Administration (GSA) Federal Risk and Authorization Management Program (FedRAMP), and meets the security requirements set out by the DOT Chief Information Officer (CIO), at the level appropriate to the requirement to provide the relevant cloud computing services.

(1) The contracting officer may award a contract to acquire cloud computing services from a cloud service provider that has not been granted provisional authorization when—

(i) The requirement for a provisional authorization is waived by the DOT CIO; or

(ii) The cloud computing service requirement is for a private, on-premises version that will be provided from Government facilities. Under this circumstance, the cloud service provider must obtain a provisional authorization prior to operational use.

(2) When contracting for cloud computing services, the contracting officer shall ensure the following information is provided by the requiring activity:

(i) Government data and Government-related data descriptions.

(ii) Data ownership, licensing, delivery, and disposition instructions specific to the relevant types of Government data and Government-related data (*e.g.*, Contract Data Requirements List; work statement task; line items). Disposition instructions shall provide for the transition of data in commercially available, or open and non-proprietary format (and for permanent records, in accordance with disposition guidance issued by National Archives and Record Administration).

(iii) Appropriate requirements to support applicable inspection, audit, investigation, or other similar authorized activities specific to the relevant types of Government data and Government-related data, or specific to the type of cloud computing services being acquired.

(iv) Appropriate requirements to support and cooperate with applicable system-wide search and access capabilities for inspections, audits, investigations.

(c) *Required storage of data within the United States or outlying areas.* (1) Cloud computing service providers are required to maintain within the 50 States, the District of Columbia, or outlying areas of the United States, all Government data that is not physically located on DOT premises, unless otherwise authorized by the DOT CIO.

(2) The contracting officer shall provide written approval to the contractor when the contractor is permitted to maintain Government data at a location outside the 50 States, the District of Columbia, and outlying areas of the United States.

1239.7203 DOT FedRAMP specific requirements.

DOT entities shall set forth DOT FedRAMP specific cloud service requirements. DOT cloud service providers shall adhere to specific requirements when providing services to DOT and its operating administrations whenever DOT or other Federal agency information, sensitive information as defined by DOT policy, personally identifiable information, or third-party provided information and data will transit through or reside on the cloud services system and infrastructure and that requires protection according to required National Institute of Standards and Technology (NIST) Federal Information Processing Standards (FIPS). In addition to the requirements found elsewhere in the FAR, the following are required—

(a) *Validated cryptography for secure communications.* The FedRAMP security control baseline requires cryptographic mechanisms to prevent unauthorized disclosure of information during transmission unless otherwise protected by alternative physical measures (see NIST FIPS 140–2). DOT entities must require FIPS 140–2 validated cryptography be used between DOT and the cloud service provider. The program/project manager or requiring activity shall specify which level (1–4) of FIPS 140–2 validation is required. See the clause prescribed at 1239.7204(c).

(b) *Digital signature cryptography—(authentication, data integrity, and non-repudiation).* Cloud service providers are required to implement FIPS 140–2 validated cryptography for digital signatures. If DOT entities require integration with specific digital signature technologies, contracting officers shall specify what level (1–4) of FIPS 140–2 encryption is required. See the clause prescribed at 1239.7204(d).

(c) *Audit record retention for cloud service providers.* DOT entities should consider the length of time Cloud Service Providers (CSP) must retain audit records. DOT implements the FedRAMP requirement for a service provider to retain system audit records on-line for at least ninety calendar days and to further preserve audit records off-line for a period that is in accordance with DOT and NARA requirements. See the clause prescribed at 1239.7204(e).

(d) *Cloud identification and authentication (organizational users) multi-factor authentication.* Cloud Service Providers pursuing a FedRAMP authorization must provide a mechanism for DOT activities and operating administrations (*i.e.*, Government consuming end-users) to use multi-factor authentication. DOT follows National Institute of Standards and Technology (NIST) Federal Information Processing Standards (FIPS) Publication (PUB) Number 201–2, Personal Identity Verification (PIV)

of Federal Employees and Contractors. See the clause prescribed at 1239.7204(f).

(e) *Identification and authentication (non-organizational users).* Contracting officers shall require that Cloud Service Providers pursuing a FedRAMP authorization provide multi-factor authentication for the provider's administrators. See the clause prescribed at 1239.7204(g).

(f) *Incident reporting timeframes.* Contracting officers shall specify in solicitations and contracts the required FedRAMP parameters for Incident Reporting at the levels stipulated in NIST SP 800–61, as well as the requirement for an Incident Reporting Plan that complies with those requirements. The program office shall include specific incident reporting requirements including who and how to notify the agency. See 1239.7002(b) and the clause prescribed at 1239.7204(h).

(g) *Media transport.* DOT or other Federal agency information and data require protection. Contracting officers shall set forth specific DOT media transport requirements. See the clause prescribed at 1239.7204(i).

(h) *Personnel screening—background investigations.* When DOT leverages FedRAMP Provisional Authorizations, DOT conducts the required background investigations, but may accept reciprocity from other agencies that have implemented the Cloud Service Provider's systems. DOT's screening procedures, process, and additional screening requirements are set forth at 1252.204–70 and the clause prescribed at 1239.7204(j).

(i) *Minimum personnel security requirements—U.S. citizenship and clearance.* Contractors shall provide support personnel who are U.S. persons maintaining a NACI clearance or greater in accordance with OMB memoranda and contract clauses, and who shall undergo required DOT background investigations prior to providing services and performing on the contract. See clause 1252.204–70(b) and the clause prescribed at 1239.7204(j). Reinvestigations are required for cloud services provider personnel as follows—

(1) Moderate risk law enforcement and high impact public trust level—a reinvestigation is required during the 5th year; and

(2) There is no reinvestigation for other moderate risk positions or any low risk positions.

1239.7204 Contract clauses.

(a) The contracting officer shall insert the clause at 1252.239–76, Cloud Computing Services, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

(b) The contracting officer shall insert a clause substantially as follows at 1252.239–77, Data Jurisdiction, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

(c) The contracting officer shall insert a clause substantially as follows at 1252.239–78, Validated Cryptography for Secure Communications, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

(d) The contracting officer shall insert a clause substantially as follows at 1252.239–79, Authentication, Data Integrity, and Non-Repudiation, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

(e) The contracting officer shall insert a clause substantially as follows at 1252.239–80, Audit Record Retention for Cloud Service Providers, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

(f) The contracting officer shall insert a clause substantially as follows at 1252.239–81, Cloud Identification and Authentication (Organizational Users) Multi-Factor Authentication, in solicitations and contracts, including those

using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

(g) The contracting officer shall insert a clause substantially as follows at 1252.239–82, Identification and Authentication (Non-Organizational Users), in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

(h) The contracting officer shall insert a clause substantially as follows at 1252.239–83, Incident Reporting Timeframes, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

(i) The contracting officer shall insert a clause substantially as follows at 1252.239–84, Media Transport, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

(j) The contracting officer shall insert a clause substantially as follows at 1252.239–85, Personnel Screening—Background Investigations, in all services solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

(k) The contracting officer shall insert a clause substantially as follows at 1252.239–86, Boundary Protection—Trusted Internet Connections, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

(l) The contracting officer shall insert a clause substantially as follows at 1252.239–87, Protection of Information at Rest, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

(m) The contracting officer shall insert a clause substantially as follows at 1252.239–88, Security Alerts, Advisories, and Directives, in solicitations and contracts, including those using FAR part 12 procedures for the acquisition of commercial products and commercial services, for information technology services involving cloud computing services.

Subpart 1239.73—Technology Modernization and Upgrades/Refreshment

1239.7300 Scope of subpart.

This subpart prescribes policies and procedures for incorporating technology modernization, upgrades, and refreshment into acquisitions involving information technology products or services supporting the development of applications, information systems, or system software.

1239.7301 Definitions.

As used in this subpart—

Application means the software that resides above system software and includes applications such as database programs, word processors and spreadsheets. Application software may be bundled with system software or published alone.

Modernization means the conversion, rewriting or porting of a legacy system to a modern computer programming language, software libraries, protocols, or hardware platform.

Refresh means the periodic replacement of equipment to ensure continuing reliability of equipment and/or improved speed and capacity.

System software means a platform composed of operating system programs and services, including settings and preferences, file libraries and functions used for system applications. System software also includes device drivers that run basic computer hardware and peripherals.

Upgrade means an updated version of existing hardware, software or firmware. The purpose of an upgrade is

improved and updated product features, including performance, product life, usefulness and convenience.

1239.7302 Policy.

Contracting officers will ensure all documents involving the acquisition of development or maintenance of DOT applications, systems, infrastructure, and services contain the appropriate clauses as may be required by the Federal Acquisition Regulation (FAR) and other Federal authorities, in order to ensure that information system modernization is prioritized accordance with Federal law, OMB Guidance, and DOT policy.

1239.7303 Contract clauses.

(a) The contracting officer shall insert the clause at 1252.239–89, Technology Modernization, in solicitations and contracts when the contractor or a subcontractor, at any tier, proposes a modernization approach to develop or maintain information systems, applications, infrastructure, or services.

(b) The contracting officer shall insert the clause at 1252.239–90, Technology Upgrades/Refreshment, in solicitations and contracts when the contractor or a subcontractor at any tier, proposes technology improvements (upgrades/refreshments) to develop or maintain information systems, applications, infrastructure, or services.

Subpart 1239.74—Records Management

1239.7400 Scope of subpart.

This subpart prescribes policies for records management requirements for contractors who create, work with, or otherwise handle Federal records, regardless of the medium in which the records exist.

1239.7401 Definition.

As used in this subpart—

Federal record, as defined in 44 U.S.C. 3301, means all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them. The term Federal record:

(1) Includes all DOT records.

(2) Does not include personal materials.

(3) Applies to records created, received, or maintained by contractors pursuant to a DOT contract.

(4) May include deliverables and documentation associated with deliverables.

1239.7402 Policy.

(a) *Requirements*—(1) *Compliance*. Contractors shall comply with all applicable records management laws and regulations, as well as National Archives and Records Administration (NARA) records policies, including but not limited to 44 U.S.C. chapters 21, 29, 31, and 33, NARA regulations at 36 CFR chapter XII, subchapter B, and those policies associated with the safeguarding of records covered by Privacy Act of 1974 (5 U.S.C. 552a). These policies include the preservation of all records, regardless of form or characteristics, mode of transmission, or state of completion.

(2) *Applicability*. In accordance with 36 CFR 1222.32, all data created for Government use and delivered to, or falling under the legal control of, the Government are Federal records subject to the provisions of 44 U.S.C. chapters 21, 29, 31, and 33, the Freedom of Information Act (FOIA) (5 U.S.C. 552), as amended, and the Privacy Act of 1974 (5 U.S.C. 552a), as amended, and must be managed and scheduled for disposition only as permitted by relevant records management laws and regulations and DOT Order 1351.28, Departmental Records Management Policy.

(3) *Records maintenance*. While DOT records are in a contractor's custody, the contractor is responsible for preventing the alienation or unauthorized destruction of the DOT records, including all forms of mutilation. Records may not be removed from the legal custody of DOT or destroyed except in accordance with the provisions of the agency records schedules and with the written concurrence of the DOT or

Component Records Officer, as appropriate. Willful and unlawful destruction, damage or alienation of Federal records is subject to the fines and penalties imposed by 18 U.S.C. 2701. In the event of any unlawful or accidental removal, defacing, alteration, or destruction of records, the contractor must report the event to the contracting officer, in accordance with 36 CFR part 1230, for reporting to NARA.

(4) *Unauthorized disclosure.* Contractors shall notify the contracting officer within two hours of discovery of any inadvertent or unauthorized disclosures of information, data, documentary materials, records or equipment. Contractors shall ensure that the appropriate personnel, administrative, technical, and physical safeguards are established to ensure the security and confidentiality of the information, data, documentary material, records and/or equipment accessed, maintained, or created. Contractors shall not remove material from Government facilities or systems, or facilities or systems operated or maintained on the Government's behalf, without the express written permission of the contracting officer or contracting officer's representative. When information, data, documentary material, records and/or equipment is no longer required, it shall be returned to DOT control or the contractor must hold it until otherwise directed. Items returned to the Government shall be hand carried, mailed, emailed, or securely electronically transmitted to the contracting officer or address prescribed in the contract. Destruction of records is expressly prohibited unless authorized.

(b) *Non-public information.* Contractors shall not create or maintain any records containing any non-public DOT information that are not specifically tied to or authorized by the contract.

1239.7403 Contract clause.

The contracting officer shall insert the clause at 1239.239–91, Records Management, in all solicitations and contracts involving services where contractors or subcontractors and their employees or associates collect, access, maintain, use, disseminate, or otherwise handle Federal records.

PART 1241 [RESERVED]

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 1242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Subpart 1242.1—Contract Audit Services

Sec.
1242.101 Contract audit responsibilities.
1242.102 Assignment of contract audit services.
1242.170 Contract clause.

Subpart 1242.2—Contract Administration Services

1242.270 Contract clauses.

Subpart 1242.3—Contract Administration Office Functions

1242.302 Contract administration functions.

Subpart 1242.15—Contractor Performance Information

1242.1503 Procedures.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1242.1—Contract Audit Services

1242.101 Contract audit responsibilities.

(b) It is DOT policy that private certified public accounting (CPA) firms may be used to provide audit services as described in FAR 42.101 to DOT contracting officers when procurement schedule demands cannot be met by the Defense Contract Audit Agency (DCAA) or the agency with audit cognizance.

1242.102 Assignment of contract audit services.

(b) In accordance with 1242.101, when the responsible audit agency declines a request for services, DOT contracting officers may utilize audit services from commercial CPA firms as authorized in 1242.101.

1242.170 Contract clause.

The contracting officer shall insert the clause at 1252.242–74, Contract Audit Support, in solicitation and contracts when other than firm-fixed-price contracts are contemplated.

Subpart 1242.2—Contract Administration Services

1242.270 Contract clauses.

(a) The contracting officer may use the clause at 1252.242–70, Dissemination of Information–Educational Institutions, in lieu of the clause at 1252.242–72, Dissemination of Contract Information, in DOT research contracts with educational institutions, except contracts that require the release or coordination of information.

(b) The contracting officer shall insert the clause at 1252.242–71, Contractor Testimony, in all solicitations and contracts issued by NHTSA. Other OAs may use the clause as deemed appropriate.

(c) The contracting officer may insert the clause at 1252.242–72, Dissemination of Contract Information, in all DOT contracts except contracts that require the release or coordination of information.

Subpart 1242.3—Contract Administration Office Functions

1242.302 Contract administration functions.

(a) If a cognizant Federal agency has not performed the functions identified in FAR 42.302(a)(5), (9), (11), and (12), then DOT contracting officers are authorized to perform these functions with the assistance of the cognizant government auditing agency, if assigned and available to provide support in a timely manner. If the cognizant government auditing agency is not assigned and/or available in the necessary timeframe, DOT contracting officers may use the audit services of a CPA firm.

(13) The assignment of contract administration to a Defense Contract Management Agency (DCMA) office by the contracting officer does not affect the designation of the paying office unless a transfer of DOT funds to the agency of the Contract Administration

Office (CAO) is effected, and the funds are converted to the CAO agency's account for payment purposes. When the contracting officer proposes to delegate the contract payment function to another agency (*e.g.*, DCMA), the contracting officer shall discuss the transfer of funds procedures with the cognizant OA payment office. The CAO, the contracting officer, or the designated contract specialist in the contracting office shall review and approve the invoices and vouchers under the assigned contracts. The review and approval of invoices under cost-reimbursement and time-and-materials type contracts cannot be delegated to the Contracting Officer's Representative.

Subpart 1242.15—Contractor Performance Information

1242.1503 Procedures.

(a)(1) Each OA is responsible for assigning responsibility and management accountability for the completeness of past performance submissions as required in FAR 42.1503(a).

PART 1245 [RESERVED]

PART 1246—QUALITY ASSURANCE

Subpart 1246.1—General

Sec.
1246.101 Definitions.
1246.101–70 Additional definitions.

Subpart 1246.7—Warranties

1246.705–70 Limitations—restrictions.
1246.706–70 Warranty terms and conditions—requirements.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1246.1—General

1246.101 Definitions.

1246.101–70 Additional definitions.

As used in this subpart—

At no additional cost to the Government means at no increase in price for firm-fixed-price contracts, at no increase in target or ceiling price for fixed price incentive contracts (*see* FAR 46.707), or at no increase in estimated cost or fee for cost-reimbursement contracts.

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.

Major acquisition means an acquisition or for supplies or services that requires submission of an OMB Exhibit 300 (Capital Asset Plan/Business Case) in accordance with OMB Circular A–11, Preparation, Submission and Execution of the Budget, and for information technology or information technology related acquisitions, compliance with the Department Chief Information Officer (CIO) Policy (CIOP). A major acquisition typically has one or more of the following characteristics—

(1) Life-cycle costs of $150 million or more;

(2) Is a financial system, e-gov system, or e-business system with a life-cycle cost of $500,000 or more; or

(3) An acquisition that does not meet the dollar thresholds of paragraph (1) or (2) of this definition but—

(i) Is mission-critical;

(ii) Requires special management attention because of its importance to an OA mission;

(iii) Plays a significant role in the administration of OA programs, processes or other resources; or

(iv) Directly supports the President's Management Agenda.

Performance requirements means the operating capabilities, maintenance, and reliability characteristics of a system that are determined to be necessary for it to fulfill the requirement for which the system is designed.

Subpart 1246.7—Warranties

1246.705–70 Limitations—restrictions.

The following restrictions are applicable to DOT contracts:

(a) The contractor shall not be required to honor the warranty on any property furnished by the Government except for—

(1) Defects in installation; and

(2) Installation or modification in such a manner that invalidates a warranty provided by the manufacturer of the property.

(b) Any warranty obtained shall specifically exclude coverage of damage in time of war (combat damage) or national emergency.

(c) Contracting officers shall not include in a warranty clause any terms that require the contractor to incur liability for loss, damage, or injury to third parties.

1246.706–70 Warranty terms and conditions—requirements.

(a) When appropriate and cost effective, the contracting officer shall comply with the following requirements when developing the warranty terms and conditions—

(1) Identify the affected line item(s) and the applicable specification(s);

(2) Require that the line item's design and manufacture will conform to—

(i) An identified revision of a top-level drawing; and/or

(ii) An identified specification or revision thereof;

(3) Require that the line item conform to the specified Government performance requirements;

(4) Require that all line items and components delivered under the contract will be free from defects in materials and workmanship;

(5) State that if the contractor fails to comply with specification or there are defects in material and workmanship, the contractor will bear the cost of all work necessary to achieve the specified performance requirements, including repair and/or replacement of all parts;

(6) Require the timely replacement/repair of warranted items and specify lead times for replacement/repair where possible;

(7) Identify the specific paragraphs containing Government performance requirements that the contractor must meet;

(8) Ensure that any performance requirements identified as goals or objectives beyond specification requirements are excluded from the warranty provision;

(9) Specify what constitutes the start of the warranty period (*e.g.*, delivery, acceptance, in-service date) and the end of the warranty period (*e.g.*, passing a test or demonstration, or operation without failure for a specified period), and specify circumstances requiring an extension of warranty duration (*e.g.*, extending the warranty period as a result of mass defect correction during warranty period);

(10) Identify what transportation costs will be paid by the contractor in relation to the warranty coverage;

(11) In addition to combat damage, identify any conditions which will not be covered by the warranty; and

(12) Identify any limitation on the total dollar amount of the contractor's warranty exposure, or agreement to share costs after a certain dollar threshold to avoid unnecessary warranty returns.

(b) In addition to the terms and conditions listed in paragraph (a) of this section, the contracting officer shall consider the following when a warranty clause is being used for a major system, as defined in FAR 2.101:

(1) For line items or components that are commercially available, obtaining a warranty as is normally provided by the manufacturer or supplier, in accordance with FAR 46.703(d) and 46.710(b)(2).

(2) Obtaining a warranty of compliance with the stated requirements for line items or components provided in accordance with either design and manufacturing or performance requirements as specified in the contract or any modification to that contract.

(3) A warranty provided under paragraph (b)(2) of this section shall provide that in the event the line items or any components thereof fails to meet the terms of the warranty provided, the contracting officer may—

(i) Require the contractor to promptly take such corrective action as the contracting officer determines to be necessary at no additional cost to the Government, including repairing or replacing all parts necessary to achieve the requirements set forth in the contract;

(ii) Require the contractor to pay costs reasonably incurred by the United States in taking necessary corrective action; or

(iii) Equitably reduce the contract price.

(4) Inserting remedies, exclusions, limitations and durations, provided these are consistent with the specific requirements of this subpart and FAR 46.706.

(5) Excluding from the terms of the warranty certain defects for specified supplies (exclusions) and limiting the contractor's liability under the terms of the warranty (limitations), as appropriate, if necessary to derive a cost-effective warranty considering the technical risk, contractor financial risk, or other program uncertainties.

(6) Structuring of a broader and more comprehensive warranty where such is advantageous. Likewise, the contracting officer may narrow the scope of a warranty when appropriate (*e.g.*, where it would be inequitable to require a warranty of all performance requirements because a contractor had not designed the system).

(c) Any contract that contains a warranty clause must contain warranty implementation procedures, including warranty notification content and procedures, and identify the individuals responsible for implementation of warranty provisions. The contract may also permit the contractor's participation in investigation of system failures, if the contractor is reimbursed at established rates for fault isolation work, and that the Government receive credit for any payments where equipment failure is covered by warranty provisions.

PART 1247—TRANSPORTATION

Subpart 1247.5—Ocean Transportation by U.S.-Flag Vessels

Sec.
1247.506 Procedures.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1247.5—Ocean Transportation by U.S.-Flag Vessels

1247.506 Procedures.

(a) The Maritime Administration (MARAD) is the enforcing agency of the cargo preference statutes. MARAD can assist contractors in locating U.S.-flag carriers and determine when such services are not available. MARAD can also assist contracting officers in evaluating costs, services, and other matters regarding ocean transportation.

(d) If no transportation officer is available, the contracting officer shall submit a copy of the rated ''on board'' bill of lading, for each shipment, no later than 20 days after the vessel's loading date for exports and 30 days for imports as stated in 46 CFR 381.3. All non-vessel ocean common carrier bills of lading should be accompanied by the underlying carrier's ocean bill of lading. The documents shall be sent to the Maritime Administration, Office of Cargo and Commercial Sealift, MAR–620, 1200 New Jersey Avenue SE, Washington, DC 20590–0001. The bill of lading shall contain the following information—

(1) Name of sponsoring Government agency or department;

(2) Name of vessel;

(3) Vessel flag of registry;

(4) Date of loading;

(5) Port of loading;

(6) Port of final discharge;

(7) Commodity description;

(8) Gross weight in kilos; and

(9) Total ocean freight revenue in U.S. dollars.

SUBCHAPTER H—CLAUSES AND FORMS

PART 1252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 1252.1—Instructions for Using Provisions and Clauses

Sec.

1252.101–70 Using this part.

Subpart 1252.2—Text of Provisions and Clauses

1252.201–70 Contracting Officer's Representative.
1252.204–70 Contractor Personnel Security and Agency Access.
1252.209–70 Organizational and Consultant Conflicts of Interest.
1252.209–71 Limitation of Future Contracting.
1252.211–70 Index for Specifications.
1252.216–70 Evaluation of Offers Subject to an Economic Price Adjustment Clause.
1252.216–71 Determination of Award Fee.
1252.216–72 Award Fee Plan.
1252.216–73 Distribution of Award Fee.
1252.216–74 Settlement of Letter Contract.
1252.217–70 Guarantee.
1252.217–71 Delivery and Shifting of Vessel.
1252.217–72 Performance.
1252.217–73 Inspection and Manner of Doing Work.
1252.217–74 Subcontracts.
1252.217–75 Lay Days.
1252.217–76 Liability and Insurance.
1252.217–77 Title.
1252.217–78 Discharge of Liens.
1252.217–79 Delays.
1252.217–80 Department of Labor Safety and Health Regulations for Ship Repair.
1252.222–70 Strikes or Picketing Affecting Timely Completion of the Contract Work.
1252.222–71 Strikes or Picketing Affecting Access to a DOT Facility.
1252.222–72 Contractor Cooperation in Equal Employment Opportunity and Anti-Harassment Investigations.
1252.223–70 Removal or Disposal of Hazardous Substances—Applicable Licenses and Permits.
1252.223–71 Accident and Fire Reporting.
1252.223–72 Protection of Human Subjects.
1252.223–73 Seat Belt Use Policies and Programs.
1252.228–70 Loss of or Damage to Leased Aircraft.
1252.228–71 Fair Market Value of Aircraft.
1252.228–72 Risk and Indemnities.
1252.228–73 Command of Aircraft.
1252.228–74 Notification of Payment Bond Protection.
1252.231–70 Date of Incurrence of Costs.
1252.232–70 Electronic Submission of Payment Requests.
1252.232–71 Limitation of Government's Obligation.
1252.235–70 Research Misconduct.
1235.235–71 Technology Transfer.
1252.236–70 Special Precautions for Work at Operating Airports.
1252.237–70 Qualifications of Contractor Employees.
1252.237–71 Certification of Data.
1252.237–72 Prohibition on Advertising.
1252.237–73 Key Personnel.
1252.239–70 Security Requirements for Unclassified Information Technology Resources.
1252.239–71 Information Technology Security Plan and Accreditation.
1252.239–72 Compliance with Safeguarding DOT Sensitive Data Controls.
1252.239–73 Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information.
1252.239–74 Safeguarding DOT Sensitive Data and Cyber Incident Reporting.
1252.239–75 DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements.
1252.239–76 Cloud Computing Services.
1252.239–77 Data Jurisdiction.
1252.239–78 Validated Cryptography for Secure Communications.
1252.239–79 Authentication, Data Integrity, and Non-Repudiation.
1252.239–80 Audit Record Retention for Cloud Service Providers.
1252.239–81 Cloud Identification and Authentication (Organizational Users) Multi-Factor Authentication.
1252.239–82 Identification and Authentication (Non-Organizational Users).
1252.239–83 Incident Reporting Timeframes.
1252.239–84 Media Transport.
1252.239–85 Personnel Screening—Background Investigations.
1252.239–86 Boundary Protection—Trusted internet Connections.
1252.239–87 Protection of Information at Rest.
1252.239–88 Security Alerts, Advisories, and Directives.
1252.239–89 Technology Modernization.
1252.239–90 Technology Upgrades/Refreshment.
1252.239–91 Records Management.
1252.239–92 Information and Communication Technology Accessibility Notice.
1252.239–93 Information and Communication Technology Accessibility.

1252.242–70 Dissemination of Information—Educational Institutions.
1252.242–71 Contractor Testimony.
1252.242–72 Dissemination of Contract Information.
1252.242–74 Contract Audit Support.

Subpart 1252.3—Provisions and Clauses Matrix

1252.301 Solicitation provisions and contract clauses (matrix).

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1252.1—Instructions for Using Provisions and Clauses

1252.101–70 Using this part.

TAR provisions or clauses that supplement the FAR shall follow the following numbering conventions in accordance with FAR 52.101(b)(2)(i):

(a) Agency-prescribed provisions and clauses permitted by TAR and used on a standard basis (*i.e.*, normally used in two or more solicitations or contracts regardless of contract type) shall be prescribed and contained in the TAR. Operating Administrations (OAs) desiring to use a provision or a clause on a standard basis shall submit a request containing a copy of the clause(s), justification for its use, and evidence of legal counsel review to the Office of the Senior Procurement Executive in accordance with 1201.304 for possible inclusion in the TAR (*see* FAR 52.101(b)(2)(i)(A)).

(b) Provisions and clauses used on a one-time basis (*i.e.*, non-standard provisions and clauses) may be approved by the contracting officer, unless a higher level is designated by the OA (*see* FAR 52.101(b)(2)(i)(C)). This authority is permitted subject to—

(1) Evidence of legal counsel review in the contract file;

(2) Inserting these clauses in the appropriate sections of the uniform contract format; and

(3) Ensuring the provisions and clauses do not deviate from the requirements of the FAR and TAR.

Subpart 1252.2—Text of Provisions and Clauses

1252.201–70 Contracting Officer's Representative.

As prescribed in 1201.604–70, insert the following clause:

CONTRACTING OFFICER'S REPRESENTATIVE (NOV 2022)

(a) The Contracting Officer may designate Government personnel to act as the Contracting Officer's Representative (COR) to perform functions under the contract such as review and/or inspection and acceptance of supplies, services, including construction, and other functions of a technical nature. The Contracting Officer will provide a written notice of such designation to the Contractor within five working days after contract award or for construction, not less than five working days prior to giving the contractor the notice to proceed. The designation letter will set forth the authorities and limitations of the COR under the contract.

(b) The Contracting Officer cannot authorize the COR or any other representative to sign documents (*i.e.*, contracts, contract modifications, etc.) that require the signature of the Contracting Officer.

(End of clause)

1252.204–70 Contractor Personnel Security and Agency Access.

As prescribed in 1204.1303, insert the following clause:

CONTRACTOR PERSONNEL SECURITY AND AGENCY ACCESS (NOV 2022)

(a) *Definitions.* As used in this clause—

Agency access means access to DOT facilities, sensitive information, information systems or other DOT resources.

Applicant means a contractor employee for whom the Contractor applies for a DOT identification card.

Contractor employee means a prime contractor and subcontractor employee who requires agency access to perform work under a DOT contract.

Identification card (or ''ID card'') means a government issued or accepted identification card such as a Personal Identity Verification (PIV) card, a PIV-Interoperable (PIV–I) card from an authorized PIV–1 issuer, or a non-PIV card issued by DOT, or a nonPIV card issued by another Federal agency and approved by DOT. PIV and PIV–1 cards have physical and electronic attributes that other (non-PIV) ID cards do not have.

Issuing office means the DOT entity that issues identification cards to contractor employees.

Local security servicing organization means the DOT entity that provides security services to the DOT organization sponsoring the contract.

(b) *Risk and sensitivity level designations.* For contracts requiring access to DOT facilities, sensitive information, information systems or other DOT resources, contractor employees will be required to complete background investigations, identity proofing, and government identification card application procedures to determine suitability for access. DOT will assign a risk and sensitivity level designation to the overall contract and/or to contractor employee positions by category, group or individual. The risk and sensitivity level designations will be the basis for determining the level of personnel security processing required for contractor employees. The following risk and sensitivity level designations and associated level of processing are required, and each level includes the prior levels—

(1) Low risk level: National Agency Check with Written Inquiries (NACI);

(2) Moderate risk level: Minimum Background Investigation (MBI); and

(3) High risk level: Background Investigation.

(c) *Security clearances.* Contractor employees may also be required to obtain security clearances (*i.e.*, Confidential, Secret, or Top Secret). National Security work designated ''special sensitive,'' ''critical sensitive,'' or ''non-critical sensitive,'' will determine the level of clearance required for contractor employees. Personnel security clearances for national security contracts in DOT will be processed according to the Department of Defense National Industrial Security Program Operating Manual (NISPOM).

(d) *Pre-screening of contractor employees.* The Contractor must pre-screen individuals designated for employment under any DOT contract by verifying minimal suitability requirements to ensure that only candidates that appear to meet such requirements are considered for contract employment, and to mitigate the burden on the Government of conducting background investigations on objectionable applicants. The Contractor must exercise due diligence in pre-screening all employees prior to submission to DOT for agency access. DOT may decline to grant agency access to a contractor employee for reasons including, but not limited to—

(1) Conviction of a felony, a crime of violence, or a misdemeanor involving moral turpitude;

(2) Falsification of information entered on forms or of other documents submitted;

(3) Improper conduct including criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct or other conduct adverse to the Government regardless of whether the conduct is directly related to the contract; and

(4) Any behavior judged to pose a potential threat to DOT facilities, sensitive information, information systems or other resources.

(e) *Citizenship status.* The Contractor must monitor a non-citizen's continued authorization for employment in the United States. The Contractor must provide documentation to the Contracting Officer or the Contracting Officer's Representative (COR) during the background investigation process that validates that the E-Verify requirement has been met for each contractor employee.

(f) *Background investigation and adjudication.* A contractor employee must have a favorable adjudication of background investigation before DOT will issue an ID card to the contractor employee granting access to DOT facilities, sensitive information, information systems or other DOT resources. DOT may accept favorable adjudications of background investigations from other Federal agencies when applicants have held PIV cards issued by those agencies with no break in service. DOT may also accept PIV–I (Interoperable) cards issued by an authorized PIV–1 issuer as evidence of identity. A favorable adjudication does not preclude DOT from initiating a new investigation when deemed necessary. At a minimum, the FBI National Criminal History Check (fingerprint check) must be favorably completed before a DOT identification card can be issued. Each Contractor must use the Office of Personnel Management's (OPM) e-QIP system to complete any required investigative forms. Instructions for obtaining fingerprints will be provided by the COR or Contracting Officer. The DOT Office of Security, M–40, or a DOT organization delegated authority by M–40, is responsible for adjudicating the suitability of contractor employees.

(g) *Agency access denied.* Upon contract award, DOT will initiate the agency access procedure for all contractor employees requiring access to DOT facilities, sensitive information, information systems and other DOT resources for contract performance. DOT may deny agency access to any individual about whom an adverse suitability determination is made. Failure to submit the required security information or to truthfully answer all questions shall constitute grounds for denial of access. The Contractor must not provide agency access to contractor employees until the COR or Contracting Officer provides notice of approval, which is authorized only by the DOT Office of Security (M–40) or a DOT organization delegated authority by M–40. Where a proposed contractor employee is denied agency access by the Government or, if for any reason a proposed application is withdrawn by the

Contractor during the agency access process, the additional costs and administrative burden for conducting additional background investigations caused by a lack of effective prescreening or planning on the part of the Contractor may be considered as part of the Contractor's overall performance evaluation.

(h) *Identification card application process.* The COR will be the DOT ID card Sponsor and point of contact for the Contractor's application for a DOT ID card. The COR shall review and approve the DOT ID card application before an ID card is issued to the applicant. An applicant may be issued either a Personal Identity Verification (PIV) card that meets the standards of Homeland Presidential Security Directive (HSPD–12), or an applicant may be issued a non-PIV card. Generally, a non-PIV card will be issued for contracts that expire in six months or less, including option periods. The COR may request the issuing office to waive the six-month eligibility requirement when it is in DOT's interest for contract performance. The following applies—

(1) PIV card. The applicant must complete a DOT on-line application for a PIV card;

(2) Non-PIV card. The applicant must complete and submit a hard copy of Form 1681 to the COR/Sponsor; and

(3) Regardless of the type of card to be issued (PIV or non-PIV), the applicant must appear in person to provide two forms of identity source documents in original form to DOT. The identity source documents must come from the list of acceptable documents included in Form F–9, OMB No. 1115–0136, Employment Eligibility Verification. At least one document must be a valid State or Federal government-issued picture identification. For a PIV card, the applicant may be required to appear in-person a second time for enrollment and activation.

(i) *Identification card custody and control.* The Contractor is responsible for the custody and control of all forms of government identification issued by DOT to contractor employees for access to DOT facilities, sensitive information, information systems and other DOT resources. The Contractor shall:

(1) Provide a listing of personnel for whom an identification (ID) card is requested to the COR or PM who will provide a copy of the listing to the card issuing office. This may include Contractor and subcontractor personnel. Follow issuing office directions for submittal of an application package(s).

(2) While visiting or performing work on a DOT facility, as specified by the issuing office, PM or COR, ensure that contractor employees prominently display their ID card.

(3) Immediately notify the COR or, if the COR is unavailable, the Contracting Officer when a contractor employee's status changes and no longer requires agency access (*e.g.*, employee's transfer, completion of a project, retirement, removal from work on the contract, or termination of employment) that may affect the employee's eligibility for access to the facility, sensitive information, or resources.

(4) Promptly deliver to the issuing office: (a) all ID cards assigned to an employee who no longer requires access to the facility; and (b) all expired ID cards within five (5) days of their expiration or all cards at time of contract termination, whichever occurs first.

(5) Immediately report any lost or stolen ID cards to the issuing office and follow its instructions.

(i) The Contractor is responsible for maintaining and safeguarding the DOT ID card upon issuance to the contractor employee. The Contractor must ensure that contractor employees comply with DOT requirements concerning the renewal, loss, theft, or damage of an ID card. The Contractor must immediately notify the COR or, if the COR is unavailable, the Contracting Officer when an ID card is lost, stolen or damaged.

(ii) Failure to comply with the requirements for custody and control of DOT ID cards may result in withholding final payment or contract termination based on the potential for serious harm caused by inappropriate access to DOT facilities, sensitive information, information systems or other DOT resources.

(iii) Specific actions and activities are required in certain events—

(A) *Renewal.* A contractor employee's DOT issued ID card is valid for a maximum of three years or until the contract expiration date (including option periods), whichever occurs first. The renewal process should begin six weeks before the PIV card expiration date. If a PIV card is not renewed before it expires, the contractor employee will be required to sign-in daily for facility access and may have limited access to information systems and other resources.

(B) *Lost/stolen.* Immediately upon detection, the Contractor or contractor employee must report a lost or stolen DOT ID card to the COR, or if the COR is unavailable, the Contracting Officer, the issuing office, or the local servicing security organization. The Contractor must submit an incident report within 48 hours, through the COR or, if the COR is unavailable, the Contracting Officer, the issuing office, or the local security servicing organization describing the circumstances of the loss or theft. The Contractor must also report a lost or stolen PIV card through the DOT on-line registration system. If the loss or theft is reported by the Contractor to the local police, a copy of the police report must be provided to the COR or Contracting Officer. From the date of notification to DOT, the Contractor must wait three days before getting a replacement ID card. During the 3-day wait period, the contractor employee must sign in daily for facility access.

(C) *Replacement.* An ID card will be replaced if it is damaged, contains incorrect data, or is lost or stolen for more than 3 days, provided there is a continuing need for agency access to perform work under the contract.

(D) *Surrender of ID cards.* Upon notification that routine access to DOT facilities, sensitive information, information systems or other DOT resources is no longer required, the Contractor must surrender the DOT issued ID card to the COR, or if the COR is unavailable, the Contracting Officer, the issuing office, or the local security servicing organization in accordance with agency procedures.

(j) *Flow down of clause.* The Contractor is required to include this clause in any subcontracts at any tier that require the subcontractor or subcontractor's employees to have access to DOT facilities, sensitive information, information systems or other resources.

(End of clause)

1252.209–70 Organizational and Consultant Conflicts of Interest.

As prescribed in 1209.507–270(a), the contracting officer shall insert a clause substantially as follows in solicitations and contracts:

ORGANIZATIONAL AND CONSULTANT CONFLICTS OF INTEREST (NOV 2022)

(a) An offeror shall identify in its proposal, quote, bid or any resulting contract, any potential or actual Organizational and Consultant Conflicts of Interest (OCCI) as described in FAR subpart 9.5. This includes actual or potential conflicts of interests of proposed subcontractors. If an offeror identifies in its proposal, quote, bid or any resulting contract, a potential or actual conflict of interests the offeror shall submit an Organizational and Consultant Conflicts of Interest Plan (OCCIP) to the contracting officer. The OCCIP shall describe how the offeror addresses potential or actual conflicts of interest and identify how they will avoid, neutralize, or mitigate present or future conflicts of interest.

(b) Offerors must consider whether their involvement and participation raises any OCCI issues, especially in the following areas when:

(1) Providing systems engineering and technical direction.

(2) Preparing specifications or work statements and/or objectives.

(3) Providing evaluation services.

(4) Obtaining access to proprietary information.

(c) If a prime contractor or subcontractor breaches any of the OCCI restrictions, or does not disclose or misrepresents any relevant facts concerning its conflict of interest, the government may take appropriate action, including terminating the contract, in additional to any remedies that may be otherwise permitted by the contract or operation of law.

(End of clause)

1252.209–71 Limitation of Future Contracting.

As prescribed in 1209.507–270(b), the contracting officer shall insert a clause substantially as follows in solicitations and contracts:

LIMITATION OF FUTURE CONTRACTING (NOV 2022)

(a) The Contracting Officer has determined that this acquisition may give rise to a potential organizational conflict of interest. Accordingly, prospective offerors are encouraged to review FAR subpart 9.5—Organizational Conflicts of Interest.

(b) The nature of this conflict is [*describe the conflict*].

(c) The restrictions upon future contracting are as follows:

(1) If the Contractor, under the terms of this contract, or through the performance of tasks pursuant to this contract, is required to develop specifications or statements of work that are to be incorporated into a solicitation, the Contractor shall be ineligible to perform the work described in that solicitation as a prime or first-tier subcontractor under an ensuing government contract. This restriction shall remain in effect for a reasonable time, as agreed to by the Contracting Officer and the Contractor, sufficient to avoid unfair competitive advantage or potential bias (this time shall in no case be less than the duration of the initial ensuing contract).

(2) To the extent that the work under this contract requires access to proprietary, business confidential, or financial data of other companies, and if these data remain proprietary or confidential, the Contractor shall protect such data from unauthorized use and disclosure and agrees not to use the data to compete with those other companies.

(End of clause)

1252.211–70 Index for Specifications.

As prescribed in 1211.204–70, insert the following clause:

INDEX FOR SPECIFICATIONS (NOV 2022)

If an index or table of contents is furnished in connection with specifications, such index or table of contents is for convenience only. Its accuracy and completeness is not guaranteed, and it is not a part of the specification.

In case of discrepancy between the index or table of contents and the specifications, the specifications shall govern.

(End of clause)

1252.216–70 Evaluation of Offers Subject to an Economic Price Adjustment Clause.

As prescribed in 1216.203–470, insert the following provision:

EVALUATION OF OFFERS SUBJECT TO AN ECONOMIC PRICE ADJUSTMENT CLAUSE (NOV 2022)

Offers shall be evaluated without an amount for an economic price adjustment being added. Offers will be rejected that—(1) increase the ceiling stipulated; (2) limit the downward adjustment; or (3) delete the economic price adjustment clause. If the offer stipulates a ceiling lower than that included in the solicitation, the lower ceiling will be incorporated into any resulting contract.

(End of provision)

1252.216–71 Determination of Award Fee.

As prescribed in 1216.406–70(a), insert the following clause:

DETERMINATION OF AWARD FEE (NOV 2022)

(a) The Government shall evaluate Contractor performance at the end of each specified evaluation period to determine the amount of award. The contractor agrees that the amount of award and the award fee determination methodology are unilateral decisions to be made at the sole discretion of the Government.

(b) Contractor performance shall be evaluated according to the Award Fee Plan. The Contractor shall be periodically informed of the quality of its performance and areas in which improvements are expected.

(c) The contractor shall be promptly advised, in writing, of the determination and reasons why the award fee was or was not earned. The Contractor may submit a performance self-evaluation for each evaluation period. The amount of award is at the sole discretion of the Government but any self-evaluation received within_____(*insert number*) days after the end of the current evaluation period will be given such consideration, as may be deemed appropriate by the Government.

(d) The amount of award fee that can be awarded in each evaluation period is limited to the amounts set forth at_____(*identify location of award fee amounts*). Award fee that is not earned in an evaluation period cannot be reallocated to future evaluation periods.

(End of clause)

1252.216–72 Award Fee Plan.

As prescribed in 1216.406–70(b), insert the following clause:

AWARD FEE PLAN (NOV 2022)

(a) An Award Fee Plan shall be unilaterally established by the Government based on the criteria stated in the contract and used for the determination of award fee. This plan shall include the criteria used to evaluate each area and the percentage of award fee, if any, available for each area. A copy of the plan shall be provided to the Contractor_____(*insert number*) calendar days prior to the start of the first evaluation period.

(b) The criteria contained within the Award Fee Plan may relate to: (1) Technical (including schedule) requirements, if appropriate; (2) Management; and (3) Cost.

(c) The Award Fee Plan may, consistent with the contract, be revised unilaterally by the Government at any time during the period of performance. Notification of such changes shall be provided to the Contractor_____(*insert number*) calendar days prior to the start of the evaluation period to which the change will apply.

(End of clause)

1252.216–73 Distribution of Award Fee.

As prescribed in 1216.406–70(c), insert the following clause:

DISTRIBUTION OF AWARD FEE (NOV 2022)

(a) The total amount of award fee available under this contract is assigned according to the following evaluation periods and amounts—

Evaluation Period:

Available Award Fee:

[*Contracting Officer insert appropriate information*]

(b) After the Contractor has been paid 85 percent of the base fee and potential award fee, the Government may withhold further payment of the base fee and award fee until a reserve is set aside in an amount that the Government considers necessary to protect its interest. This reserve shall not exceed 15 percent of the total base fee and potential award fee or $150,000, whichever is less. Thereafter, base fee and award fee payments may continue.

(c) In the event of contract termination, either in whole or in part, the amount of award fee available shall represent a prorata distribution associated with evaluation period activities or events as determined by the Government.

(d) The Government will promptly make payment of any award fee upon the submission by the Contractor to the Contracting Officer's Representative, of a public voucher or invoice in the amount of the total fee earned for the period evaluated. Payment may be made without using a contract modification.

(End of clause)

1252.216–74 Settlement of Letter Contract.

As prescribed in 1216.603–4, insert the following clause:

SETTLEMENT OF LETTER CONTRACT (NOV 2022)

(a) This contract constitutes the definitive contract contemplated by issuance of letter contract_____[*insert number*] dated_____[*insert effective date*]. It supersedes the letter contract and its modification number(s)_____[*insert number(s)*] and, to the extent of any inconsistencies, governs.

(b) The cost(s) and fee(s), or price(s), established in this definitive contract represents full and complete settlement of letter contract_____[*insert number*] and modification number(s)_____[*insert number(s)*]. Payment of the agreed upon fee or profit withheld pending definitization of the letter contract, may commence immediately at the rate and times stated within this contract.

(End of clause)

1252.217–70 Guarantee.

As prescribed at 1217.7001(a), insert the following clause:

GUARANTEE (NOV 2022)

(a) In the event any work performed or materials furnished by the Contractor prove defective or deficient within 60 days from the date of redelivery of the vessel(s), the Contractor, as directed by the Contracting Officer and at its own expense, shall correct and repair the deficiency in accordance with the contract terms and conditions.

(b) If the Contractor or any subcontractor has a guarantee for work performed or materials furnished that exceeds the 60-day period, the Government shall be entitled to rely upon the longer guarantee until its expiration.

(c) With respect to any individual work item identified as incomplete at the time of redelivery of the vessel(s), the guarantee period shall run from the date the item is completed.

(d) If practicable, the Government shall give the Contractor an opportunity to correct the deficiency.

(1) If the Contracting Officer determines it is not practicable or is otherwise not advisable to return the vessel(s) to the Contractor, or the Contractor fails to proceed with the repairs promptly, the Contracting Officer may direct that the repairs be performed elsewhere, at the Contractor's expense.

(2) If correction and repairs are performed by other than the Contractor, the Contracting Officer may discharge the Contractor's liability by making an equitable deduction in the price of the contract.

(e) The Contractor's liability shall extend for an additional 90-day guarantee period on those defects or deficiencies that the Contractor corrected.

(f) At the option of the Contracting Officer, defects and deficiencies may be left uncorrected. In that event, the Contractor and Contracting Officer shall negotiate an equitable reduction in the contract price. Failure to agree upon an equitable reduction shall constitute a dispute under the Disputes clause of this contract.

(End of clause)

1252.217–71 Delivery and Shifting of Vessel.

As prescribed at 1217.7001(b), insert the following clause:

DELIVERY AND SHIFTING OF VESSEL (NOV 2022)

The Government shall deliver the vessel to the Contractor at his place of business. Upon completion of the work, the Government shall accept delivery of the vessel at the Contractor's place of business. The Contractor shall provide, at no additional charge, upon 24 hours' advance notice, a tug or tugs and docking pilot, acceptable to the Contracting Officer, to assist in handling the vessel between (to and from) the Contractor's plant and the nearest point in a waterway regularly navigated by vessels of equal or greater draft and length. While the vessel is in the hands of the Contractor, any necessary towage, cartage, or other transportation between ship and shop or elsewhere, which may be incident to the work herein specified, shall be furnished by the Contractor without additional charge to the Government.

(End of clause)

1252.217–72 Performance.

As prescribed at 1217.7001(b), insert the following clause:

PERFORMANCE (NOV 2022)

(a) Upon the award of the contract, the Contractor shall promptly start the work specified and shall diligently prosecute the work to completion. The Contractor shall

not start work until the contract has been awarded except in the case of emergency work ordered by the Contracting Officer in writing.

(b) The Government shall deliver the vessel described in the contract at the time and location specified in the contract. Upon completion of the work, the Government shall accept delivery of the vessel at the time and location specified in the contract.

(c) The Contractor shall without charge—

(1) Make available to personnel of the vessel while in dry dock or on a marine railway, sanitary lavatory and similar facilities at the plant acceptable to the Contracting Officer;

(2) Supply and maintain suitable brows and gangways from the pier, dry dock, or marine railway to the vessel;

(3) Treat salvage, scrap or other ship's material of the Government resulting from performance of the work as items of Government-furnished property, in accordance with clause 52.245–1, Government Property;

(4) Perform, or pay the cost of, any repair, reconditioning or replacement made necessary as the result of the use by the Contractor of any of the vessel's machinery, equipment or fittings, including, but not limited to, winches, pumps, rigging, or pipe lines; and

(5) Furnish suitable offices, office equipment and telephones at or near the site of the work for the Government's use.

(d) The contract will state whether dock and sea trials are required to determine whether the Contractor has satisfactorily performed the work.

(1) If dock and sea trials are required, the vessel shall be under the control of the vessel's commander and crew.

(2) The Contractor shall not conduct dock and sea trials not specified in the contract without advance approval of the Contracting Officer. Dock and sea trials not specified in the contract shall be at the Contractor's expense and risk.

(3) The Contractor shall provide and install all fittings and appliances necessary for dock and sea trials. The Contractor shall be responsible for care, installation, and removal of instruments and apparatus furnished by the Government for use in the trials.

(End of clause)

1252.217–73 Inspection and Manner of Doing Work.

As prescribed at 1217.7001(b), insert the following clause:

INSPECTION AND MANNER OF DOING WORK (NOV 2022)

(a) The Contractor shall perform work in accordance with the contract, any drawings and specifications made a part of the job order, and any change or modification issued under the Changes clause.

(b)(1) Except as provided in paragraph (b)(2) of this clause, and unless otherwise specifically provided in the contract, all operational practices of the Contractor and all workmanship, material, equipment, and articles used in the performance of work under this contract shall be in accordance with the best commercial marine practices and the rules and requirements of all appropriate regulatory bodies including, but not limited to the American Bureau of Shipping, the U.S. Coast Guard, and the Institute of Electrical and Electronic Engineers, in effect at the time of Contractor's submission of offer, and shall be intended and approved for marine use.

(2) When Navy specifications are specified in the contract, the Contractor shall follow Navy standards of material and workmanship. The solicitation shall prescribe the Navy standard whenever applicable.

(c) The Government may inspect and test all material and workmanship at any time during the Contractor's performance of the work.

(1) If, prior to delivery, the Government finds any material or workmanship is defective or not in accordance with the contract, in addition to its rights under the Guarantee clause, the Government may reject the defective or nonconforming material or workmanship and require the Contractor to correct or replace it at the Contractor's expense.

(2) If the Contractor fails to proceed promptly with the replacement or correction of the material or workmanship, the Government may replace or correct the defective or nonconforming material or workmanship and charge the Contractor the excess costs incurred.

(3) As specified in the contract, the Contractor shall provide and maintain an inspection system acceptable to the Government.

(4) The Contractor shall maintain complete records of all inspection work and shall make them available to the Government during performance of the contract and for 90 days after the completion of all work required.

(d) The Contractor shall not permit any welder to work on a vessel unless the welder is, at the time of the work, qualified to the standards established by the U.S. Coast Guard, American Bureau of Shipping, or Department of the Navy for the type of welding being performed. Qualifications of a welder shall be as specified in the contract.

(e) The Contractor shall—

(1) Exercise reasonable care to protect the vessel from fire;

(2) Maintain a reasonable system of inspection over activities taking place in the vicinity of the vessel's magazines, fuel oil tanks,

or storerooms containing flammable materials.

(3) Maintain a reasonable number of hose lines ready for immediate use on the vessel at all times while the vessel is berthed alongside the Contractor's pier or in dry dock or on a marine railway;

(4) Unless otherwise provided in the contract, provide sufficient security patrols to reasonably maintain a fire watch for protection of the vessel when it is in the Contractor's custody;

(5) To the extent necessary, clean, wash, and steam out or otherwise make safe, all tanks under alteration or repair.

(6) Furnish the Contracting Officer a ''gas-free'' or ''safe-for-hotwork'' certificate before any hot work is done on a tank;

(7) Treat the contents of any tank as Government property in accordance with clause 52.245–1, Government Property; and

(8) Dispose of the contents of any tank only at the direction, or with the concurrence, of the Contracting Officer.

(9) Be responsible for the proper closing of all openings to the vessel's underwater structure upon which work has been performed. The Contractor additionally must advise the COR of the status of all valve closures and openings for which the Contractor's workers were responsible.

(f) Except as otherwise provided in the contract, when the vessel is in the custody of the Contractor or in dry dock or on a marine railway and the temperature is expected to go as low as 35 Fahrenheit, the Contractor shall take all necessary steps to—

(1) Keep all hose pipe lines, fixtures, traps, tanks, and other receptacles on the vessel from freezing; and

(2) Protect the stern tube and propeller hubs from frost damage.

(g) The Contractor shall, whenever practicable—

(1) Perform the required work in a manner that will not interfere with the berthing and messing of Government personnel attached to the vessel; and

(2) Provide Government personnel attached to the vessel access to the vessel at all times.

(h) Government personnel attached to the vessel shall not interfere with the Contractor's work or workers.

(i)(1) The Government does not guarantee the correctness of the dimensions, sizes, and shapes set forth in any contract, sketches, drawings, plans, or specifications prepared or furnished by the Government, unless the contract requires that the Contractor perform the work prior to any opportunity to inspect.

(2) Except as stated in paragraph (i)(1) of this clause, and other than those parts furnished by the Government, and the Contractor shall be responsible for the correctness of the dimensions, sizes, and shapes of parts furnished under this contract.

(j) The Contractor shall at all times keep the site of the work on the vessel free from accumulation of waste material or rubbish caused by its employees or the work. At the completion of the work, unless the contract specifies otherwise, the Contractor shall remove all rubbish from the site of the work and leave the immediate vicinity of the work area ''broom clean.''

(End of clause)

1252.217–74 Subcontracts.

As prescribed at 1217.7001(b), insert the following clause:

SUBCONTRACTS (NOV 2022)

(a) Nothing contained in the contract shall be construed as creating any contractual relationship between any subcontractor and the Government. The divisions or sections of the specifications are not intended to control the Contractor in dividing the work among subcontractors or to limit the work performed by any trade.

(b) The Contractor shall be responsible to the Government for acts and omissions of its own employees, and of subcontractors and their employees. The Contractor shall also be responsible for the coordination of the work of the trades, subcontractors, and material men.

(c) The Contractor shall, without additional expense to the Government, employ specialty subcontractors where required by the specifications.

(d) The Government or its representatives will not undertake to settle any differences between the Contractor and its subcontractors, or any differences between subcontractors.

(End of clause)

1252.217–75 Lay Days.

As prescribed at 1217.7001(c), insert the following clause:

LAY DAYS (NOV 2022)

(a) Lay day time will be paid by the Government at the Contractor's stipulated bid price for this item of the contract when the vessel remains on the dry dock or marine railway as a result of any change that involves work in addition to that required under the basic contract.

(b) No lay day time shall be paid until all items of the basic contract for which a price was established by the Contractor and for which docking of the vessel was required have been satisfactorily completed and accepted.

(c) Days of hauling out and floating, whatever the hour, shall not be paid as lay day time, and days when no work is performed by the Contractor shall not be paid as lay day time.

(d) Payment of lay day time shall constitute complete compensation for all costs, direct and indirect, to reimburse the Contractor for use of dry dock or marine railway.

(End of clause)

1252.217–76 Liability and Insurance.

As prescribed at 1217.7001(b), insert the following clause:

LIABILITY AND INSURANCE (NOV 2022)

(a) The Contractor shall exercise its best efforts to prevent accidents, injury, or damage to all employees, persons, and property, in and about the work, and to the vessel or part of the vessel upon which work is done.

(b) *Loss or damage to the vessel, materials, or equipment.* (1) Unless otherwise directed or approved in writing by the Contracting Officer, the Contractor shall not carry insurance against any form of loss or damage to the vessel(s) or to the materials or equipment to which the Government has title or which have been furnished by the Government for installation by the Contractor. The Government assumes the risks of loss of and damage to that property.

(2) The Government does not assume any risk with respect to loss or damage compensated for by insurance or otherwise or resulting from risks with respect to which the Contractor has failed to maintain insurance, if available, as required or approved by the Contracting Officer.

(3) The Government does not assume risk of and will not pay for any costs of the following:

(i) Inspection, repair, replacement, or renewal of any defects in the vessel(s) or material and equipment due to—

(A) Defective workmanship performed by the Contractor or its subcontractors;

(B) Defective materials or equipment furnished by the Contractor or its subcontractors; or

(C) Workmanship, materials, or equipment which do not conform to the requirements of the contract, regardless of whether the defect is latent or whether the nonconformance is the result of negligence.

(ii) Loss, damage, liability, or expense caused by, resulting from, or incurred as a consequence of any delay or disruption, willful misconduct or lack of good faith by the Contractor or any of its representatives that have supervision or direction of—

(A) All or substantially all of the Contractor's business; or

(B) All or substantially all of the Contractor's operation at any one plant.

(4) As to any risk that is assumed by the Government, the Government shall be subrogated to any claim, demand or cause of action against third parties that exists in favor of the Contractor. If required by the Contracting Officer, the Contractor shall execute a formal assignment or transfer of the claim, demand, or cause of action.

(5) No party other than the Contractor shall have any right to proceed directly against the Government or join the Government as a codefendant in any action.

(6) Notwithstanding the foregoing, the Contractor shall bear the first $5,000 of loss or damage from each occurrence or incident, the risk of which the Government would have assumed under the provision of this paragraph (b).

(c) *Indemnification.* The Contractor indemnifies the Government and the vessel and its owners against all claims, demands, or causes of action to which the Government, the vessel or its owner(s) might be subject as a result of damage or injury (including death) to the property or person of anyone other than the Government or its employees, or the vessel or its owner, arising in whole or in part from the negligence or other wrongful act of the Contractor, or its agents or employees, or any subcontractor, or its agents or employees.

(1) The Contractor's obligation to indemnify under this paragraph shall not exceed the sum of $300,000 as a consequence of any single occurrence with respect to any one vessel.

(2) The indemnity includes, without limitation, suits, actions, claims, costs, or demands of any kind, resulting from death, personal injury, or property damage occurring during the period of performance of work on the vessel or within 90 days after redelivery of the vessel. For any claim, etc., made after 90 days, the rights of the parties shall be as determined by other provisions of this contract and by law. The indemnity applies to death occurring after 90 days where the injury was received during the period covered by the indemnity.

(d) *Insurance.* (1) The Contractor shall, at its own expense, obtain and maintain the following insurance—

(i) Casualty, accident, and liability insurance, as approved by the Contracting Officer, insuring the performance of its obligations under paragraph (c) of this clause.

(ii) Workers Compensation Insurance (or its equivalent) covering the employees engaged on the work.

(2) The Contractor shall ensure that all subcontractors engaged on the work obtain and maintain the insurance required in paragraph (d)(1) of this clause.

(3) Upon request of the Contracting Officer, the Contractor shall provide evidence of the

insurance required by paragraph (d) of this clause.

(e) The Contractor shall not make any allowance in the contract price for the inclusion of any premium expense or charge for any reserve made on account of self-insurance for coverage against any risk assumed by the Government under this clause.

(f) The Contractor shall give the Contracting Officer written notice as soon as practicable after the occurrence of a loss or damage for which the Government has assumed the risk.

(1) The notice shall contain full details of the loss or damage.

(2) If a claim or suit is later filed against the Contractor as a result of the event, the Contractor shall immediately deliver to the Government every demand, notice, summons, or other process received by the Contractor or its employees or representatives.

(3) The Contractor shall cooperate with the Government and, upon request, shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses, and the conduct of suits. The Government shall reimburse the Contractor for expenses incurred in this effort, other than the cost of maintaining the Contractor's usual organization.

(4) The Contractor shall not, except at its own expense, voluntarily make any payments, assume any obligation, or incur any expense other than what would be imperative for the protection of the vessel(s) at the time of the event.

(g) In the event of loss of or damage to any vessel(s), material, or equipment which may result in a claim against the Government under the insurance provisions of this contract, the Contractor shall promptly notify the Contracting Officer of the loss or damage. The Contracting Officer may, without prejudice to any right of the Government, either—

(1) Order the Contractor to proceed with replacement or repair, in which event the Contractor shall effect the replacement or repair;

(i) The Contractor shall submit to the Contracting Officer a request for reimbursement of the cost of the replacement or repair together with whatever supporting documentation the Contracting Officer may reasonably require, and shall identify the request as being submitted under the Insurance clause of this contract.

(ii) If the Government determines that the risk of the loss or damage is within the scope of the risks assumed by the Government under this clause, the Government will reimburse the Contractor for the reasonable allowable cost of the replacement or repair, plus a reasonable profit (if the work or replacement or repair was performed by the Contractor) less the deductible amount specified in paragraph (b) of this clause.

(iii) Payments by the Government to the Contractor under this clause are outside the scope of and shall not affect the pricing structure of the contract, and are additional to the compensation otherwise payable to the Contractor under this contract; or

(2) Decide that the loss or damage shall not be replaced or repaired and in that event, the Contracting Officer shall—

(i) Modify the contract appropriately, consistent with the reduced requirements reflected by the unreplaced or unrepaired loss or damage; or

(ii) Terminate the repair of any part or all of the vessel(s) under the Termination for Convenience of the Government clause of this contract.

(End of clause)

1252.217–77 Title.

As prescribed at 1217.7001(b), insert the following clause:

TITLE (NOV 2022)

(a) Unless otherwise provided, title to all materials and equipment to be incorporated in a vessel in the performance of this contract shall vest in the Government upon delivery at the location specified for the performance of the work.

(b) Upon completion of the contract, or with the approval of the Contracting Officer during performance of the contract, all Contractor-furnished materials and equipment not incorporated in, or placed on, any vessel, shall become the property of the Contractor, unless the Government has reimbursed the Contractor for the cost of the materials and equipment.

(c) The vessel, its equipment, movable stores, cargo, or other ship's materials shall not be considered Government-furnished property.

(End of clause)

1252.217–78 Discharge of Liens.

As prescribed at 1217.7001(b), insert the following clause:

DISCHARGE OF LIENS (NOV 2022)

(a) The Contractor shall immediately discharge or cause to be discharged, any lien or right *in rem* of any kind, other than in favor of the Government, that exists or arises in connection with work done or materials furnished under this contract.

(b) If any such lien or right *in rem* is not immediately discharged, the Government, at the expense of the Contractor, may discharge, or cause to be discharged, the lien or right.

(End of clause)

1252.217–79 Delays.

As prescribed at 1217.7001(b), insert the following clause:

DELAYS (NOV 2022)

When during the performance of this contract the Contractor is required to delay work on a vessel temporarily, due to orders or actions of the Government respecting stoppage of work to permit shifting the vessel, stoppage of hot work to permit bunkering, stoppage of work due to embarking or debarking passengers and loading or discharging cargo, and the Contractor is not given sufficient advance notice or is otherwise unable to avoid incurring additional costs on account thereof, an equitable adjustment shall be made in the price of the contract pursuant to the ''Changes'' clause.

(End of clause)

1252.217–80 Department of Labor Safety and Health Regulations for Ship Repair.

As prescribed at 1217.7001(b), insert the following clause:

DEPARTMENT OF LABOR SAFETY AND HEALTH REGULATIONS FOR SHIP REPAIR (NOV 2022)

Nothing contained in this contract shall relieve the Contractor of any obligations it may have to comply with—

(a) The Occupational Safety and Health Act of 1970 (29 U.S.C. 651, *et seq.*);

(b) The Occupational Safety and Health Standards for Shipyard Employment (29 CFR part 1915); or

(c) Any other applicable Federal, State, and local laws, codes, ordinances, and regulations.

(End of clause)

1252.222–70 Strikes or Picketing Affecting Timely Completion of the Contract Work.

As prescribed in 1222.101–71(a), insert the following clause:

STRIKES OR PICKETING AFFECTING TIMELY COMPLETION OF THE CONTRACT WORK (NOV 2022)

Notwithstanding any other provision hereof, the Contractor is responsible for delays arising out of labor disputes, including but not limited to strikes, if such strikes are reasonably avoidable. A delay caused by a strike or by picketing which constitutes an unfair labor practice is not excusable unless the Contractor takes all reasonable and appropriate action to end such a strike or picketing, such as the filing of a charge with the National Labor Relations Board, the use of other available Government procedures, and the use of private boards or organizations for the settlement of disputes.

(End of clause)

1252.222–71 Strikes or Picketing Affecting Access to a DOT Facility.

As prescribed in 1222.101–71(b), insert the following clause:

STRIKES OR PICKETING AFFECTING ACCESS TO A DOT FACILITY (NOV 2022)

If the Contracting Officer notifies the Contractor in writing that a strike or picketing—(a) Is directed at the Contractor or subcontractor or any employee of either; and (b) Impedes or threatens to impede access by any person to a DOT facility where the site of the work is located, the Contractor shall take all appropriate action to end such strike or picketing, including, if necessary, the filing of a charge of unfair labor practice with the National Labor Relations Board or the use of other available judicial or administrative remedies.

(End of clause)

1252.222–72 Contractor Cooperation in Equal Employment Opportunity and Anti-Harassment Investigations.

As prescribed in 1222.810–70, insert the following clause:

CONTRACTOR COOPERATION IN EQUAL EMPLOYMENT OPPORTUNITY AND ANTI–HARASSMENT INVESTIGATIONS (NOV 2022)

(a) *Definitions.* As used in this clause—

Complaint means a formal or informal complaint that has been filed with DOT management, DOT agency Equal Employment Opportunity (EEO) officials, the Equal Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP) or a court of competent jurisdiction.

Contractor employee means all current Contractor employees who work or worked under this contract. The term also includes current employees of subcontractors who work or worked under this contract. In the case of Contractor and subcontractor employees who worked under this contract, but who are no longer employed by the Contractor or subcontractor, or who have been assigned to another entity within the Contractor's or subcontractor's organization, the Contractor shall provide DOT with that employee's last known mailing address, email address, and telephone number, if that employee has been identified as a witness in

an EEO or Anti-Harassment complaint or investigation.

Good faith cooperation means, but is not limited to, making Contractor employees available, with the presence or assistance of counsel as deemed appropriate by the Contractor, for:

(1) Formal and informal interviews by EEO counselors, the OFCCP, or other Agency officials processing EEO or Anti-Harassment complaints;

(2) Formal or informal interviews by EEO investigators charged with investigating complaints of unlawful discrimination filed by Federal employees;

(3) Reviewing and signing appropriate affidavits or declarations summarizing statements provided by such Contractor employees during EEO or Anti-Harassment investigations;

(4) Producing documents requested by EEO counselors, EEO investigators, OFCCP investigators, Agency employees, or the EEOC in connection with a pending EEO or Anti-Harassment complaint; and

(5) Preparing for and providing testimony in depositions or in hearings before the Merit Systems Protection Board, EEOC, OFCCP, and U.S. District Court.

(b) *Cooperation with investigations.* In addition to complying with the clause at FAR 52.222–26, Equal Opportunity, the Contractor shall, in good faith, cooperate with the Department of Transportation in investigations of EEO complaints processed pursuant to 29 CFR part 1614 and internal Anti-Harassment investigations.

(c) *Compliance.* Failure on the part of the Contractor or its subcontractors to comply with the terms of this clause may be grounds for the Contracting Officer to terminate this contract for default or for cause in accordance with the termination clauses in the contract.

(d) *Subcontract flowdown.* The Contractor shall include the provisions of this clause in all subcontract solicitations and subcontracts awarded, at any tier, under this contract.

(End of clause)

1252.223–70 Removal or Disposal of Hazardous Substances—Applicable Licenses and Permits.

As prescribed in 1223.303, insert the following clause:

REMOVAL OR DISPOSAL OF HAZARDOUS SUBSTANCES—APPLICABLE LICENSES AND PERMITS (NOV 2022)

The Contractor has___or does not have___[*Contractor check applicable response*] all licenses and permits required by Federal, State, and local laws to perform hazardous substance(s) removal or disposal services. If the Contractor does not currently possess these documents, it must obtain all requisite licenses and permits within_____[*Contracting Officer insert number*] calendar days after date of award. The Contractor shall provide evidence of said documents to the Contracting Officer or designated Government representative prior to commencement of work under the contract.

(End of clause)

1252.223–71 Accident and Fire Reporting.

As prescribed in 1223.7000(a), insert the following clause:

ACCIDENT AND FIRE REPORTING (NOV 2022)

(a) The Contractor shall report to the Contracting Officer any accident or fire occurring at the site of the work which causes—

(1) A fatality or as much as one lost workday on the part of any employee of the Contractor or subcontractor at any tier;

(2) Damage of $1,000 or more to Government-owned or leased property, either real or personal;

(3) Damage of $1,000 or more to Contractor or subcontractor owned or leased motor vehicles or mobile equipment; or

(4) Damage for which a contract time extension may be requested.

(b) Accident and fire reports required by paragraph (a) of this section shall be accomplished by the following means:

(1) Accidents or fires resulting in a death, hospitalization of five or more persons, or destruction of Government-owned or leased property (either real or personal), the total value of which is estimated at $100,000 or more, shall be reported immediately by telephone to the Contracting Officer or his/her authorized representative and shall be confirmed in writing within 24 hours to the Contracting Officer. Such report shall state all known facts as to extent of injury and damage and as to cause of the accident or fire.

(2) Other accident and fire reports required by paragraph (a) of this section may be reported by the Contractor using a state, private insurance carrier, or Contractor accident report form which provides for the statement of—

(i) The extent of injury; and

(ii) The damage and cause of the accident or fire.

Such report shall be mailed or otherwise delivered to the Contracting Officer within 48 hours of the occurrence of the accident or fire.

(c) The Contractor shall assure compliance by subcontractors at all tiers with the requirements of this clause.

(End of clause)

1252.223–72 Protection of Human Subjects.

As prescribed in 1223.7000(b), insert the following clause:

PROTECTION OF HUMAN SUBJECTS (NOV 2022)

(a) The Contractor shall comply with 49 CFR part 11, DOT's regulations for the protection of human subjects participating in activities supported directly or indirectly by contracts from DOT. In addition, the Contractor shall comply with any DOT Operating Administration (OA)-specific policies and procedures on the protection of human subjects.

(b) To demonstrate compliance with the subject DOT regulations and to protect human subjects, the Contractor shall ensure the following:

(1) The Contractor shall establish and maintain a committee competent to review projects and activities that involve human subjects.

(2) The committee shall be assigned responsibility to determine, for each activity planned and conducted, that—

(i) The rights and welfare of subjects are adequately protected;

(ii) The risks to subjects are outweighed by potential benefits; and

(iii) The informed consent of subjects shall be obtained by methods that are adequate and appropriate.

(3) Committee reviews shall be conducted with objectivity and in a manner to ensure the exercise of independent judgment of the members. Members shall be excluded from review of projects or activities in which they have an active role or a conflict of interests.

(4) Continuing constructive communication between the committee and the project directors must be maintained as a means of safeguarding the rights and welfare of subjects.

(5) Facilities and professional attention required for subjects who may suffer physical, psychological, or other injury as a result of participating in an activity shall be provided.

(6) The committee shall maintain records of committee review of applications and active projects, of documentation of informed consent, and of other documentation that may pertain to the selection, participation, and protection of subjects. Detailed records shall be maintained of circumstances of any review that adversely affects the rights or welfare of the individual subjects. Such materials shall be made available to DOT upon request.

(7) The retention period of such records and materials shall be as specified at FAR 4.703.

(c) Periodic reviews shall be conducted by the Contractor to assure, through appropriate administrative overview, that the practices and procedures designed for the protection of the rights and welfare of subjects are being effectively applied.

(d) If the Contractor has or maintains a relationship with a Department of Health and Human Services approved Institutional Review Board (IRB) which can appropriately review this contract in accordance with the technical requirements and any applicable OA policies and procedures that apply, that IRB will be considered acceptable for the purposes of this contract.

(End of clause)

1252.223–73 Seat Belt Use Policies and Programs.

As prescribed in 1223.7000(c), insert the following clause:

SEAT BELT USE POLICIES AND PROGRAMS (NOV 2022)

In accordance with Executive Order 13043, Increasing Seat Belt Use in the United States, dated April 16, 1997, the Contractor is encouraged to adopt and enforce on-the-job seat belt use policies and programs for its employees when operating company-owned, rented, or personally-owned vehicles. The National Highway Traffic Safety Administration (NHTSA) is responsible for providing leadership and guidance in support of this Presidential initiative. For information on how to implement such a program or for statistics on the potential benefits and cost-savings to your company or organization, please visit the Click it or Ticket seat belt safety section of NHTSA's website at *https://www.nhtsa.gov/campaign/click-it-or-ticket* and *https://www.nhtsa.gov/risky-driving/seat-belts*.

(End of clause)

1252.228–70 Loss of or Damage to Leased Aircraft.

As prescribed in 1228.306–70(a), insert the following clause:

LOSS OF OR DAMAGE TO LEASED AIRCRAFT (NOV 2022)

(a) Except normal wear and tear, the Government assumes all risk of loss of, or damage to, the leased aircraft during the term of this lease while the aircraft is in the possession of the Government.

(b) In the event of damage to the aircraft, the Government, at its option, shall make the necessary repairs with its own facilities or by contract, or pay the Contractor the reasonable cost of repair of the aircraft.

(c) In the event the aircraft is lost or damaged beyond repair, the Government shall

pay the Contractor a sum equal to the fair market value of the aircraft at the time of such loss or damage, which value may be specifically agreed to in clause 1252.228–71, Fair Market Value of Aircraft, less the salvage value of the aircraft. However, the Government may retain the damaged aircraft or dispose of it in its discretion. In that event, the Contractor will be paid the fair market value of the aircraft as stated in the clause.

(d) The Contractor agrees that the contract price does not include any cost attributable to hull insurance or to any reserve fund it has established to protect its interest in the aircraft. If, in the event of loss or damage to the leased aircraft, the Contractor receives compensation for such loss or damage in any form from any source, the amount of such compensation shall be credited to the Government in determining the amount of the Government's liability.

(e) In the event of loss of or damage to the aircraft, the Government shall be subrogated to all rights of recovery by the Contractor against third parties for such loss or damage and the Contractor shall promptly assign such rights in writing to the Government.

(End of clause)

1252.228–71 Fair Market Value of Aircraft.

As prescribed in 1228.306–70(a), insert the following clause:

FAIR MARKET VALUE OF AIRCRAFT (NOV 2022)

For purposes of clause 1252.228–70, Loss of or Damage to Leased Aircraft, the fair market value of the aircraft to be used in the performance of this contract shall be the lesser of the two values set out in paragraphs (a) and (b) below—

(a) $_____; [*Contracting Officer insert value*] or

(b) If the Contractor has insured the same aircraft against loss or destruction in connection with other operations, the amount of such insurance coverage on the date of the loss or damage for which the Government may be responsible under this contract.

(End of clause)

1252.228–72 Risk and Indemnities.

As prescribed in 1228.306–70(a) and (d), insert the following clause:

RISK AND INDEMNITIES (NOV 2022)

The Contractor hereby agrees to indemnify and hold harmless the Government, its officers and employees from and against all claims, demands, damages, liabilities, losses, suits and judgments (including all costs and expenses incident thereto) which may be suffered by, accrue against, be charged to or recoverable from the Government, its officers and employees by reason of injury to or death of any person other than officers, agents, or employees of the Government or by reason of damage to property of others of whatsoever kind (other than the property of the Government, its officers, agents or employees) arising out of the operation of the aircraft. In the event the Contractor holds or obtains insurance in support of this covenant, evidence of insurance shall be delivered to the Contracting Officer.

(End of clause)

1252.228–73 Command of Aircraft.

As prescribed in 1228.306–70(d), insert the following clause:

COMMAND OF AIRCRAFT (NOV 2022)

During the performance of a contract for out-service flight training for DOT, whether the instruction to DOT personnel is in leased, contractor-provided, or Government-provided aircraft, contractor personnel shall always, during the entirety of the course of training and during operation of the aircraft, remain in command of the aircraft. At no time shall other personnel be permitted to take command of the aircraft.

(End of clause)

1252.228–74 Notification of Payment Bond Protection.

As prescribed in guidance at 1228.106–470, insert the following clause:

NOTIFICATION OF PAYMENT BOND PROTECTION (NOV 2022)

(a) The prime contract is subject to the Bonds statute (historically referred to as the Miller Act) (40 U.S.C. chapter 31, subchapter III), under which the prime contractor has obtained a payment bond. This payment bond may provide certain unpaid employees, suppliers, and subcontractors a right to sue the bonding surety under the Bonds statute for amounts owned for work performed and materials delivery under the prime contract.

(b) Persons believing that they have legal remedies under the Bonds statute should consult their legal advisor regarding the proper steps to take to obtain these remedies. This notice clause does not provide any party any rights against the Federal Government, or create any relationship, contractual or otherwise, between the Federal Government and any private party.

(c) The surety which has provided the payment bond under the prime contract is: [*Contracting Officer fill-in prime contractor's surety information*]

_____

(Name)

(Street Address)

(City, State, Zip Code)

(Contact & Tel. No.)

(d) Subcontract flowdown requirements. This clause shall be flowed down to all subcontractors. Prime contractors shall insert this notice clause in all first-tier subcontracts and shall require the clause to be subsequently flowed down by all first-tier subcontractors to all their subcontractors, at any tier. This notice contains information pertaining to the surety that provided the payment bond under the prime contract and is required to be inserted in its entirety to include the information set forth in paragraph (c).

(End of clause)

1252.231–70 Date of Incurrence of Costs.

As prescribed in 1231.205–3270(b), insert the following clause:

DATE OF INCURRENCE OF COSTS (NOV 2022)

The Contractor shall be entitled to reimbursement for costs incurred on or after____ [*Contracting Officer insert date*] in an amount not to exceed $____ [*Contracting Officer insert amount*] that, if incurred after this contract had been entered into, would have been reimbursable under this contract.

(End of clause)

1252.232–70 Electronic Submission of Payment Requests.

As prescribed in 1232.7005, insert the following clause:

ELECTRONIC SUBMISSION OF PAYMENT REQUESTS (NOV 2022)

(a) *Definitions.* As used in this clause—

(1) *Contract financing payment* has the meaning given in FAR 32.001.

(2) *Payment request* means a bill, voucher, invoice, or request for contract financing payment or invoice payment with associated supporting documentation. The payment request must comply with the requirements identified in FAR 32.905(b), ''Content of Invoices,'' this clause, and the applicable Payment clause included in this contract.

(3) *Electronic form* means an automated system transmitting information electronically according to the accepted electronic data transmission methods and formats identified in paragraph (c) of this clause. Facsimile, email, and scanned documents are not acceptable electronic forms for submission of payment requests.

(4) *Invoice payment* has the meaning given in FAR 32.001.

(b) *Electronic payment requests.* Except as provided in paragraph (e) of this clause, the contractor shall submit payment requests in electronic form. Purchases paid with a Governmentwide commercial purchase card are considered to be an electronic transaction for purposes of this rule, and therefore no additional electronic invoice submission is required.

(c) *Processing system.* The Department of Transportation utilizes the DELPHI system for processing invoices. The DELPHI module for submitting invoices is called *iSupplier*. Access to DELPHI is granted with electronic authentication of credentials (name & valid email address) utilizing the GSA credentialing platform *login.gov*. Vendors submitting invoices are required to submit invoices via *iSupplier* (DELPHI) and authenticated via *www.login.gov*.

(d) *Invoice requirements.* To receive payment and in accordance with the Prompt Payment Act, all invoices submitted as attachments in *iSupplier* (DELPHI) shall contain the following:

(1) Invoice number and invoice date.

(2) Period of performance covered by invoice.

(3) Contract number and title.

(4) Task/Delivery Order number and title (if applicable).

(5) Amount billed (by CLIN), current and cumulative.

(6) Total ($) of billing.

(7) Cumulative total billed for all contract work to date.

(8) Name, title, phone number, and mailing address of person to be contacted in the event of a defective invoice.

(9) Travel. If the contract includes allowances for travel, all invoices which include charges pertaining to travel expenses will catalog a breakdown of reimbursable expenses with the appropriate receipts to substantiate the travel expenses.

(e) *Payment system registration.* All persons accessing the *iSupplier* (DELPHI) will be required to have their own unique user ID and password and be credentialed through *login.gov*.

(1) *Electronic authentication. See www.login.gov* for instructions.

(2) To create a *www.login.gov* account, the user will need a valid email address and a working phone number. The user will create a password and then *www.login.gov* will reply with an email confirming the email address.

(3) *iSupplier* (DELPHI) registration instructions: New users should navigate to: *http://einvoice.esc.gov* to establish an account. Users are required to log in to *iSupplier* (DELPHI) every 45 days to keep it active.

(4) *Training on DELPHI.* To facilitate use of DELPHI, comprehensive user information is available at *http://einvoice.esc.gov*.

(5) *Account Management.* Vendors are responsible to contact their assigned COR when their firm's points of contacts will no longer be submitting invoices, so they can be removed from the system.

(f) *Waivers.* For contractors/vendors who are unable to utilize DOT's DELPHI system, waivers may be considered by DOT on a case-by-case basis. Vendors should contact their Contracting Officer's Representative (COR) for procedures.

(g) *Exceptions and alternate payment procedures.* If, based on one of the circumstances set forth in 1232.7002(a) or (b), and the contracting officer directs that payment requests be made by mail, the contractor shall submit payment requests by mail through the United States Postal Service to the designated agency office. If alternate payment procedures are authorized, the Contractor shall include a copy of the Contracting Officer's written authorization with each payment request. If DELPHI is succeeded by later technology, the Contracting Officer will supply the Contractor with the latest applicable electronic invoicing instructions.

(End of clause)

1252.232–71 Limitation of Government's Obligation.

As prescribed in 1232.770–7, insert the following clause:

LIMITATION OF GOVERNMENT'S OBLIGATION (NOV 2022)

(a) Funding is not currently available to fully fund this contract due to the Government operating under a continuing resolution (CR). The item(s) listed in the table below are being incrementally funded as described below. The funding allotted to these item(s) is presently available for payment and allotted to this contract. This table will be updated by a modification to the contract when additional funds, if any, are made available to this contract.

Contract line item No. (CLIN)	CLIN total price	Funds allotted to the CLIN	Funds required for complete funding of the CLIN
	$	$	$
	$	$	$
	$	$	$
	$	$	$
Totals	$	$	$

(b) For the incrementally funded CLIN(s) identified in paragraph (a) of this clause, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including any invoice payments to which the Contractor is entitled and reimbursement of authorized termination costs in the event of termination of those CLIN(s) for the Government's convenience, does not exceed the total amount currently obligated to those CLIN(s). The Contractor is not authorized to continue work on these item(s) beyond that point. The Government will not be obligated—in any event—to reimburse the Contractor in excess of the amount allotted to the CLIN(s) of the contract regardless of anything to the contrary in any other clause, including but not limited to the clause entitled ''Termination for Convenience of the Government'' or paragraph (l) entitled ''Termination for the Government's Convenience'' of the clause at FAR 52.212–4,''Commercial Terms and Conditions—Commercial Products and Commercial Services.''

(c) Notwithstanding paragraph (h) of this clause, the Contractor shall notify the Contracting Officer in writing at least 30 days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the item(s) identified in paragraph (a) of this clause. The notification shall state the estimated date when that point will be reached and an estimate of additional funding, if any, needed to continue performance. The notification shall also advise the Contracting Officer of the estimated amount of additional funds required for the timely performance of the item(s) funded pursuant to this contract. If after such notification additional funds are not allotted by the date identified in the Contractor's notification, or by an agreed upon substitute date, the Contracting Officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the terms of this contract authorizing termination for the convenience of the Government. Failure to make the notification required by this paragraph, whether for reasons within or beyond the Contractor's control, will not increase the maximum amount payable to the Contractor under paragraphs (a) and (b) of this clause.

(d) The Government may, at any time prior to termination, allot additional funds

for the performance of the item(s) identified in paragraph (a) of this clause.

(e) The termination provisions of paragraphs (a) through (h) of this clause do not limit the rights of the Government under the clause entitled ''Default'' or paragraph (m) entitled ''Termination for Cause,'' of the clause at FAR 52.212–4, ''Commercial Terms and Conditions—Commercial Products and Commercial Services.'' The provisions of this clause are limited to the work and allotment of funds for the item(s) set forth in paragraph (a) of this clause. This clause no longer applies once the contract is fully funded.

(f) Nothing in this clause affects the right of the Government to terminate this contract pursuant to the Government's termination for convenience terms set forth in this contract.

(g) Nothing in this clause shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342.

(h) The parties contemplate that the Government will allot funds to this contract from time to time as the need arises and as funds become available. There is no fixed schedule for providing additional funds.

(End of clause)

1252.235–70 Research Misconduct.

As prescribed in 1235.070–1, insert the following clause:

RESEARCH MISCONDUCT (NOV 2022)

(a) *Definitions.* As used in this clause—

Adjudication means the process of reviewing recommendations from the investigation phase and determining appropriate corrective actions.

Complainant means the person who makes an allegation of research misconduct or the person who cooperates with an inquiry or investigation.

DOT Oversight Organization is the Department of Transportation (DOT) operating administration or Secretarial office sponsoring or managing Federally-funded research.

Evidence includes, but is not limited to, research records, transcripts, or recordings of interviews, committee correspondence, administrative records, grant applications and awards, manuscripts, publications, expert analyses, and electronic data.

Fabrication means making up data or results and recording or reporting them.

Falsification means manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

Inquiry means preliminary information gathering and fact-finding to determine if an allegation, or apparent instance of research misconduct, warrants an investigation.

Investigation means formal collection and evaluation of information and facts to determine if research misconduct can be established, to assess its extent and consequences, and to recommend appropriate action.

Plagiarism means the appropriation of another person's ideas, processes, results, or words without giving appropriate credit. Research misconduct does not include honest error or differences of opinion.

Research and Technology Coordinating Council (RTCC) is the lead DOT entity for coordination of all actions related to allegations of research misconduct. The respondent in a research misconduct finding may appeal through the RTCC to the Deputy Secretary of Transportation.

Research institution includes any Contractor conducting research under DOT-funded contractual instruments, contracts, and similar instruments.

Research misconduct means fabrication, falsification, or plagiarism, in proposing, performing, or reviewing research, or in reporting research results. Research misconduct does not include honest error or difference of opinion.

Research record means the record of data or results that embody the facts resulting from scientific inquiry, and includes, but is not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles.

Respondent means the person against whom an allegation of research misconduct has been made, or the person whose actions are the focus of the inquiry or investigation.

(b) *General guidelines.* (1) *Confidentiality.* DOT organizations, including research organizations, are required to safeguard the confidentiality of the inquiry, investigation and decision-making processes, including maintaining complete confidentiality of all records and identities of respondents and complainants.

(2) *Retaliation prohibited.* If a complainant who has reported possible research misconduct alleges retaliation on the part of DOT organization management, the report will be addressed by management officials who will conduct an inquiry into the allegations followed by an appropriate management action.

(3) *Separation of phases.* DOT organizations and research organizations must ensure the separation of the Inquiry, Investigation and Determination Phases of this process.

(4) In general, DOT organizations must strive to protect the interests of the Federal Government and the public in carrying out this process.

(c) *Elements to support a finding of research misconduct.* Research institutions (including

Contractors) that receive DOT funds shall respond to allegations of research misconduct. The following elements describe the type of behavior, level of intent, and burden of proof required to support a finding of research misconduct:

(1) There must be a significant departure from the accepted practices of the relevant research community;

(2) The misconduct must have been committed intentionally, knowingly, or recklessly; and

(3) The allegation must be proven by a preponderance of the evidence.

(d) *DOT Oversight Organization Investigation.* The DOT oversight organization may proceed with its own investigation at any time if:

(1) DOT determines the research institution is not prepared to handle the allegation in a manner consistent with this policy.

(2) DOT involvement is needed to protect the public interest, including public health and safety.

(3) The allegation involves an entity of sufficiently small size (or an individual) that it cannot sufficiently conduct the investigation itself.

(4) The DOT oversight organization may take, or cause to be taken, interim administrative actions (including special certifications, assurances, or other administrative actions) when deemed appropriate to protect the welfare of human and animal subjects of research, prevent inappropriate use of Federal funds, or otherwise protect the public interest and safety.

(e) *Investigating research misconduct.* Research institutions, or in limited circumstances discussed in paragraph (d) the DOT Oversight Organization shall use the following procedures to investigate allegations of research misconduct:

(1) Inquire promptly into the research misconduct allegation and complete an initial inquiry within 60 calendar days after receipt of the allegation.

(2) Notify the Contracting Officer immediately, in writing, when an inquiry results in a determination that an investigation is warranted, and promptly begin an investigation.

(3) Ensure the objectivity and expertise of the individuals selected to review allegations and conduct investigations.

(4) Conduct the investigation according to established internal procedures and complete it within 120 calendar days of completing the initial inquiry.

(5) Document the investigation. Include documentation that—

(i) Describes the allegation(s);

(ii) Lists the investigators;

(iii) Describes the methods and procedures used to gather information and evaluate the allegation(s);

(iv) Summarizes the records and data compiled, states the findings, and explains the supporting reasons and evidence;

(v) States the potential impact of any research misconduct; and

(vi) Describes and explains any institutional sanctions or corrective actions recommended or imposed as appropriate within its jurisdiction and as consistent with other relevant laws.

(6) Provide the respondent (the person against whom an allegation of research misconduct has been made) with a reasonable opportunity (*e.g.*, 30 calendar days) to review and respond to the investigation report. The respondent's written comments or rebuttal will be made part of the investigative record.

(7) Within 30 calendar days after completion of an investigation, forward investigative reports, documentation, and respondent's response to the Contracting Officer who will coordinate with the DOT oversight organization(s) sponsoring and/or monitoring the federally-funded research.

(8) Time extensions. Contractors should request time extensions as needed from the Contracting Officer of the appropriate DOT oversight organization. The Contracting Officer has discretion to waive time requirements for good cause.

(f) *Activity sanctions or corrective actions.* Upon receipt of the investigative reports from the contractor, the DOT oversight organization, in conjunction with the Contracting Officer, will review the report, and determine the appropriate administrative action to be taken. In deciding what actions to take, the oversight organizations should consider: the severity of the misconduct; the degree to which the misconduct was knowing, intentional, or reckless; and whether it was an isolated event or part of a pattern. Sanctions or corrective actions may range as follows—

(1) *Minimal restrictions*—such as a letter of reprimand, additional conditions on awards, requiring third-party certification of accuracy or compliance with particular policies, regulations, guidelines, or special terms and conditions;

(2) *Moderate restrictions*—such as limitations on certain activities or expenditures under an active award or special reviews of requests for funding; or

(3) *More severe restrictions*—such as termination of an active award or government-wide suspension or debarment.

(g) *Appeals and final administrative action.* (1) The Federal Acquisition Regulation governs in all matters pertaining to termination of the contract and suspension/debarment.

(2) In all other cases, the Contractor may appeal the sanction or corrective action through the DOT Research and Technology Coordinating Council (RTCC) to the Deputy Secretary of Transportation, in writing

within 30 calendar days after receiving written notification of the research misconduct finding and associated administrative action(s). The Contractor shall mail a copy of the appeal to the Contracting Officer.

(3) If there is no request for appeal within 30 calendar days, the administrative actions of the oversight organization shall be final.

(4) If a request for appeal is received by the RTCC within the 30-calendar day limit, the Deputy Secretary may have the RTCC review the appeal and make recommendations.

(5) The RTCC on behalf of the Deputy Secretary will normally inform the appellant of the final decision on an appeal within 60 calendar days of receipt. This decision will then be the final DOT administrative action.

(h) *Criminal or civil fraud violations.* When the DOT oversight organization concludes an investigation with a determination of research misconduct, the DOT Office of the Senior Procurement Executive may notify any other sources of research that provide support to the respondent. If criminal or civil fraud violations may have occurred, the oversight organization should promptly refer the matter to the DOT Inspector General, the Department of Justice or other appropriate investigative body. The DOT oversight organization, in conjunction with the Contracting Officer will notify the respondent in writing of its action, sanctions to be imposed if applicable, and the DOT appeal procedures.

(i) *Subcontract flowdown.* The Contractor shall include the substance of this clause in all subcontracts that involve research.

(End of clause)

1252.235–71 Technology Transfer.

As prescribed in 1235.011–70, insert the following clause:

TECHNOLOGY TRANSFER (NOV 2022)

(a) The Contractor, in accordance with the provisions in the attached Statement of Work, will develop a Technology Transfer Plan to be approved by_____[*Fill-in: Contracting Officer to fill-in the cognizant DOT/OA*] prior to the initiation of any work under this contract and shall execute the approved plan throughout the conduct of this Agreement. Such plan shall include, at a minimum—

(1) A description of the problem and technical solutions being researched, including any potential or identified technology developments that are the intended output of or which may be derived from the research;

(2) A list identifying and categorizing by interest potential stakeholders in the outputs of the research to be performed;

(3) A plan for engaging the identified potential stakeholders to determine interest in and obtain suggested refinements to the research, before and during the conduct of this contract, to enhance the likelihood of adoption/implementation of the research outputs. Such engagement activities shall comprise communicating research status to identified stakeholders, soliciting their feedback; disseminating research outputs, and identifying whether the outputs were adopted/implemented;

(4) A proposed delivery or demonstration activity (*e.g.*, conference presentation of a final report, demonstration of software, or demonstration of tangible output);

(5) A draft plan for the commercialization of any research outputs, including the specific identification of stakeholders most likely to be interested in the commercialization of the research outputs;

(6) The identification of the specific methods and channels for dissemination of the research outputs (*e.g.*, publication, licensing to a third party, or manufacture and sale); and

(7) A plan for tracking and reporting the research outputs, outcomes, and impacts to [*Fill-in: Contracting Officer to fill in the cognizant DOT/OA*].

(b) The Contractor shall provide to_____[*Fill-in: Contracting Officer to fill-in the cognizant DOT/OA*] at least once every six months, or as an attachment to any more frequent research progress reports, a Technology Transfer Report addressing and updating each element of their approved Technology Transfer Plan. Such report shall include—

(1) An updated description of the problem and technical solution(s) being researched, particularly where any revisions to the research are based on feedback from a stakeholder engagement;

(2) A summary of overall technology transfer progress;

(3) An updated listing of interested stakeholders and an identification of their potential role (*e.g.*, research sponsor, potential end-user, or regulator);

(4) A listing of the stakeholders engaged since the most recently submitted Technology Transfer Report;

(5) The identification of any additional stakeholder engagement activity (including the mechanism used to engage the stakeholder) and the results of such activity;

(6) The conduct and results of any delivery/demonstration activity occurring since the most recently submitted Report update, including the identification of any stakeholder participants;

(7) An acknowledgement of the submission of any technical or progress report that would satisfy the Public Access requirement and whether such submissions are properly represented in the USDOT Research Hub and the National Transportation Library; and

(8) Any information on instances of any use of an output of research conducted under this contract.

(End of clause)

1252.236–70 Special Precautions for Work at Operating Airports.

As prescribed in 1236.570, insert the following clause:

SPECIAL PRECAUTIONS FOR WORK AT OPERATING AIRPORTS (NOV 2022)

(a) When work is to be performed at an operating airport, the Contractor must arrange its work schedule so as not to interfere with flight operations. Such operations will take precedence over construction convenience. Any operations of the Contractor that would otherwise interfere with or endanger the operations of aircraft shall be performed only at times and in the manner directed by the Contracting Officer. The Government will make every effort to reduce the disruption of the Contractor's operation.

(b) Unless otherwise specified by local regulations, all areas in which construction operations are underway shall be marked by yellow flags during daylight hours and by red lights at other times. The red lights along the edge of the construction areas within the existing aprons shall be the electric type of not less than 100 watts intensity placed and supported as required. All other construction markings on roads and adjacent parking lots may be either electric or battery type lights. These lights and flags shall be placed to outline the construction areas and the distance between any two flags or lights shall not be greater than 25 feet. The Contractor shall provide adequate watch to maintain the lights in working condition at all times other than daylight hours. The hour of beginning and the hour of ending of daylight will be determined by the Contracting Officer.

(c) All equipment and material in the construction areas or when moved outside the construction area shall be marked with airport safety flags during the day and when directed by the Contracting Officer, with red obstruction lights at nights. All equipment operating on the apron, taxiway, runway, and intermediate areas after darkness hours shall have clearance lights in conformance with instructions from the Contracting Officer. No construction equipment shall operate within 50 feet of aircraft undergoing fuel operations. Open flames are not allowed on the ramp except at times authorized by the Contracting Officer.

(d) Trucks and other motorized equipment entering the airport or construction area shall do so only over routes determined by the Contracting Officer. Use of runways, aprons, taxiways, or parking areas as truck or equipment routes will not be permitted unless specifically authorized for such use. Flag personnel shall be furnished by the Contractor at points on apron and taxiway for safe guidance of its equipment over these areas to assure right of way to aircraft. Areas and routes used during the contract must be returned to their original condition by the Contractor. The maximum speed allowed at the airport shall be established by airport management. Vehicles shall be operated to be under safe control at all times, weather and traffic conditions considered. Vehicles must be equipped with head and tail lights during the hours of darkness.

(End of clause)

1252.237–70 Qualifications of Contractor Employees.

As prescribed in 1237.110–70(a), insert the following clause:

QUALIFICATIONS OF CONTRACTOR EMPLOYEES (NOV 2022)

(a) *Definition. Sensitive information,* as used in this clause, means any information that is proprietary data or, if subject to unauthorized access, modification, loss, or misuse, could adversely affect the national interest, the conduct of Federal programs, or the privacy of individuals specified in The Privacy Act, 5 U.S.C. 552a, but has not been specifically authorized under criteria established by an Executive Order or an Act of Congress to be kept secret in the interest of national defense or foreign policy.

(b) Work under this contract may involve access to DOT facilities or sensitive information or resources (*e.g.,* information technology including computer systems). To protect sensitive information, which shall not be disclosed by the contractor unless authorized in writing by the Contracting Officer, the Contractor shall provide training to any contractor employees authorized to access sensitive information, and upon request of the Government, provide information to assist the Government in determining an individual's suitability to have authorization.

(c) The Contracting Officer may require dismissal from work under this contract of those employees deemed incompetent, careless, insubordinate, unsuitable, or otherwise objectionable, or whose continued employment is deemed contrary to the public interest or inconsistent with the best interest of national security.

(d) Contractor employees working on this contract must complete such forms as may be necessary for security or other reasons, including the conduct of background investigations to determine suitability. Completed forms shall be submitted as directed by the Contracting Officer. Upon the Contracting Officer's Representative (COR) or Program Manager's (PM) request, the Contractor's employees shall be fingerprinted or subject to other investigations as required.

(e) The Contractor shall ensure that contractor employees working on this contract are citizens of the United States of America or non-citizens who have been lawfully admitted for permanent residence or employment (indicated by immigration status) as evidenced by U.S. Citizenship and Immigration Services (USCIS) documentation.

(f) Subcontract flow-down requirement. The Contractor shall include this clause, including this paragraph (f), in subcontracts whenever this clause is included in the prime contractor's contract.

(End of clause)

1252.237–71 Certification of Data.

As prescribed in 1237.7003, insert the following provision:

CERTIFICATION OF DATA (NOV 2022)

(a) The offeror represents and certifies that to the best of its knowledge and belief, the information and/or data (*e.g.*, company profile; qualifications; background statements; brochures) submitted with its offer is current, accurate, and complete as of the date of its offer.

(b) The offeror understands that any inaccurate data provided to the Department of Transportation may subject the offeror, its subcontractors, its employees, or its representatives to: (1) prosecution for false statements pursuant to 18 U.S.C. 1001 and/or; (2) enforcement action for false claims or statements pursuant to the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. 3801–3812 and 49 CFR part 31 and/or; (3) termination for default or for cause under any contract resulting from its offer and/or; (4) debarment or suspension.

(c) The offeror agrees to obtain a similar certification from its subcontractors and submit such certification(s) with its offer.

Signature: _____

Date: _____

Typed Name and Title: _____

Company Name: _____

This certification concerns a matter within the jurisdiction of an agency of the United States and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under 18 U.S.C. 1001. _____

(End of provision)

1252.237–72 Prohibition on Advertising.

As prescribed in 1213.7101 and 1237.7003, insert the following clause:

PROHIBITION ON ADVERTISING (NOV 2022)

The contractor or its representatives (including training instructors) shall not advertise or solicit business from attendees for private, non-Government training during contracted-for training sessions. This prohibition extends to unsolicited oral comments, distribution or sales of written materials, and/or sales of promotional videos or audio tapes. The contractor agrees to insert this clause in its subcontracts.

(End of clause)

1252.237–73 Key Personnel.

As prescribed in 1237.110–70(b), insert the following clause:

KEY PERSONNEL (NOV 2022)

(a) The personnel as specified below are considered essential to the work being performed under this contract and may, with the consent of the contracting parties, be changed during the course of the contract by adding or deleting personnel, as appropriate.

(b) Before removing, replacing, or diverting any of the specified individuals, the Contractor shall notify the contracting officer, in writing, before the change becomes effective. The Contractor shall submit information to support the proposed action to enable the contracting officer to evaluate the potential impact of the change on the contract. The Contractor shall not remove or replace personnel under this contract until the Contracting Officer approves the change in writing. The key personnel under this contract are:

[*Contracting Officer insert specified key personnel*]

(End of clause)

1252.239–70 Security Requirements for Unclassified Information Technology Resources.

As prescribed in 1239.106–70, insert the following clause:

SECURITY REQUIREMENTS FOR UNCLASSIFIED INFORMATION TECHNOLOGY RESOURCES (NOV 2022)

(a) The Contractor shall be responsible for information technology security for all systems connected to a Department of Transportation (DOT) network or operated by the Contractor for DOT, regardless of location. This clause is applicable to all or any part of the contract that includes information technology resources or services in which the Contractor has physical or electronic access to DOT information that directly supports the mission of DOT. The term ''information technology,'' as used in this clause, means any equipment or interconnected system or subsystem of equipment, including telecommunications equipment, that is used in

the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. This includes both major applications and general support systems as defined by OMB Circular A–130. Examples of tasks that require security provisions include—

(1) Hosting of DOT e-Government sites or other IT operations;

(2) Acquisition, transmission, or analysis of data owned by DOT with significant replacement cost should the contractor's copy be corrupted; and

(3) Access to DOT general support systems/major applications at a level beyond that granted the general public, *e.g.,* bypassing a firewall.

(b) The Contractor shall develop, provide, implement, and maintain an IT Security Plan. This plan shall describe the processes and procedures that the Contractor will follow to ensure appropriate security of IT resources developed, processed, or used under this contract. The plan shall describe those parts of the contract to which this clause applies. The Contractor's IT Security Plan shall comply with applicable Federal Laws that include, but are not limited to, 40 U.S.C. 11331, the Federal Information Security Management Act (FISMA) of 2002, and the E-Government Act of 2002. The plan shall meet IT security requirements in accordance with Federal and DOT policies and procedures, as amended during the term of this contract, which include, but are not limited to the following:

(1) OMB Circular A–130, Managing Information as a Strategic Resource;

(2) National Institute of Standards and Technology (NIST) Guidelines;

(3) DOT CIO IT Policy (CIOP) compendium and associated guidelines;

(4) DOT Order 1630.2C, Personnel Security Management; and

(5) DOT Order 1351.37, Departmental Cyber Security Policy.

(c) Within 30 days after contract award, the contractor shall submit the IT Security Plan to the DOT Contracting Officer for review. This plan shall detail the approach contained in the offeror's proposal or sealed bid. Upon acceptance by the Contracting Officer, the Plan shall be incorporated into the contract by contract modification.

(d) Within six (6) months after contract award, the Contractor shall submit written proof of IT Security accreditation to the Contracting Officer. Such written proof may be furnished either by the Contractor or by a third party. Accreditation shall be in accordance with DOT policy available from the Contracting Officer upon request. The Contractor shall submit along with this accreditation a final security plan, risk assessment, security test and evaluation, and disaster recovery plan/continuity of operations plan. The accreditation and accompanying documents, to include a final security plan, risk assessment, security test and evaluation, and disaster recovery/continuity of operations plan, upon acceptance by the Contracting Officer, will be incorporated into the contract by contract modification.

(e) On an annual basis, the Contractor shall verify in writing to the Contracting Officer that the IT Security Plan remains valid.

(f) The Contractor shall ensure that the official DOT banners are displayed on all DOT systems (both public and private) operated by the Contractor that contain Privacy Act information before allowing anyone access to the system. The DOT CIO will make official DOT banners available to the Contractor.

(g) The Contractor shall screen all personnel requiring privileged access or limited privileged access to systems operated by the Contractor for DOT or interconnected to a DOT network in accordance with DOT Order 1630.2C Personnel Security Management, as amended.

(h) The Contractor shall ensure that its employees performing services under this contract receive annual IT security training in accordance with OMB Circular A–130, FISMA, and NIST requirements, as amended, with a specific emphasis on rules of behavior.

(i) The Contractor shall provide the Government access to the Contractor's and subcontractors' facilities, installations, operations, documentation, databases and personnel used in performance of the contract. The Contractor shall provide access to enable a program of IT inspection (to include vulnerability testing), investigation, and audit (to safeguard against threats and hazards to the integrity, availability and confidentiality of DOT data or to the function of information technology systems operated on behalf of DOT), and to preserve evidence of computer crime.

(j) The Contractor shall incorporate and flow down the substance of this clause to all subcontracts that meet the conditions in paragraph (a) of this clause.

(k) The Contractor shall immediately notify the Contracting Officer when an employee who has access to DOT information systems or data terminates employment.

(End of clause)

1252.239–71 Information Technology Security Plan and Accreditation.

As prescribed in 1239.106–70, insert the following provision:

INFORMATION TECHNOLOGY SECURITY PLAN AND ACCREDITATION (NOV 2022)

All offers submitted in response to this solicitation shall address the approach for

completing the security plan and accreditation requirements in clause 1252.239–70, Security Requirements for Unclassified and Sensitive Information Technology Resources.

(End of provision)

1252.239–72 Compliance with Safeguarding DOT Sensitive Data Controls.

As prescribed in TAR 1239.7003(a), insert the following clause:

COMPLIANCE WITH SAFEGUARDING DOT SENITIVE DATA CONTROLS (NOV 2022)

(a) The Contractor shall implement security requirements contained in clause 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, for all DOT sensitive data on all Contractor information systems that support the performance of this contract.

(b) Contractor information systems not part of an information technology service or system operated on behalf of the Government as part of this contract are not subject to the provisions of this clause.

(c) By submission of this offer, the Offeror represents that it will implement the security requirements specified by National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, Revision 2, ''Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations'' at *https://csrc.nist.gov/publications/detail/sp/800-171/rev-2/final* that are in effect at the time the solicitation is issued or as authorized by the contracting officer.

(d) If the Offeror proposes to vary from any security requirements specified by NIST SP 800–171, Rev. 2 in effect at the time the solicitation is issued or as authorized by the Contracting Officer, the Offeror shall submit to the Contracting Officer, for consideration by the DOT Chief Information Officer (CIO), a written explanation of—

(1) Why a particular security requirement is not applicable; or

(2) How the Contractor will use an alternative, but equally effective, security measure to satisfy the requirements of NIST SP 800–171, Rev. 2.

(e) The Office of the DOT CIO will evaluate offeror requests to vary from NIST SP 800–171, Rev. 2 requirements and inform the Offeror in writing of its decision before contract award. The Contracting Officer will incorporate accepted variance(s) from NIST SP 800–171, Rev. 2 into any resulting contract.

(End of clause)

1252.239–73 Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information.

As prescribed in 1239.7003(b), insert the following clause:

LIMITATIONS ON THE USE OR DISCLOSURE OF THIRD–PARTY CONTRACTOR REPORTED CYBER INCIDENT INFORMATION (NOV 2022)

(a) *Definitions.* As used in this clause—

Compromise means disclosure of information to unauthorized persons, or a violation of the security policy of a system, whereby without authorization information is disclosed, modified, destroyed, lost, or copied to unauthorized media—whether intentionally or unintentionally.

DOT sensitive data means unclassified information that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies, and is—

(1) Marked or otherwise identified in the contract, task order, or delivery order and provided to the Contractor by or on behalf of DOT in support of the performance of the contract; or

(2) Collected, developed, received, transmitted, used, or stored by or on behalf of the Contractor in support of the performance of the contract.

Cyber incident means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which DOT sensitive data is recorded, stored, or printed within a covered contractor information system.

DOT technical information means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information. Examples of technical information include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports,

technical orders, catalog-item identifications, data sets, studies and analyses and related information, and computer software executable code and source code.

(b) *Restrictions.* (1) The Contractor agrees that the following conditions apply to any information it receives or creates in the performance of this contract derived from a third-party's reporting of a cyber incident, pursuant to TAR clause, 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting (or derived from such information obtained under that clause):

(2) The Contractor shall access and use the information only for the purpose of furnishing advice or technical assistance directly to the Government in support of the Government's activities related to clause 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting, and shall not be used for any other purpose.

(3) The Contractor shall protect the information against unauthorized release or disclosure.

(4) The Contractor shall ensure that its employees are subject to use and non-disclosure obligations consistent with this clause prior to the employees being provided access to or use of the information.

(5) The third-party contractor that reported the cyber incident is a third-party beneficiary of the non-disclosure agreement between the Government and Contractor, as required by paragraph (b)(3) of this clause.

(6) A breach of these obligations or restrictions may subject the Contractor to—

(i) Criminal, civil, administrative, and contractual penalties and other appropriate remedies; and

(ii) Civil actions for damages and other appropriate remedies by the third party that reported the cyber incident, as a third-party beneficiary of this clause.

(c) *Subcontract flowdown requirement.* The Contractor shall include this clause, including this paragraph (c), in subcontracts, or similar contractual instruments, for services that include support for the Government's activities related to safeguarding covered DOT sensitive data and cyber incident reporting, including subcontracts for commercial products or commercial services, without alteration, except to identify the parties.

(End of clause)

1252.239–74 Safeguarding DOT Sensitive Data and Cyber Incident Reporting.

As prescribed in 1239.7003(c), insert the following clause:

SAFEGUARDING DOT SENSITIVE DATA AND CYBER INCIDENT REPORTING (NOV 2022)

(a) *Definitions.* As used in this clause—

Adequate security means protective measures that are commensurate with the consequences and probability of loss, misuse, or unauthorized access to, or modification of information against the probability of occurrence.

Compromise means disclosure of information to unauthorized persons, or a violation of the security policy of a system, whereby without authorization information is disclosed, modified, destroyed, lost, or copied to unauthorized media—whether intentionally or unintentionally.

Contractor attributional/proprietary information means information that identifies the Contractor(s), whether directly or indirectly, by the grouping of information that can be traced back to the Contractor(s) (*e.g.,* program description, facility locations), personally identifiable information, trade secrets, commercial or financial information, or other commercially sensitive information not customarily shared outside of a company.

Covered contractor information system means an unclassified information system owned or operated by or for a Contractor and that processes, stores, or transmits DOT sensitive data.

DOT sensitive data means unclassified information that requires safeguarding or dissemination controls pursuant to and consistent with law, regulation, and Government-wide policies, and is—

(1) Marked or otherwise identified in the contract, task order, or delivery order and provided to the Contractor by or on behalf of DOT in support of the performance of the contract; or

(2) Collected, developed, received, transmitted, used, or stored by or on behalf of the Contractor in support of the performance of the contract.

Cyber incident means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

Federal record as defined in 44 U.S.C. 3301, includes all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them. The term Federal record—

(1) Includes all DOT records;

(2) Does not include personal materials;

(3) Applies to records created, received, or maintained by Contractors pursuant to a DOT contract; and

(4) May include deliverables and documentation associated with deliverables.

Forensic analysis means the practice of gathering, retaining, and analyzing computer-related data for investigative purposes in a manner that maintains the integrity of the data.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

Malicious software means computer software or firmware intended to perform an unauthorized process that will have adverse impact on the confidentiality, integrity, or availability of an information system. This definition includes a virus, worm, Trojan horse, or other code-based entity that infects a host, as well as spyware and some forms of adware.

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which DOT sensitive data is recorded, stored, or printed within a covered contractor information system.

Operationally critical support means supplies or services designated by the Government as critical for airlift, sealift, intermodal transportation services, or logistical support that is essential to the mobilization, deployment, or sustainment of the Armed Forces in a contingency operation.

Spillage security incident means an incident that results in the transfer of classified or unclassified information onto an information system not accredited (*i.e.*, authorized) for the appropriate security level.

Technical information means recorded information, regardless of the form or method of the recording, of a scientific or technical nature (including computer software documentation). The term does not include computer software or data incidental to contract administration, such as financial and/or management information, regardless of whether or not the clause is incorporated in this solicitation or contract. Examples of technical information include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog-item identifications, data sets, studies and analyses and related information, and computer software executable code and source code.

(b) *Adequate security.* The Contractor shall provide adequate security on all covered contractor information systems. To provide adequate security, the Contractor shall implement, at a minimum, the following information security protections:

(1) For covered Contractor information systems that are part of an information technology (IT) service or system operated on behalf of the Government, the following security requirements apply:

(i) Cloud computing services shall be subject to the security requirements specified in the clause 1252.239–76, Cloud Computing Services, of this contract.

(ii) Any other such IT service or system (*i.e.,* other than cloud computing) shall be subject to the security requirements specified elsewhere in this contract.

(2) For covered Contractor information systems that are not part of an IT service or system operated on behalf of the Government and therefore are not subject to the security requirement specified at paragraph (b)(1) of this clause, the following security requirements apply:

(i) Except as provided in paragraph (b)(2)(iv) of this clause, the contractor information system shall be subject to the security requirements in National Institute of Standards and Technology (NIST) Special Publication (SP) 800–171, Revision 2, ''Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations'' (available via the internet at *https://csrc.nist.gov/publications/detail/sp/800-171/rev-2/final*) in effect at the time the solicitation is issued or as authorized by the Contracting Officer.

(ii) The Contractor shall implement NIST SP 800–171, Rev. 2, no later than 30 days after the award of this contract. The Contractor shall notify Contract Officer of any security requirements specified by NIST SP 800–171, Rev. 2 not implemented within 30 days of time of contract award.

(iii) If the Offeror proposes to vary from any security requirements specified by NIST SP 800–171, Rev. 2 in effect at the time the solicitation is issued or as authorized by the Contracting Officer, the Offeror shall submit to the Contracting Officer, for consideration by the DOT Chief Information Officer (CIO), a written explanation of—

(A) Why a particular security requirement is not applicable; or

(B) How the Contractor will use an alternative, but equally effective, security measure to satisfy the requirements of NIST SP 800–171, Rev. 2.

(iv) The Office of the DOT CIO will evaluate offeror requests to vary from NIST SP 800–171, Rev. 2 requirements and inform the Offeror in writing of its decision before contract award. The Government will incorporate accepted variance(s) from NIST SP 800–171, Rev. 2 into any resulting contract.

(v) The Contractor need not implement any security requirement adjudicated by an authorized representative of the DOT CIO to be nonapplicable, or have an alternative, but equally effective, security measure that may be implemented in its place.

(vi) If the DOT CIO has previously adjudicated the contractor's requests indicating that a requirement is not applicable or that

an alternative security measure is equally effective, a copy of that approval shall be provided to the Contracting Officer when the Contractor requests its recognition under this contract

(3) If the Contractor intends to use an external cloud service provider to store, process, or transmit any DOT sensitive data in performance of this contract, the Contractor shall require and ensure that the cloud service provider meets security requirements equivalent to those established by the Government for the Federal Risk and Authorization Management Program (FedRAMP) Moderate baseline (*https://www.fedramp.gov/resources/documents/*) and that the cloud service provider complies with requirements in paragraphs (c) through (h) of this clause for cyber incident reporting, malicious software, media preservation and protection, access to additional information and equipment necessary for forensic analysis, and cyber incident damage assessment.

(4) The Contractor will apply other information systems security measures when the Contractor reasonably determines that information systems security measures, in addition to those identified in paragraphs (b)(1) and (b)(2) of this clause, may be required to provide adequate security in a dynamic environment or to accommodate special circumstances (*e.g.*, medical devices) and any individual, isolated, or temporary deficiencies based on an assessed risk or vulnerability. These measures may be addressed in a system security plan, as required by, clause 1252.239–70, Security Requirements for Unclassified Information Technology Resources.

(c) *Cyber incident reporting requirement.* (1) When the Contractor discovers a cyber incident that affects a covered contractor information system or the DOT sensitive data residing therein, or that affects the contractor's ability to perform the requirements of the contract that are designated as operationally critical support and identified in the contract, the Contractor shall—

(i) Conduct a review for evidence of compromise of DOT sensitive data, including, but not limited to, identifying compromised computers, servers, specific data, and user accounts. This review shall also include analyzing covered contractor information system(s) that were part of the cyber incident, as well as other information systems on the Contractor's network(s), that may have been accessed as a result of the incident in order to identify compromised DOT sensitive data or whether the incident affects the Contractor's ability to provide operationally critical support; and

(ii) Rapidly report cyber incidents to DOT Security Operations Center (SOC) 24x7x365 at phone number: 571–209–3080 (Toll Free: 1–866–580–1852).

(d) *Cyber incident report.* The cyber incident report shall be treated as information created by or for DOT and shall include, at a minimum, the required elements in paragraph (c)(1)(i).

(e) *Spillage.* Upon notification by the Government of a spillage, or upon the Contractor's discovery of a spillage, the Contractor shall cooperate with the Contracting Officer to address the spillage in compliance with DOT policy.

(f) *Malicious software.* When the Contractor or subcontractors discover and isolate malicious software in connection with a reported cyber incident, the Contractor shall submit the malicious software to DOT in accordance with instructions provided by the Contracting Officer. Do not send the malicious software to the Contracting Officer.

(g) *Media preservation and protection.* When a Contractor discovers a cyber incident has occurred, the Contractor shall preserve and protect images of all known affected information systems identified in paragraph (c)(1)(i) of this clause and all relevant monitoring/packet capture data for at least 90 days from the submission of the cyber incident report to allow DOT to request the media or decline interest.

(h) *Access to additional information or equipment necessary for forensic analysis.* Upon request by DOT, the Contractor shall provide DOT with access to additional information or equipment that is necessary to conduct a forensic analysis.

(i) *Cyber incident damage assessment activities.* If DOT elects to conduct a damage assessment, the Contracting Officer will request that the Contractor provide all of the damage assessment information gathered in accordance with paragraph (c) of this clause.

(j) *DOT safeguarding and use of Contractor attributional/proprietary information.* The Government shall protect against the unauthorized use or release of information obtained from the Contractor (or derived from information obtained from the Contractor) under this clause that includes Contractor attributional/proprietary information, including such information submitted in accordance with paragraph (c). To the maximum extent practicable, the Contractor shall identify and mark attributional/proprietary information. In making an authorized release of such information, the Government will implement appropriate procedures to minimize the Contractor attributional/proprietary information that is included in such authorized release consistent with applicable law.

(k) *Use and release of Contractor attributional/proprietary information not created by or for DOT.* Information that is obtained from the Contractor (or derived from information obtained from the Contractor) under this clause that is not created by or

for DOT is authorized to be released outside of DOT—

(1) To entities with missions that may be affected by such information;

(2) To entities that may be called upon to assist in the diagnosis, detection, or mitigation of cyber incidents;

(3) To Government entities that conduct counterintelligence or law enforcement investigations;

(4) To a support services contractor (''recipient'') that is directly supporting Government activities under a contract that includes the clause at 1252.239–73, Limitations on the Use or Disclosure of Third-Party Contractor Reported Cyber Incident Information; or

(5) With Contractor's consent; or

(6) As otherwise required by law.

(l) *Use and release of Contractor attributional/proprietary information created by or for DOT.* Information that is obtained from the Contractor (or derived from information obtained from the Contractor) under this clause that is created by or for DOT (including the information submitted pursuant to paragraph (c) of this clause) is authorized to be used and released outside of DOT for purposes and activities authorized by paragraph (j) of this clause, and for any other lawful Government purpose or activity, subject to all applicable statutory, regulatory, and policy based restrictions on the Government's use and release of such information.

(m) The Contractor shall conduct activities under this clause in accordance with applicable laws and regulations on the interception, monitoring, access, use, and disclosure of electronic communications and data.

(n) *Other safeguarding or reporting requirements.* The safeguarding and cyber incident reporting required by this clause in no way abrogates the Contractor's responsibility for other safeguarding or cyber incident reporting pertaining to its unclassified information systems as required by other applicable clauses of this contract, or as a result of other applicable Government statutory or regulatory requirements.

(o) *Subcontract flowdown requirements.* The Contractor shall—

(1) Include this clause, including this paragraph (o), in subcontracts, or similar contractual instruments, for operationally critical support, or for which subcontract performance will involve DOT sensitive data, including subcontracts for commercial products and commercial services, without alteration, except to identify the parties. The Contractor shall determine if the information required for subcontractor performance retains its identity as DOT sensitive data and will require protection under this clause, and, if necessary, consult with the Contracting Officer; and

(2) Require subcontractors to—

(i) Notify the prime Contractor (or next higher-tier subcontractor) when submitting a request to vary from a NIST SP 800–171, Rev. 2 security requirement to the Contracting Officer, in accordance with paragraph (b)(2)(iii) of this clause; and

(ii) Provide the incident report number, automatically assigned by DOT, to the prime Contractor (or next higher-tier subcontractor) as soon as practicable, when reporting a cyber incident to DOT as required in paragraph (c) of this clause.

(End of clause)

1252.239–75 DOT Protection of Information About Individuals, PII, and Privacy Risk Management Requirements.

As prescribed in 1239.7104, insert the following clause:

DOT PROTECTION OF INFORMATION ABOUT INDIVIDUALS, PII, AND PRIVACY RISK MANAGEMENT REQUIREMENTS (NOV 2022)

(a) *Compliance with standards.* To the extent Contractor creates, maintains, acquires, discloses, uses, or has access to PII in furtherance of the contract, Contractor shall comply with all applicable Federal law, guidance, and standards and DOT policies pertaining to its protection. Contractor shall notify DOT in writing immediately upon the discovery that Contractor is no longer in compliance with DOT data protection standards with respect to any PII.

(b) *Unanticipated threats.* If new or unanticipated threats or hazards are discovered by either the Government or the Contractor, or if existing safeguards have ceased to function, the discoverer shall immediately bring the situation to the attention of the other party.

(c) *Privacy Act.* The Contractor will—

(1) Comply with the Privacy Act of 1974, 5 U.S.C. 552a, DOT implementing regulations (49 CFR part 10), and DOT policies issued under the Act in the design, development, and/or operation of any system of records on individuals to accomplish a DOT function when the contract specifically identifies the 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 redesign, development, and/or operation of a system of records on individuals that is subject to the Act; and

(3) Include this clause, including this paragraph (c), in all subcontracts awarded under this contract which requires the design, development, and/or operation of such a system of records.

(d) *Privacy Act records.* The Contractor shall not release records subject to the Privacy Act except by the direction of the DOT, regardless of whether DOT or the Contractor maintains the records.

(e) *Confidentiality agreement.* Contractor agrees to execute a confidentiality agreement protecting PII, when necessary, and further agrees not to appropriate such PII for its own use or to disclose such information to third parties unless specifically authorized by DOT in writing.

(f) *Surrender of records.* If at any time during the term of the Contract any part of PII, in any form, that Contractor obtains from or on behalf of DOT ceases to be required by Contractor for the performance of its obligations under the Contract, or upon termination of the Contract, whichever occurs first, Contractor shall, within ten (10) business days, notify DOT and securely return such PII to DOT, or, at DOT's written request destroy, un-install and/or remove all copies of such PII in Contractor's possession or control, or such part of the PII which relates to the part of the Contract which is terminated, or the part no longer required, as appropriate, and certify to DOT that the requested action has been completed.

(g) *NIST FIPS 140–2.* At a minimum, the Contractor shall protect all PII created, collected, used, maintained, or disseminated on behalf of the Department using controls consistent with Federal Information Processing Standard Publication 199 (FIPS 199) moderate confidentiality standards, unless otherwise authorized by the DOT Chief Privacy Officer.

(h) *Protection of sensitive information.* The Contractor shall comply with Government and DOT guidance for protecting PII.

(i) *Breach.* The Contractor shall bear all costs, losses, and damages resulting from the Contractor's breach of these clauses. Contractor agrees to release, defend, indemnify, and hold harmless DOT for claims, losses, penalties, and damages and costs to the extent arising out of Contractor's, or its subcontractor's, negligence, unauthorized use or disclosure of PII and/or Contractor's, or its subcontractor's, breach of its obligations under these clauses.

(j) *Breach reporting.* Contractors shall report breaches involving PII directly to DOT at (202) 385–4357 or 1–(866)–466–5221 within two (2) hours of discovery. Contractor shall provide the incident number automatically assigned by DOT for all breaches reported by the Contractor or any subcontractors to the Contracting Officer.

(k) *Applicability.* Contractor shall inform all principals, officers, employees, agents and subcontractors engaged in the performance of this contract of the obligations contained in these clauses.

(l) *Training.* To the extent necessary and/or required by law, the Contractor shall provide training to employees, agents, and subcontractors to promote compliance with these clauses. The Contractor is liable for any breach of these clauses by any of its principals, officers, employees, agents, and subcontractors.

(m) *Subcontractor engagement.* When the Contractor engages a subcontractor in connection with its performance under the contract, and the Contractor provides such subcontractor access to PII, the Contractor shall provide the Contracting Officer with prompt notice of the identity of the subcontractor and the extent of the role that the subcontractor will play in connection with the performance of the contract. This obligation is in addition to any limitations of subcontracting and consent to subcontract requirements identified elsewhere in the clauses and provisions of this contract.

(n) *Subcontract flowdown requirements.* Contractors shall flow down this clause to all subcontracts and purchase orders or other agreements and require that subcontractors incorporate this clause in their subcontracts, appropriately modified for identification of the parties. The Contractor shall enforce the terms of the clause, including action against its subcontractors, their employees and associates, or third-parties, for noncompliance. All subcontractors given access to any PII must agree to—

(1) Abide by the clauses set forth herein, including, without limitation, provisions relating to compliance with data privacy standards for the Protection of Data about Individuals, Breach Notification Controls, and Notice of Security and/or Privacy Incident;

(2) Restrict use of PII only for subcontractor's internal business purposes and only as necessary to render services to Contractor in connection with Contractor's performance of its obligations under the contract;

(3) Certify in writing, upon completion of services provided by a subcontractor, that the subcontractor has returned to the Contractor all records containing PII within 30 days of subcontractor's completion of services to Contractor. Failure of subcontractor to return all records containing PII within this period will be reported to DOT as a privacy incident; and

(4) Report breaches involving PII directly to DOT at (202) 385–4357 or 1-(866)-466–5221 within two (2) hours of discovery. Subcontractors shall provide the incident report number automatically assigned by DOT to the prime contractor. Lower-tier subcontractors, likewise, shall report the incident report number automatically assigned by DOT to their higher-tier subcontractor until the prime contractor is reached. Contractor shall provide the DOT incident number to the Contracting Officer.

(End of clause)

1252.239–76 Cloud Computing Services.

As prescribed in 1239.7204(a), insert the following clause:

CLOUD COMPUTING SERVICES (NOV 2022)

(a) *Definitions.* As used in this clause—

Authorizing official, as described in Appendix B of DOT Order 1350.37, Departmental Cybersecurity Policy, means the senior Federal official or executive with the responsibility for operating an information system at an acceptable level of risk to organizational operations (including mission, functions, image, or reputation), organizational assets, individuals, other organizations, and the Nation.

Cloud computing means a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (*e.g.,* networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This includes other commercial terms, such as on-demand self-service, broad network access, resource pooling, rapid elasticity, and measured service. It also includes commercial offerings for software-as-a-service, infrastructure-as-a-service, and platform-as-a-service.

Compromise means disclosure of information to unauthorized persons, or a violation of the security policy of a system, whereby without authorization information is disclosed, modified, destroyed, lost, or copied to unauthorized media—whether intentionally or unintentionally.

Cyber incident means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

Government data means any information, document, media, or 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 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 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.

Information system means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

Media means physical devices or writing surfaces including, but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which information is recorded, stored, or printed within an information system.

Spillage security incident means an incident that results in the transfer of classified information onto an information system not accredited (*i.e.,* authorized) for the appropriate security level.

(b) *Cloud computing security requirements.* The requirements of this clause are applicable when using cloud computing to provide information technology services in the performance of the contract.

(1) If the Contractor indicated in its offer that it does not anticipate the use of cloud computing services in the performance of a resultant contract, and after the award of this contract, the Contractor proposes to use cloud computing services in the performance of the contract, the Contractor shall obtain approval from the Contracting Officer prior to utilizing cloud computing services in performance of the contract.

(2) The Contractor shall implement and maintain administrative, technical, and physical safeguards and controls with the security level and services required in accordance with the DOT Order 1351.37, Departmental Cybersecurity Policy, and the requirements of DOT Order 1351.18, Departmental Privacy Risk Management Policy (the versions of each that in effect at the time the solicitation is issued or as authorized by the Contracting Officer), unless notified by the Contracting Officer that this requirement has been waived by the DOT Chief Information Officer.

(3) The Contractor shall maintain all Government data not physically located on DOT premises within the United States, the District of Columbia, and all territories and possessions of the United States, unless the Contractor receives written notification from the Contracting Officer to use another location, in accordance with DOT Policy.

(4) DOT will determine the security classification level for the cloud system in accordance with Federal Information Processing Standard 199; the Contractor will then apply the appropriate set of impact baseline controls as required in the FedRAMP Cloud Computing Security Requirements Baseline document to ensure compliance with security standards. The FedRAMP baseline controls are based on NIST Special Publication 800–53, Revision 5, Security and Privacy Controls for Information Systems and Organizations, Security Control Baselines and also includes a set of additional controls for use within systems providing cloud services to the Federal government.

(5) The Contractor shall maintain a security management continuous monitoring environment that meets or exceeds the requirements in the Reporting and Continuous Monitoring section of this contract/task order _____ [*Fill-in: Contracting Officer enter the requirements document paragraph reference number*] based upon the latest edition of FedRAMP Cloud Computing Security Requirements Baseline and FedRAMP Continuous Monitoring Requirements.

(6) The Contractor shall be responsible for the following privacy and security safeguards:

(i) To the extent required to carry out the FedRAMP assessment and authorization process and FedRAMP continuous monitoring, to safeguard against threats and hazards to the security, integrity, and confidentiality of any non-public Government data collected and stored by the Contractor, the Contractor shall provide the Government access to the Contractor's facilities, installations, technical capabilities, operations, documentation, records, and databases.

(ii) The Contractor shall also comply with any additional FedRAMP and DOT Orders containing cybersecurity and privacy policies.

(7) The Government may perform manual or automated audits, scans, reviews, or other inspections of the vendor's IT environment being used to provide or facilitate services for the Government. In accordance with the Federal Acquisition Regulation (FAR) clause 52.239–1, Privacy or Security Safeguards, the Contractor shall provide the Government access to Contractor's facilities, installations, technical capabilities, operations, documentation, records and databases to carry out a program of inspection. Contractors shall provide access within two hours of notification by the Government. The program of inspection shall include, but is not limited to—

(i) Authenticated and unauthenticated operating system/network vulnerability; scans;

(ii) Authenticated and unauthenticated web application vulnerability scans;

(iii) Authenticated and unauthenticated database application vulnerability scans; and

(8) Automated scans can be performed by Government personnel, or agents acting on behalf of the Government, using Government operated equipment, and Government specified tools.

(9) If new or unanticipated threats or hazards are discovered by either the Government or the Contractor, or if existing safeguards have ceased to function, the discoverer shall immediately bring the situation to the attention of the other party.

(10) If the vendor chooses to run its own automated scans or audits, results from these scans may, at the Government's discretion, be accepted in lieu of Government performed vulnerability scans. In these cases, the Government will approve scanning tools and their configuration. In addition, the Contractor shall provide complete results of vendor-conducted scans to the Government.

(c) *Limitations on access to and use and disclosure of Government data and Government-related data.*

(1) 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.

(i) 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.

(ii) The Contractor shall ensure that its employees are subject to all such access, use, and disclosure prohibitions and obligations.

(iii) These access, use, and disclosure prohibitions and obligations shall survive the expiration or termination of this contract.

(2) The Contractor shall 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.

(d) *Cloud computing services cyber incident reporting.* The Contractor shall report all cyber incidents related to the cloud computing service provided under this contract. to DOT via the DOT Security Operations Center (SOC) 24 hours-a-day, 7 days-a-week, 365 days a year (24x7x365) at phone number: 571–209–3080 (Toll Free: 866–580–1852) within 2 hours of discovery.

(e) *Spillage.* Upon notification by the Government of a spillage, or upon the Contractor's discovery of a spillage, the Contractor shall cooperate with the Contracting Officer to address the spillage in compliance with agency procedures.

(f) *Malicious software.* The Contractor or subcontractor(s) that discovers and isolates malicious software in connection with a reported cyber incident shall submit the malicious software in accordance with instructions provided by the Contracting Officer.

(g) *Media preservation and protection.* When a Contractor discovers a cyber incident has occurred, the Contractor shall preserve and protect images of all known affected information systems identified in the cyber incident report (*see* paragraphs (b)(5) and (d) of this clause) and all relevant monitoring/packet capture data for at least 90 days from the submission of the cyber incident report to allow DOT to request the media or decline interest.

(h) *Access to additional information or equipment necessary for forensic analysis.* Upon request by DOT, the Contractor shall provide DOT with access to additional information

or equipment that is necessary to conduct a forensic analysis.

(i) *Cyber incident damage assessment activities.* If DOT elects to conduct a damage assessment, the Contracting Officer will request that the Contractor provide all of the damage assessment information gathered in accordance with paragraph (b)(7) of this clause.

(j) *Subcontract flowdown requirement.* The Contractor shall include this clause, including this paragraph (j), in all subcontracts that involve or may involve cloud services, including subcontracts for commercial products or commercial services.

(End of clause)

1252.239–77 Data Jurisdiction.

As prescribed in 1239.7204(b), insert a clause substantially as follows:

DATA JURISDICTION (NOV 2022)

The Contractor shall identify all data centers in which the data at rest or data backup will reside, including primary and replicated storage. The Contractor shall ensure that all data centers not physically located on DOT premises reside within the United States, the District of Columbia, and all territories and possessions of the United States, unless otherwise authorized by the DOT CIO. The Contractor shall provide a Wide Area Network (WAN), with a minimum of _____ [*Contracting Officer fill-in: Insert specific number*] data center facilities at _____ [*Contracting Officer fill-in number]* different geographic locations with at least _____ [*Contracting Officer fill-in number*] internet Exchange Point (IXP) for each price offering. The Contractor shall provide internet bandwidth at the minimum of _____ [*Contracting Officer fill-in applicable gigabytes*] GB.

(End of clause)

1252.239–78 Validated Cryptography for Secure Communications.

As prescribed in 1239.7204(c), insert a clause substantially as follows:

VALIDATED CRYPTOGRAPHY FOR SECURE COMMUNICATIONS (NOV 2022)

(a) The Contractor shall use only cryptographic mechanisms that comply with _____ [*Contracting Officer insert FIPS 140–2 level #*]. All deliverables shall be labeled _____ [*Contracting Officer insert appropriate label such as ''For Official Use Only'' (FOUO) or other DOT-agency selected designation per document sensitivity*].

(b) External transmission/dissemination of _____ [*Contracting Officer fill-in: e.g., labeled deliverables*] to or from a Government computer must be encrypted. Certified encryption modules must be used in accordance with _____ [*Contracting Officer shall insert the standard, such as FIPS PUB 140–2, ''Security requirements for Cryptographic Modules.''*

(End of clause)

1252.239–79 Authentication, Data Integrity, and Non-Repudiation.

As prescribed in 1239.7204(d), insert a clause substantially as follows:

AUTHENTICATION, DATA INTEGRITY, AND NON-REPUDIATION (NOV 2022)

The Contractor shall provide a [*Fill-in: Contracting Officer fill-in the ''cloud service'' name*] system that implements _____ [*Contracting Officer insert the required level (1–4) of FIPS 140–2 encryption standard*] that provides for origin authentication, data integrity, and signer non-repudiation.

(End of clause)

1252.239–80 Audit Record Retention for Cloud Service Providers.

As prescribed in 1239.7204(e), insert the following clause:

AUDIT RECORD RETENTION FOR CLOUD SERVICE PROVIDERS (NOV 2022)

(a) The Contractor shall support a system in accordance with the requirement for Federal agencies to manage their electronic records in accordance with 36 CFR 1236.20 and 1236.22, including but not limited to capabilities such as those identified in DoD STD–5015.2 V3, Electronic Records Management Software Applications Design Criteria Standard, NARA Bulletin 2008–05, July 31, 2008, Guidance concerning the use of email archiving applications to store email, and NARA Bulletin 2010–05 September 08, 2010, Guidance on Managing Records in Cloud Computing Environments.

(b) The Contractor shall maintain records to retain functionality and integrity throughout the records' full lifecycle including—

(1) Maintenance of links between records and metadata; and

(2) Categorization of records to manage retention and disposal, either through transfer of permanent records to NARA or deletion of temporary records in accordance with NARA approved retention schedules.

(End of clause)

1252.239–81 Cloud Identification and Authentication (Organizational Users) Multi-Factor Authentication.

As prescribed in 1239.7204(f), insert the following clause:

CLOUD IDENTIFICATION AND AUTHENTICATION (ORGANIZATIONAL USERS) MULTI-FACTOR AUTHENTICATION (NOV 2022)

The Contractor shall support a secure, multi-factor method of remote authentication and authorization to identified Government Administrators that will allow Government-designated personnel the ability to perform management duties on the system. The Contractor shall support multi-factor authentication in accordance with National Institute of Standards and Technology (NIST) Federal Information Processing Standards (FIPS) Publication (PUB) Number 201–2, Personal Identity Verification (PIV) of Federal Employees and Contractors, and OMB implementation guidance for personal identity verification.

(End of clause)

1252.239–82 Identification and Authentication (Non-Organizational Users).

As prescribed in 1239.7204(g), insert the following clause:

IDENTIFICATION AND AUTHENTICATION (NON-ORGANIZATIONAL USERS) (NOV 2022)

The Contractor shall support a secure, multi-factor method of remote authentication and authorization to identified Contractor Administrators that will allow Contractor designated personnel the ability to perform management duties on the system as required by the contract.

(End of clause)

1252.239–83 Incident Reporting Timeframes.

As prescribed in 1239.7204(h), insert the following clause:

INCIDENT REPORTING TIMEFRAMES (NOV 2022)

(a) The Contractor shall report all computer security incidents to the DOT Security Operations Center (SOC) in accordance with Subpart 1239.70—Information Security and Incident Response Reporting.

(b) Contractors and subcontractors are required to report cyber incidents directly to DOT via the DOT SOC 24 hours-a-day, 7 days-a-week, 365 days a year (24x7x365) at phone number: 571–209–3080 (Toll Free: 866–580–1852) within 2 hours of discovery, regardless of the incident category. See 1252.239–74, Safeguarding DOT Sensitive Data and Cyber Incident Reporting.

(End of clause)

1252.239–84 Media Transport.

As prescribed in 1239.7204(i), insert a clause substantially as follows:

MEDIA TRANSPORT (NOV 2022)

(a) The Contractor shall document activities associated with the transport of DOT information stored on digital and non-digital media and employ cryptographic mechanisms to protect the confidentiality and integrity of this information during transport outside of controlled areas. This applies to—

(1) Digital media containing DOT or other Federal agency or other sensitive or third-party provided information that requires protection must be encrypted using FIPS 140–2 [*Contracting Officer insert required encryption mode, based on FIPS 199 risk category*] when transported outside of controlled areas; and

(2) Nondigital media must be secured using the same policies and procedures as paper.

(b) Contractors shall ensure accountability for media containing DOT or other Federal agency or other sensitive or third-party provided information that is transported outside of controlled areas. This can be accomplished through appropriate actions such as logging and a documented chain of custody form.

(c) DOT or other Federal agency sensitive or third-party provided information that resides on mobile/portable devices (*e.g.*, USB flash drives, external hard drives, and SD cards) must be encrypted using FIPS 140–2 [*Contracting Officer insert the required encryption mode based on FIPS 199 risk category*]. All Federal agency data residing on laptop computing devices must be protected with NIST-approved encryption software.

(End of clause)

1252.239–85 Personnel Screening—Background Investigations.

As prescribed in 1239.7204(j), insert the clause as follows:

PERSONNEL SCREENING—BACKGROUND INVESTIGATIONS (NOV 2022)

(a) Contractors shall provide support personnel who are U.S. persons maintaining a NACI clearance or greater in accordance with OMB memorandum M–05–24, Section C (*see https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2005/m05-24.pdf*).

(b) The Contractor shall furnish documentation reflecting favorable adjudication

of background investigations for all personnel supporting the system. The Contractor shall also comply with Executive Order 12968, Access to Classified Information. DOT separates the risk levels for personnel working on Federal computer systems into three categories: low risk, moderate risk, and high risk. The Contractor is responsible for the cost of meeting all security requirements and maintaining assessment and authorization.

(c) The Contractor's employees with access to DOT systems containing sensitive information may be required to obtain security clearances (*i.e.*, Confidential, Secret, or Top Secret). National Security work designated ''special sensitive,'' ''critical sensitive,'' or ''non-critical sensitive,'' will determine the level of clearance required for contractor employees. Personnel security clearances for national security contracts in DOT will be processed according to the Department of Defense National Industrial Security Program Operating Manual (NISPOM).

(d) The Contracting Officer, through the Contracting Officer's Representative (COR) or Program Manager will ensure that all required information is forwarded to the Federal Protective Service (FPS) in accordance with the DOT Policy. FPS will then contact each Applicant with instructions for completing required forms and releases for the type of personnel investigation requested.

(e) Applicants will not be reinvestigated if a prior favorable adjudication is on file with FPS, OPM or DoD, there has been no break in service, and the position is identified at the same or lower risk level. Once a favorable FBI Criminal History Check (Fingerprint Check) has been returned, Applicants may receive a DOT identity credential (if required) and initial access to information systems holding DOT information.

(End of clause)

1252.239–86 Boundary Protection—Trusted Internet Connections.

As prescribed in 1239.7204(k), insert the clause as follows:

BOUNDARY PROTECTION—TRUSTED INTERNET CONNECTIONS (NOV 2022)

The Contractor shall ensure that Federal information, other than non-sensitive information, being transmitted from Federal government entities to external entities using cloud services is inspected by Trusted internet Connections (TIC) processes or the Contractor shall route all external connections through a Trusted internet Connection (TIC).

(End of clause)

1252.239–87 Protection of Information at Rest.

As prescribed in 1239.7204(l), insert the clause as follows:

PROTECTION OF INFORMATION AT REST AND IN TRANSIT (NOV 2022)

The Contractor shall provide security mechanisms for handling data at rest and in transit in accordance with FIPS 140–2 _____ [*Contracting officer insert encryption standard, based on NIST FIPS 199 categorization*].

(End of clause)

1252.239–88 Security Alerts, Advisories, and Directives.

As prescribed in 1239.7204(m), insert the clause as follows:

SECURITY ALERTS, ADVISORIES, AND DIRECTIVES (NOV 2022)

The Contractor shall provide a list of its personnel, identified by name and role, who are assigned system administration, monitoring, and/or security responsibilities and who are designated to receive security alerts, advisories, and directives and individuals responsible for the implementation of remedial actions associated with them.

(End of clause)

1252.239–89 Technology Modernization.

As prescribed in 1239.7303(a), insert the following clause:

TECHNOLOGY MODERNIZATION (NOV 2022)

(a) *Modernization approach.* After issuance of the contract, the Government may solicit, and the Contractor is encouraged to propose independently, a modernization approach to the hardware, software, specifications, or other requirements of the contract. This modernization approach may be proposed to increase efficiencies (both system and process level), reduce costs, or strengthen the cyber security posture, or for any other purpose which presents an advantage to the Government. Furthermore, the modernization approach should, to the maximum extent practicable, align with how the commercial sector would solve the problem.

(b) *Proposal requirements.* As part of the proposed changes, the Contractor shall submit a price or cost proposal to the Contracting Officer for evaluation. Those proposed modernized improvements that are acceptable to the Government will be processed as modifications to the contract. At a

minimum, the Contractor shall submit the following information with each proposal:

(1) A summary of how the modernized proposal aligns with the commercial sector approach and how the current approach is out of alignment/differs;

(2) A description of the difference between the existing contract requirement and the proposed change, and the comparative advantages and disadvantages of each;

(3) Itemized requirements of the contract that must be changed if the proposal is adopted and the proposed revision to the contract for each such change;

(4) An estimate of the changes in performance and price or cost, if any, that will result from adoption of the proposal;

(5) An evaluation of the effects the proposed changes would have on collateral costs to the Government, such as Government-furnished property costs, costs of related items, and costs of maintenance, operation and conversion (including Government application software);

(6) A statement of the schedule for contract modification adopting the proposal that maximizes benefits of the changes during the remainder of the contract, including supporting rationale; and

(7) Identification of impacts on contract cost and schedule. The Government is not liable for proposal preparation costs or for any delay in acting upon any proposal submitted pursuant to this clause.

(c) *Withdrawal.* The Contractor has a right to withdraw, in whole or in part, any proposal not adopted by contract modification within the period specified in the proposal. The decision of the Contracting Officer whether to accept any such proposal under this contract is final and not subject to the ''Disputes'' clause of this contract.

(d) *Product testing.* If the Government wishes to test and evaluate any item(s) proposed, the Contracting Officer will issue written directions to the Contractor specifying what item(s) will be tested, where and when the item(s) will be tested, to whom the item(s) is to be delivered, and the number of days (not to exceed 90 calendar days) that the item will be tested.

(e) *Contract modification.* The Contracting Officer may accept any proposal submitted pursuant to this clause by giving the Contractor written notice thereof. This written notice will be given by issuance of a modification to the contract. Until the Government issues a modification incorporating a proposal under this contract, the Contractor shall remain obligated to perform in accordance with the requirements, terms, and conditions of the existing contract.

(f) *Change orders.* If a proposal submitted pursuant to this clause is accepted and applied to this contract, the equitable adjustment increasing or decreasing the price or cost-plus-fixed-fee (CPFF) shall be in accordance with the procedures of the applicable ''Changes'' clause incorporated by reference in the contract. The resulting contract modification will state that it is made pursuant to this clause.

(End of clause)

1252.239–90 Technology Upgrades/Refreshment.

As prescribed in 1239.7303(b), insert the following clause:

TECHNOLOGY UPGRADES/REFRESHMENT (NOV 2022)

(a) *Upgrade/refreshment approach.* After issuance of the contract, the Government may solicit, and the Contractor is encouraged to propose independently, technology improvements to the hardware, software, specifications, or other requirements of the contract. These improvements may be proposed to save money, to improve performance, to save energy, to satisfy increased data processing requirements, or for any other purpose that presents a technological advantage to the Government. As part of the proposed changes, the Contractor shall submit a price or cost proposal to the Contracting Officer for evaluation. Those proposed technology improvements that are acceptable to the Government will be processed as modifications to the contract. As a minimum, the following information shall be submitted by the Contractor with each proposal:

(1) A description of the difference between the existing contract requirement and the proposed change, and the comparative advantages and disadvantages of each;

(2) Itemized requirements of the contract that must be changed if the proposal is adopted, and the proposed revision to the contract for each such change;

(3) An estimate of the changes in performance and price or cost, if any, that will result from adoption of the proposal;

(4) An evaluation of the effects the proposed changes would have on collateral costs to the Government, such as Government-furnished property costs, costs of related items, and costs of maintenance, operation and conversion (including Government application software);

(5) A statement of the time by which the contract modification adopting the proposal must be issued so as to obtain the maximum benefits of the changes during the remainder of the contract including supporting rationale; and

(6) Identification of any impacts to contract completion time or delivery schedule. The Government is not liable for proposal preparation costs or for any delay in acting upon any proposal submitted pursuant to this clause. The Contractor has a right to

withdraw, in whole or in part, any proposal not adopted by contract modification within the period specified in the proposal. The decision of the Contracting Officer whether to accept any such proposal under this contract is final and not subject to the ''Disputes'' clause of this contract.

(b) *Test and evaluation.* If the Government wishes to test and evaluate any item(s) proposed, the Contracting Officer will issue written directions to the Contractor specifying what item(s) will be tested, where and when the item(s) will be tested, to whom the item(s) is to be delivered, and the number of days (not to exceed 90 calendar days) that the item will be tested. The Contracting Officer may accept any proposal submitted pursuant to this clause by giving the Contractor written notice thereof. This written notice will be given by issuance of a modification to the contract. Unless and until a modification is executed to incorporate a proposal under this contract, the Contractor shall remain obligated to perform in accordance with the requirements, terms and conditions of the existing contract. If a proposal submitted pursuant to this clause is accepted and applied to this contract, the equitable adjustment increasing or decreasing the price or CPFF shall be in accordance with the procedures of the applicable ''Changes'' clause incorporated by reference in Section I of the contract. The resulting contract modification will state that it is made pursuant to this clause.

(End of clause)

1252.239–91 Records Management.

As prescribed in 1239.7403, insert the following clause:

RECORDS MANAGEMENT (NOV 2022)

(a) *Definition.*

Federal record, as defined in 44 U.S.C. 3301, means all recorded information, regardless of form or characteristics, made or received by a Federal agency under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the United States Government or because of the informational value of data in them. The term Federal record:

(1) Includes all DOT records.

(2) Does not include personal materials.

(3) Applies to records created, received, or maintained by Contractors pursuant to a DOT contract.

(4) May include deliverables and documentation associated with deliverables.

(b) *Requirements.* (1) *Compliance.* Contractor shall comply with all applicable records management laws and regulations, as well as National Archives and Records Administration (NARA) records policies, including but not limited to 44 U.S.C. chapters 21, 29, 31, and 33, NARA regulations at 36 CFR chapter XII, subchapter B, and those policies associated with the safeguarding of records covered by Privacy Act of 1974 (5 U.S.C. 552a). These policies include the preservation of all records, regardless of form or characteristics, mode of transmission, or state of completion.

(2) *Applicability.* In accordance with 36 CFR 1222.32, all data created for Government use and delivered to, or falling under, the legal control of the Government, are Federal records subject to the provisions of 44 U.S.C. chapters 21, 29, 31, and 33, the Freedom of Information Act (FOIA) (5 U.S.C. 552), as amended, and the Privacy Act of 1974 (5 U.S.C. 552a), as amended. Such Federal records shall be managed and scheduled for disposition only as permitted by the Federal Records Act, other relevant statutes or regulations, and DOT Order 1351.28, Departmental Records Management Policy.

(3) *Records maintenance.* While DOT records are in the Contractor's custody, the Contractor is responsible for preventing the alienation or unauthorized destruction of DOT records, including all forms of mutilation. Records may not be removed from the legal custody of DOT or destroyed except in accordance with the provisions of the agency records schedules and with the written concurrence of the DOT or Component Records Officer, as appropriate. Willful and unlawful destruction, damage or alienation of Federal records is subject to the fines and penalties imposed by 18 U.S.C. 2701. In the event of any unlawful or accidental removal, defacing, alteration, or destruction of records, the Contractor must report the event to the Contracting Officer in accordance with 36 CFR part 1230, Unlawful or Accidental Removal, Defacing, Alteration, or Destruction of Records, for reporting to NARA.

(4) *Unauthorized disclosure.* The Contractor shall notify the Contracting Officer within two hours of discovery of any inadvertent or unauthorized disclosures of information, data, documentary materials, records or equipment. Disclosure of non-public information is limited to authorized personnel with a need-to-know as described in the contract. The Contractor shall ensure that the appropriate personnel, administrative, technical, and physical safeguards are established to ensure the security and confidentiality of this information, data, documentary material, records and/or equipment. The Contractor shall not remove material from Government facilities or systems, or facilities or systems operated or maintained on the Government's behalf, without the express written permission of the Contracting Officer.

When information, data, documentary material, records and/or equipment is no longer required, it shall be returned to DOT control or the Contractor must hold it until otherwise directed. Items returned to the Government shall be hand carried, mailed, emailed, or securely electronically transmitted to the Contracting Officer or address prescribed in the contract. Destruction of records is expressly prohibited unless in accordance with the contract.

(c) *Non-public information.* The Contractor shall not create or maintain any records containing any non-public DOT information that are not specifically authorized by the contract.

(d) *Rights in data.* Rights in data under this contract are set forth in clauses prescribed by FAR part 27 and included in this contract, (*e.g.,* 52.227–14 Rights in Data—General). The Contractor must make any assertion of copyright in the data or other deliverables under this contract and substantiate such assertions. The Contractor must add or correct all limited rights, restricted rights, or copyright notices and take all other appropriate actions in accordance with the terms of this contract and the clauses included herein.

(e) *Notification of third-party access requests.* The Contractor shall notify the Contracting Officer promptly of any requests from a third party for access to Federal records, 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 Federal records, from any unauthorized disclosure.

(f) *Training.* All Contractor employees assigned to this contract who create, work with, or otherwise handle records are required to take DOT-provided records management training. The Contractor is responsible for confirming to the Contracting Officer that training, including initial training and any annual or refresher training, has been completed in accordance with agency policies.

(g) *Subcontract flowdown requirements.* (1) The Contractor shall incorporate the substance of this clause, its terms and requirements including this paragraph (g), in all subcontracts under this contract, and require written subcontractor acknowledgment of same.

(2) Violation by a subcontractor of any provision set forth in this clause will be attributed to the Contractor.

(End of clause)

1252.239–92 Information and Communication Technology Accessibility Notice.

As prescribed in 1239.203–70(a), insert the following provision:

INFORMATION AND COMMUNICATION TECHNOLOGY ACCESSIBILITY NOTICE (NOV 2022)

(a) Any offeror responding to this solicitation must comply with established DOT Information and Communication Technology (ICT) (formerly known as Electronic and Information (EIT)) accessibility standards. Information about Section 508 is available at *https://www.section508.gov/.*

(b) The Section 508 accessibility standards applicable to this solicitation are stated in the clause at 1252.239–93, Information and Communication Technology Accessibility. In order to facilitate the Government's determination whether proposed ICT supplies and services meet applicable Section 508 accessibility standards, offerors must submit appropriate Section 508 Checklists, in accordance with the checklist completion instructions. The purpose of the checklists is to assist DOT acquisition and program officials in determining whether proposed ICT supplies or information, documentation and services support conform to applicable Section 508 accessibility standards. The checklists allow offerors or developers to self-evaluate their supplies and document—in detail—whether they conform to a specific Section 508 accessibility standard, and any underway remediation efforts addressing conformance issues.

(c) Respondents to this solicitation must identify any exception to Section 508 requirements. If an offeror claims its supplies or services meet applicable Section 508 accessibility standards, and it is later determined by the Government, *i.e.,* after award of a contract or order, that supplies or services delivered do not conform to the described accessibility standards, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its expense.

(End of provision)

[87 FR 61159, Oct. 7, 2022, as amended at 88 FR 88262, Dec. 21, 2023]

1252.239–93 Information and Communication Technology Accessibility.

As prescribed in 1239.203–70(b), insert the following clause:

INFORMATION AND COMMUNICATION TECHNOLOGY ACCESSIBILITY (NOV 2022)

(a) All Information and Communication Technology (ICT) supplies, information, documentation and services support developed, acquired, maintained or delivered under this contract or order must comply with the Information and Communication Technology (ICT) Standards and Guidelines (*see* 36 CFR parts 1193 and 1194). Information about Section 508 is available at *https://www.section508.gov/*.

(b) The Section 508 accessibility standards applicable to this contract or order are identified in the Specification, Statement of Work, or Performance Work Statement. If it is determined by the Government that ICT supplies and services provided by the Contractor do not conform to the described accessibility standards in the contract, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(c) The Section 508 accessibility standards applicable to this contract are: _____ [*Contracting Officer inserts the applicable Section 508 accessibility standards*].

(d) In the event of a modification(s) to this contract or order, which adds new ICT supplies or services or revises the type of, or specifications for, supplies or services, the Contracting Officer may require that the Contractor submit a completed Section 508 Checklist and any other additional information necessary to assist the Government in determining that the ICT supplies or services conform to Section 508 accessibility standards. If the Government determines that ICT supplies and services provided by the Contractor do not conform to the described accessibility standards in the contract, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(e) If this is an indefinite-delivery type contract, a Blanket Purchase Agreement or a Basic Ordering Agreement, the task/delivery order requests that include ICT supplies or services will define the specifications and accessibility standards for the order. In those cases, the Contractor may be required to provide a completed Section 508 Checklist and any other additional information necessary to assist the Government in determining that the ICT supplies or services conform to Section 508 accessibility standards. If it is determined by the Government that ICT supplies and services provided by the Contractor do not conform to the described accessibility standards in the provided documentation, remediation of the supplies or services to the level of conformance specified in the contract will be the responsibility of the Contractor at its own expense.

(End of clause)

1252.242–70 Dissemination of Information—Educational Institutions.

As prescribed in 1242.270(a), insert the following clause:

DISSEMINATION OF INFORMATION—EDUCATIONAL INSTITUTIONS (NOV 2022)

(a) The Department of Transportation (DOT) desires widespread dissemination of the results of funded transportation research. The Contractor, therefore, may publish (subject to the provisions of the ''Data Rights'' and ''Patent Rights'' clauses of the contract) research results in professional journals, books, trade publications, or other appropriate media (a thesis or collection of theses should not be used to distribute results because dissemination will not be sufficiently widespread). All costs of publication pursuant to this clause shall be borne by the Contractor and shall not be charged to the Government under this or any other Federal contract.

(b) Any copy of material published under this clause must contain acknowledgment of DOT's sponsorship of the research effort and a disclaimer stating that the published material represents the position of the author(s) and not necessarily that of DOT. Articles for publication or papers to be presented to professional societies do not require the authorization of the Contracting Officer prior to release. However, two copies of each article shall be transmitted to the Contracting Officer at least two weeks prior to release or publication.

(c) Press releases concerning the results or conclusions from the research under this contract shall not be made or otherwise distributed to the public without prior written approval of the Contracting Officer.

(d) Publication under the terms of this clause does not release the Contractor from the obligation of preparing and submitting to the Contracting Officer a final report containing the findings and results of research, as set forth in the schedule of the contract.

(End of clause)

1252.242–71 Contractor Testimony.

As prescribed in 1242.270(b), insert the following clause:

CONTRACTOR TESTIMONY (NOV 2022)

All requests for the testimony of the Contractor or its employees, and any intention to testify as an expert witness relating to: (a) any work required by, and/or performed under, this contract; or (b) any information provided by any party to assist the Contractor in the performance of this contract,

shall be immediately reported to the Contracting Officer. Neither the Contractor nor its employees shall testify on a matter related to work performed or information provided under this contract, either voluntarily or pursuant to a request, in any judicial or administrative proceeding unless approved, in advance, by the Contracting Officer or required by a judge in a final court order.

(End of clause)

1252.242–72 Dissemination of Contract Information.

As prescribed in 1242.270(c), insert the following clause:

DISSEMINATION OF CONTRACT INFORMATION (NOV 2022)

The Contractor shall not publish, permit to be published, or distribute for public consumption, any information, oral or written, concerning the results or conclusions made pursuant to the performance of this contract, without the prior written consent of the Contracting Officer. Two copies of any material proposed to be published or distributed shall be submitted to the Contracting Officer.

(End of clause)

1252.242–74 Contract Audit Support.

As prescribed in 1242.170, insert the following clause:

CONTRACT AUDIT SUPPORT (NOV 2022)

The Government may at its sole discretion utilize certified public accountant(s) to provide contract audit services in lieu of the cognizant government audit agency to accomplish the contract administration requirements of FAR parts 32 and 42 under the terms and conditions of this contract. The audit services contractor reviewing the Contractor's accounting systems and data will perform this function in accordance with contract provisions which prohibit disclosure of proprietary financial data or use of such data for any purpose other than to perform the required audit services. The Contractor shall provide access to accounting systems, records, and data to the audit services contractor like that provided to the cognizant government auditor.

(End of clause)

Subpart 1252.3—Provision and Clause Matrix

1252.301 Solicitation provisions and contract clauses (matrix).

The TAR matrix is not published in the CFR. It is available on the *Acquisition.gov* website at *https://www.acquisition.gov/TAR*.

PART 1253—FORMS

Subpart 1253.2—Prescription of Forms

Sec.
1253.204–70 Administrative matters—agency specified forms.
1253.227 Patents, data, and copyrights.
1253.227–3 Patent rights under Government contracts.

Subpart 1253.3—Forms Used in Acquisitions

1253.300–70 DOT agency forms.

AUTHORITY: 5 U.S.C. 301; 41 U.S.C. 1121(c)(3); 41 U.S.C. 1702; and 48 CFR 1.301 through 1.304.

SOURCE: 87 FR 61159, Oct. 7, 2022, unless otherwise noted.

Subpart 1253.2—Prescription of Forms

1253.204–70 Administrative matters—agency specified forms.

The following forms are prescribed for use in the closeout of applicable contracts, as specified in 1204.804–570:

(a) *Department of Transportation (DOT) Form DOT F 4220.4, Contractor's Release.* Form DOT F 4220.4 is authorized for local reproduction and a copy may be obtained at *https://www.transportation.gov/assistant-secretary-administration/procurement/tar-part-1253-forms*.

(b) *Form DOT F 4220.45, Contractor's Assignment of Refunds, Rebates, Credits, and Other Amounts.* Form DOT F 4220.45 is authorized for local reproduction and a copy may be obtained at *https://www.transportation.gov/assistant-secretary-administration/procurement/tar-part-1253-forms*.

(c) *Form DOT F 4220.46, Cumulative Claim and Reconciliation Statement.* Form DOT F 4220.46 is authorized for local reproduction and a copy may be obtained at *https://*

www.transportation.gov/assistant-secretary-administration/procurement/tar-part-1253-forms.

(d) *Department of Defense DD Form 882, Report of Inventions and Subcontracts*. DD Form 882 can be found at *https://www.esd.whs.mil/Directives/forms/*.

1253.227 Patents, data, and copyrights.

1253.227–3 Patent rights under Government contracts.

The following form is prescribed as a means for contractors to report inventions made during contract performance, as specified in 1227.305–4: Department of Defense DD Form 882, Report of Inventions and Subcontracts. DD Form 882 can be found at *https://www.esd.whs.mil/Directives/forms/*.

Subpart 1253.3—Forms Used in Acquisitions

1253.300–70 DOT agency forms.

This subpart identifies, in numerical sequence, agency forms that are specified by the TAR for use in acquisitions. See table 1 to 1253.300–70. Forms are also accessible in Adobe PDF and Microsoft Word files on the DOT Office of Senior Procurement Executive website at *https://www.transportation.gov/assistant-secretary-administration/procurement/tar-part-1253-forms*.

TABLE 1 TO 1253.300–70—FORMS USED IN DOT ACQUISITIONS

Form name	Form No.
Contractor's Release Form	4220.4
Contractor's Assignment of Refunds, Rebates, Credits, and other Amounts.	4220.45
Cumulative Claim and Reconciliation Statement	4220.46

PARTS 1254–1299 [RESERVED]

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SUBCHAPTER A—GENERAL

PART 1300 [RESERVED]

PART 1301—DEPARTMENT OF COMMERCE ACQUISITION REGULATIONS SYSTEM

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1301.000 Scope of part.

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1301.101 Purpose.
1301.103 Authority.
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1301.105–1 Publication and code arrangement.
1301.105–2 Arrangement of regulations.
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1301.601 General.
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1301.603 Selection, appointment, and termination of appointment.
1301.603–1 General.
1301.603–2 Selection.
1301.603–3 Appointment.
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1301.670 Appointment of contracting officer's representative (COR).
1301.670–70 Provisions and clauses.
1301.671 Assignment of program and project managers.

Subpart 1301.7—Determinations and Findings

1301.707 Signatory authority.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

1301.000 Scope of part.

This part sets out general Department of Commerce Acquisition Regulation (CAR) policies, including information regarding the maintenance and administration of the CAR, acquisition policies and practices, and procedures for deviation from the CAR and the Federal Acquisition Regulation (FAR). This part describes the Commerce Acquisition Regulation in terms of establishment, relationship to the Federal Acquisition Regulation, arrangement, applicability, and deviation procedures.

Subpart 1301.1—Purpose, Authority, Issuance

1301.101 Purpose.

The CAR establishes uniform acquisition policies and procedures that implement and supplement the FAR. If there is a discrepancy between the CAR and FAR, the FAR will take precedence.

1301.103 Authority.

The CAR is issued under the authority of section 22 of the Office of Federal Procurement Policy Act, as amended (41 U.S.C. 418b), and FAR Subpart 1.3 by the Department Procurement Executive pursuant to a delegation initiating from the Secretary of Commerce.

1301.104 Applicability.

The CAR applies to all Department of Commerce (DOC) acquisitions as defined in part 2 of the FAR, except where expressly excluded.

1301.105 Issuance.

1301.105–1 Publication and code arrangement.

(a) The CAR is published in the FEDERAL REGISTER, in cumulative form in the Code of Federal Regulations (CFR), and is available online at the U.S. Department of Commerce, Office of Acquisition Management Web site.

(b) The CAR is issued as chapter 13 of title 48 of the CFR.

1301.105–2 Arrangement of regulations.

(a) *General.* The CAR is divided into the same parts, subparts, sections, and subsections as the FAR.

(b) *Numbering.* If the DOC does not have supplemental regulations there will be no corresponding coverage in the CAR, and there will be gaps in the CAR numbering system.

1301.105–3 Copies.

(a) Copies of the CAR in FEDERAL REGISTER or CFR form may be purchased from the Superintendent of Documents, Government Printing Office, Washington, DC 20402.

(b) The CAR is available online at the U.S. Department of Commerce, Office of Acquisition Management Web site (*http://oam.ocs.doc.gov*).

Subpart 1301.3—Agency Acquisition Regulations

1301.301 Policy.

(a) The designee authorized to prescribe the CAR is set forth in the Commerce Acquisition Manual (CAM) 1301.70.

(b) The DOC internal operating guidance and procedures are contained in the CAM and other policy guidance documents issued by the Procurement Executive relating to acquisitions. The DOC Contracting Offices may issue additional guidance and procedures.

1301.303 Publication and codification.

(a) The CAR parallels the FAR in format, arrangement and numbering system. Coverage within the CAR is identified by the prefix ''13'' or ''130'' followed by the complete FAR citation to the subsection level (*e.g.*, CAR coverage of FAR 1.602–1 is cited as 1301.602–1).

(b) Supplementary material without a FAR counterpart will be codified using 70 and up as appropriate for the part, subpart, section, or subsection number (*e.g.*, part 1370, subpart 1301.70, section 1301.370 or subsection 1301.301–70).

1301.304 Agency control and compliance procedures.

Operating unit counsel shall limit issuance of directives that restrain the flexibilities found in the FAR.

Subpart 1301.4—Deviations From the FAR

1301.403 Individual deviations.

The designee authorized to approve individual deviations from the FAR is set forth in CAM 1301.70.

1301.404 Class deviations.

The designee authorized to approve class deviations from the FAR is set forth in CAM 1301.70.

Subpart 1301.6—Career Development, Contracting Authority, and Responsibilities

1301.601 General.

The agency head for procurement matters is the Chief Financial Officer/Assistant Secretary for Administration (CFO/ASA), unless prohibited by statute. The authority for agency head for procurement matters is delegated to the Procurement Executive as the authority to establish lines of contracting authority within DOC and to implement policies and procedures related to the acquisition process. Specific contracting authorities are set forth in CAM 1301.70.

1301.602 Contracting officers.

1301.602–1 Authority.

In accordance with CAM 1301.70, only individuals who have been certified as contracting officers through issuance of a Certificate of Appointment by the Senior Bureau Procurement Official may exercise the authority of DOC contracting officers. In addition to the authority to enter into, administer, and terminate contracts, contracting officers have been delegated certain functions as set out in appendix A to CAM 1301.70.

1301.602–170 Provisions and clauses.

Insert clause 1352.201–70, *Contracting Officer's Authority*, in all solicitations and contracts.

1301.602–3 Ratification of unauthorized commitments.

(a) Insert clause 1352.201–71, *Ratification Release*, in a contract document under which payment is made for unauthorized commitments after a ratification has been processed.

(b)(1) Unauthorized commitments occur when the Department accepts goods or services in the absence of an enforceable contract entered into by an authorized official. It is the policy of DOC that all acquisitions are to be made only by Government officials having authority to make such acquisitions. Acquisitions made by other than authorized personnel are contrary to Departmental policy and the Department is not bound by any formal or informal type of agreement or contractual commitment which is made by persons who are not delegated contracting authority. Payment for goods or services accepted in the absence of an authorized commitment may be made only through the ratification process. Unauthorized commitments may be considered matters of serious misconduct and may subject the responsible employees to appropriate disciplinary actions.

(2) The delegation of the ratification authority is set forth in CAM 1301.70. All requests for ratification must fully explain the circumstances that gave rise to the unauthorized commitment and detail, if appropriate, any disciplinary action taken with respect to any responsible employee. Ratifications may be approved only if all criteria in FAR 1.602–3 have been met.

1301.602–370 Ratification approval by Procurement Counsel.

Ratifications may not be approved unless the concurrence of Procurement Counsel is obtained.

1301.603 Selection, appointment, and termination of appointment.

1301.603–1 General.

The Department's procurement career management program and system for the selection, appointment, and termination of appointment of contracting officers are described in CAM 1301.6.

1301.603–2 Selection.

In addition to the criteria set forth in FAR 1.603–2, selection of contracting officers shall be based upon Section 4 of CAM 1301.6.

1301.603–3 Appointment.

In addition to the criteria set forth in FAR 1.603–3, appointment of contracting officers shall be based upon Section 4 of CAM 1301.6.

1301.603–4 Termination.

In addition to the criteria set forth in FAR 1.603–4, termination of contracting officers shall be based upon Section 4 of CAM 1301.6.

1301.670 Appointment of contracting officer's representative (COR).

The Department's Contracting Officer's Representative certification program for the nomination, appointment and cancellation of CORs is described in CAM 1301.670.

1301.670–70 Provisions and clauses.

Insert clause 1352.201–72, *Contracting Officer's Representative (COR)*, in all solicitations and contracts where a COR will be appointed.

1301.671 Assignment of program and project managers.

The Department's Program and Project Manager certification program for the assignment and certification of Program and Project Managers is described in CAM 1301.671.

Subpart 1301.7—Determinations and Findings

1301.707 Signatory authority.

Signatory authority for determinations and findings (D&Fs) is specified in the FAR for the associated subject matter unless otherwise noted in CAM 1301.70.

PART 1302—DEFINTIONS OF WORDS AND TERMS

Subpart 1302.1—Definitions

Sec.

1302.101 Definitions.
1302.170 Abbreviations.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1302.1—Definitions

1302.101 Definitions.

Accountable Personal Property means all personal property for which responsibility for control is formally assigned to an individual, and official property records are maintained as set forth in DOC PPMM Chapter 4.

Agency Head (or Head of Agency) (HA) means the Secretary of Commerce, except, pursuant to Department Organization Order (DOO) 10–5, *Chief Financial Officer and Assistant Secretary for Administration*, the head of the agency for procurement matters shall be the Chief Financial Officer and Assistant Secretary for Administration (CFO/ASA), unless a statute provides that the authority of the Secretary is non-delegable.

Chief Acquisition Officer (CAO) means the Department's executive-level noncareer employee designated pursuant to the *Services Acquisition Reform Act* to advise and assist the head of the agency and other agency officials to ensure the mission of the agency is achieved through the management of the agency's acquisition activities. The CFO/ASA has been designated by the Head of the Agency as the Chief Acquisition Officer for the Department of Commerce.

Civilian Agency Acquisition Council (CAAC) means the council that assists the Administrator of General Services in developing and maintaining the Federal Acquisition Regulation (FAR) System by developing or reviewing all proposed changes to the FAR. The Council is comprised of a representative designated by each of several Federal departments and agencies, including the DOC. The CAAC coordinates its activities with the Defense Acquisition Regulations Council (DARC). The CAAC is authorized under 48 CFR 1.2.

Commerce Acquisition Manual (CAM) means non-regulatory uniform policies and procedures for internal operations associated with acquiring supplies and services within the Department that implements and supplements the FAR and CAR.

Commerce Acquisition Regulation (CAR) means uniform acquisition policies and procedures, which implement and supplement the FAR.

Contracting Activity means the operating units identified under the definition of ''Operating Units'' below. Contracting activities may or may not have authority to operate contracting offices (*see* definition for *Contracting Office*).

Contracting Office means an office that awards or executes contracts for supplies or services and performs post-award functions. The operating units authorized to operate contracting offices are identified in DAO 208–2.

Contracting Officer means an individual designated authority by the Senior Bureau Procurement Official (BPO) to enter into, administer, and/or terminate contracts and make related determinations and findings. Only those individuals who have been certified as contracting officers, through the issuance of a Certificate of Appointment (Contracting Officer Warrant (SF 1402)), by the BPO in accordance with the requirements and procedures of the CAR and the CAM may exercise the authorities of contracting officers. However, by virtue of their positions, the Head of the Agency, the Procurement Executive, and the Heads of Operating Units are also designated as contracting officers.

Department or Departmental or DOC means the Department of Commerce.

Head of Agency (HA)—see definition for ''Agency Head.''

Head of Contracting Office (HCO) means those individuals designated by the BPO to head the contracting offices within each operating unit that has designated contracting authority to award and administer contracts. In performing their duties, HCOs are empowered to the full limits of the Department's contracting authority. The HCO must be a procurement professional in the GS–1102 occupational series (or equivalent OPM occupational designation). BPOs will issue each HCO a Contracting Officer Warrant that delegates the authority to enter into, administer, and/or terminate contracts and to make related determinations and findings.

Head of the Contracting Activity (HCA) means, for purposes of delegation of contracting authority, officials who are designated as Heads of Operating Units (those who are assigned by the President or by the Secretary to manage the primary or constituent operating units of the DOC) in orders establishing the respective operating units, with the exception of the Office of the Secretary. Such officials are designated as the HCA for procurements initiated in support of the procurement activities of that operating unit. The Chief Financial Officer and Assistant Secretary for Administration has been designated as the HCA for procurements initiated in support of the programs and activities of the Office of the Secretary and all other Secretarial Offices and Departmental Offices.

Office of Small and Disadvantaged Business Utilization (OSDBU), The means the advocacy and advisory office responsible for promoting the use of small, small disadvantaged, 8(a), women-owned, veteran-owned, service-disabled veteran-owned, and HUBZone small businesses within the Department acquisition process.

Office of the Assistant General Counsel for Administration, Employment & Labor Law Division means the Department Legal Office that provides advice and guidance to management regarding employment and labor law issues, including the legal standards for taking adverse and performance-based actions.

Office of the Assistant General Counsel for Administration, Ethics Law and Program Division means the Department Legal Office that provides advice and guidance regarding conflict of interest statutes, ethics regulations, and related laws.

Operating Units are organizational entities outside the Office of the Secretary charged with carrying out specified substantive functions (*i.e.*, programs) of the Department and are identified in DAO 208–2.

Procurement Counsel means, except for the Patent and Trademark Office (PTO), the Office of the Assistant General Counsel for Finance & Litigation, Contract Law Division, the office responsible for providing legal review of applicable contract actions and procurement legal advice to all operating units, and handling procurement-related litigation. ''Procurement Counsel'' for all PTO procurement-related actions means Office of General Law.

Procurement Executive (or Senior Procurement Executive (PE)) means the official appointed pursuant to Executive Order 12931 and the Services Acquisition Reform Act of 2003 to carry out the responsibilities identified in both the Executive Order and the Act. The Director for Acquisition Management is the Procurement Executive for the Department of Commerce.

Senior Bureau Procurement Official (BPO) means the senior career procurement official, within each operating unit that has been delegated contracting authority, who is designated as the Senior Bureau Procurement Official. The BPO must be a procurement professional who has both experience and training in the area of Federal procurement and contracting. HCAs may designate one BPO within their organization to carry out the day-to-day functions of managing the contracting activity. BPOs may also serve as the Head of Contracting Office. The Procurement Executive will issue each BPO a Contracting Officer Warrant which delegates the authority to enter into, administer, and/or terminate contracts and to make related determinations and findings.

1302.170 Abbreviations

AIR Additional Item Requirements
BPO Senior Bureau Procurement Official
CAAC Civilian Agency Acquisition Council
CAM Commerce Acquisition Manual
CAO Chief Acquisition Officer
CAR Commerce Acquisition Regulation
CFO/ASA Chief Financial Officer/Assistant Secretary for Administration
CFR Code of Federal Regulations
CO Contracting Officer
COR Contracting Officer's Representative
DAO Departmental Administrative Order
DOC Department of Commerce
DOO Departmental Organizational Order
D&F Determination and Findings
EVMS Earned Value Management System
FAR Federal Acquisition Regulation
HCA Head of Contracting Activity
HCO Head of Contracting Office
IRB Institutional Review Board
JOFOC Justification for Other than Full and Open Competition
NIST National Institute of Standards and Technology

NOAA National Oceanic and Atmospheric Administration
OCI Organizational Conflict of Interest
OCIO Office of the Chief Information Officer
OFPP Office of Federal Procurement Policy
OIG Office of Inspector General
OMB Office of Management and Budget
OS Office of the Secretary
OSDBU Office of Small and Disadvantaged Business Utilization
PE Procurement Executive
PTO Patent and Trademark Office
RFP Request for Proposals
SBA Small Business Administration
OU Operating Unit

PART 1303—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 1303.1—Safeguards

Sec.
1303.101 Standards of conduct.
1303.101–2 Solicitation and acceptance of gratuities by government personnel.
1303.101–3 Agency regulations.
1303.104 Procurement integrity.
1303.104–4 Disclosure, protection and marking of contractor bid or proposal information and source selection information.
1303.104–7 Violations or possible violations.

Subpart 1303.2—Contractor Gratuities to Government Personnel

1303.203 Reporting suspected violations of the gratuities clause.
1303.204 Treatment of violations.

Subpart 1303.3—Reports of Suspected Antitrust Violations

1303.303 Reporting suspected antitrust violations.

Subpart 1303.4—Contingent Fees

1303.405 Misrepresentations or violations of the covenant against contingent fees.

Subpart 1303.5—Other Improper Business Practices

1303.502 Subcontractor kickbacks.
1303.502–2 Subcontractor kickbacks.

Subpart 1303.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

1303.602 Exceptions.

Subpart 1303.7—Voiding and Rescinding Contracts

1303.704 Policy.
1303.705 Procedures.

Subpart 1303.8—Limitation on the Payment of Funds To Influence Federal Transactions

1303.804 Policy.
1303.806 Processing suspected violations.

Subpart 1303.9—Whistleblower Protections for Contractor Employees

1303.905 Procedures for investigating complaints.
1303.906 Remedies.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1303.1—Safeguards

1303.101 Standards of conduct.

1303.101–2 Solicitation and acceptance of gratuities by government personnel.

(a) Suspected violations of the prohibition on soliciting and accepting gratuities shall be reported to the Office of the Inspector General in accordance with DAO 207–10, *Inspector General Investigations*.

(b) To obtain legal advice regarding the solicitation and acceptance of gratuities, contact the Office of the Assistant General Counsel for Administration, Ethics Law and Program Division.

1303.101–3 Agency regulations.

The Department has issued rules implementing Executive Order 11222 prescribing employee standards of conduct (*see* DOC Office of General Counsel Web site).

1303.104 Procurement integrity.

1303.104–4 Disclosure, protection and marking of contractor bid or proposal information and source selection information.

Contractor bid or proposal information and source selection information must be protected from unauthorized disclosure in accordance with FAR Parts 3, 14 and 15, and CAM 1315.3.

1303.104–7 Violations or possible violations.

Suspected violations of the Procurement Integrity Act shall be reported to

the individuals designated in CAM 1301.70.

Subpart 1303.2—Contractor Gratuities to Government Personnel

1303.203 Reporting suspected violations of the gratuities clause.

Suspected violations of the Gratuities clause shall be reported to the HCA in writing detailing the circumstances. The report must identify the contractor and personnel involved, provide a summary of the pertinent evidence and circumstances that indicate a violation, and include any other available supporting documentation. The HCA will evaluate the report, and, if the allegations appear to support a violation, the matter will be referred to the Head of Contracting Office with copies provided to the Senior Procurement Executive and the DOC Office of Inspector General. *See* DAO 207–10 for procedures.

1303.204 Treatment of violations.

(a) The designee authorized to determine violations of the Gratuities clause is set forth in CAM 1301.70.

(b) Upon receipt of an allegation or evidence of a violation of the Gratuities clause, the designee shall conduct a fact-finding. If there is a basis for further action, a signed notice shall be prepared and sent to the contractor by certified mail, return receipt requested, or any other method that provides signed evidence of receipt. If a reply is not received from the contractor within 45 calendar days of sending the notice, a decision shall be made on the appropriate action to be taken. If a reply is received from the contractor within 45 calendar days of sending the notice, the information in the reply must be considered before making a decision on the appropriate action to be taken. Upon request of the contractor, the contractor shall be provided an opportunity to appear in person to present information concerning the matter. A report shall be prepared following the presentation and the information must be considered when making a decision. A decision shall be made on the basis of all information available, including findings of fact and oral or written information submitted by the contractor. All mitigating factors shall be considered prior to making a final decision concerning what action will be taken.

Subpart 1303.3—Reports of Suspected Antitrust Violations

1303.303 Reporting suspected antitrust violations.

Suspected anti-competitive practices and antitrust law violations, as described in FAR 3.301 and FAR 3.303, shall be reported to the Contract Law Division, by the HCO. A copy of the report shall be sent to the Procurement Executive concurrently with the submission to the Office of the Assistant General Counsel for Administration, Ethics Law and Program Division. The Office of the Assistant General Counsel will submit any required reports to the Attorney General.

Subpart 1303.4—Contingent Fees

1303.405 Misrepresentations or violations of the covenant against contingent fees.

If the contracting officer has specific evidence or other reasonable basis to believe that a violation of the Covenant Against Contingent Fees has occurred, the matter shall be referred to the HCO, who shall, in appropriate circumstances, take one or more of the actions described in FAR 3.405(b). The HCO shall also refer the matter to the DOC Office of the Inspector General as well as the Office of the Assistant General Counsel for Administration, Ethics Law and Program Division. The Office of the Assistant General Counsel for Administration, Ethics Law and Program Division shall refer the matter to the Department of Justice, as appropriate.

Subpart 1303.5—Other Improper Business Practices

1303.502 Subcontractor kickbacks.

1303.502–2 Subcontractor kickbacks.

Suspected violations of the Anti-Kickback Act of 1986 shall be reported to the DOC Office of Inspector General.

Subpart 1303.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

1303.602 Exceptions.

The designee authorized to make an exception to the policy in FAR 3.601 is set forth in CAM 1301.70.

Subpart 1303.7—Voiding and Rescinding Contracts

1303.704 Policy.

The designee authorized to declare void and rescind contracts, in cases in which there has been a final conviction for any violation of 18 U.S.C. 201–224, is set forth in CAM 1301.70.

1303.705 Procedures.

The designee authorized to declare a contract void and rescinded is set forth in CAM 1301.70. The DOC will follow the procedures set forth in FAR 3.705.

Subpart 1303.8—Limitation on the Payment of Funds To Influence Federal Transactions

1303.804 Policy.

The original OMB Form LLL, Disclosure of Lobbying Activities, shall be retained in the contract file and a copy shall be submitted to the Office of the Assistant General Counsel for Administration, Ethics Law and Program Division.

1303.806 Processing suspected violations.

Suspected violations of 31 U.S.C. 1352 shall be referred to the DOC Office of Inspector General and the Senior Procurement Executive.

Subpart 1303.9—Whistleblower Protections for Contractor Employees

1303.905 Procedures for investigating complaints.

The designee authorized to take specified actions related to Inspector General findings regarding whistleblower complaints of contractor employees is set forth in CAM 1301.70.

1303.906 Remedies.

The designee authorized to determine whether a contractor has subjected an employee to reprisal and to determine the appropriate remedy is set forth in CAM 1301.70.

PART 1304—ADMINISTRATIVE MATTERS

Subpart 1304.2—Contract Distribution

Sec.

1304.201 Procedures
1304.201–70 Accountable personal property.

Subpart 1304.6—Contract Reporting

1304.602 General
1304.602–70 Federal Procurement Data System.

Subpart 1304.8—Government Contract Files

1304.804 Closeout of contract files
1304.804–70 Contract closeout procedures.
1304.805 Storage, handling, and disposal of contract files.
1304.805–70 Storage, handling, and disposal of contract files.

Subpart 1304.13—Personal Identity Verification

1304.1301 Policy.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1304.2—Contract Distribution

1304.201 Procedures.

1304.201–70 Accountable personal property.

Provide one copy of all contracts and purchase orders for accountable personal property to the appropriate Departmental property management office(s) for inclusion in the Department's personal property system in accordance with the DOC Personal Property Management Manual. Accountable personal property purchased with a Governmentwide commercial purchase card is also to be reported to the property management office.

Subpart 1304.6—Contract Reporting

1304.602 General.

1304.602–70 Federal Procurement Data System.

Departmental Federal Procurement Data System reporting procedures are set forth in CAM 1304.602.

Subpart 1304.8—Government Contract Files

1304.804 Closeout of contract files.

1304.804–70 Contract closeout procedures.

CAM 1304.804 supplements FAR 4.804 with the Department's contract closeout procedures.

1304.805 Storage, handling, and disposal of contract files.

1304.805–70 Storage, handling, and disposal of contract files.

CAM 1304.804 supplements FAR 4.805 with the Department's procedures for storage, handling, and disposal of contract files.

Subpart 1304.13—Personal Identity Verification

1304.1301 Policy.

(a) Implementation of Federal Information Processing Standards Publication (FIPS PUB) 201 and OMB guidance M–05–24 is set forth in DOC Personal Identify Verification (PIV) Implementation Guidance, which is available on the Office of Security Web site.

(b) The DOC official responsible for verifying contractor employee personal identity is set forth in the DOC Personal Identify Verification (PIV) Implementation Guidance.

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

PART 1305—PUBLICIZING CONTRACT ACTIONS

Subpart 1305.2—Synopses of Proposed Contract Actions.

Sec.
1305.202 Exceptions.

Subpart 1305.4—Release of Information

1305.403 Requests from Members of Congress.
1305.404 Release of long range acquisition estimates.
1305.404–1 Release procedures.

Subpart 1305.5—Paid Advertisements

1305.502 Authority.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1305.2—Synopses of Proposed Contract Actions

1305.202 Exceptions.

The designee authorized to decide, in writing, that advance notice through the GPE (Governmentwide Point of Entry) is not appropriate or reasonable is set forth in CAM 1301.70.

Subpart 1305.4—Release of Information

1305.403 Requests from Members of Congress.

Requests from Members of Congress shall be handled in accordance with the policies and procedures outlined in DAO 218–2.

1305.404 Release of long-range acquisition estimates.

1305.404–1 Release procedures.

The designee authorized to release long-range acquisition estimates is set forth in CAM 1301.70.

Subpart 1305.5—Paid Advertisements

1305.502 Authority.

The designee authorized to provide authorization for publication of paid advertisements in newspapers is set forth in CAM 1301.70. The contracting officer shall obtain written authorization from the designee.

PART 1306—COMPETITION REQUIREMENTS

Subpart 1306.2—Full and Open Competition after Exclusion of Sources

Sec.
1306.202 Establishing or maintaining alternative sources.

Subpart 1306.3—Other Than Full and Open Competition

1306.302 Circumstances permitting other than full and open competition.
1306.302–5 Authorized or required by statute.
1306.303 Justification.
1306.303–70 Documentation and legal review of justifications.
1306.304 Approval of the justification.

Subpart 1306.5—Competition Advocates

1306.501 Requirement.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1306.2—Full and Open Competition After Exclusion of Sources

1306.202 Establishing or maintaining alternative sources.

The authority to exclude a source from a contract action in order to establish or maintain an alternate source is set forth in CAM 1301.70

Subpart 1306.3—Other Than Full and Open Competition

1306.302 Circumstances permitting other than full and open competition.

1306.302–5 Authorized or required by statute.

In accordance with Executive Order 13457, a sole source acquisition may not be justified on the basis of any earmark included in any non-statutory source, except when otherwise required by law or when an earmark meets the criteria for funding set out in Executive Order 13457.

1306.303 Justifications.

1306.303–70 Documentation and legal review of justifications.

The justification for providing for other than full and open competition in accordance with FAR 6.303–2 shall contain sufficient facts and rationale to justify the use of the authority cited and include all of the content set forth in FAR 6.303–2 as appropriate for the cited authority. If the estimated value of the procurement is over legal review thresholds, review by the Procurement Counsel is required.

[89 FR 59673, July 23, 2024]

1306.304 Approval of the justification.

The designee authorized to approve justifications for other than full and open competition at the dollar thresholds in FAR 6.304 is set forth in CAM 1301.70.

Subpart 1306.5—Competition Advocates

1306.501 Requirement.

The designee authorized to designate a Competition Advocate for the Department and each procuring activity is set forth in CAM 1301.70.

PART 1307—ACQUISITION PLANNING

Subpart 1307.1—Acquisition Plans

Sec.
1307.102 Policy.
1307.103 Agency head responsibilities.
1307.105 Contents of written acquisition plans.

Subpart 1307.3—Contractor versus Government Performance

1307.302 Policy.

Subpart 1307.5—Inherently Governmental Functions

1307.503 Policy.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1307.1—Acquisition Plans

1307.102 Policy.

In accordance with FAR 7.102, it is the Department's policy to perform acquisition planning and conduct market research in order to promote the acquisition of commercial items and provide for full and open competition.

1307.103 Agency-head responsibilities.

The designee authorized as responsible for compliance with FAR 7.103 is set forth in CAM 1301.70.

1307.105 Contents of written acquisition plans.

Information on the contents of Acquisition Plans is set forth in CAM 1307.1

Subpart 1307.3—Contractor versus Government Performance

1307.302 Policy.

The Department's competitive sourcing policy and procedures are set forth in CAM 1307.370.

Subpart 1307.5—Inherently Governmental Functions

1307.503 Policy.

All procurement request packages submitted by program offices to initiate a procurement action for services shall contain a written determination by the designated requirements official that affirms that none of the functions to be performed in the statement of work are inherently governmental. This policy applies to all services other than personal services issued under

statutory authority. If the contracting officer determines that there are substantial questions whether the work statement involves performance of inherently governmental functions, the contracting officer shall submit the matter for review by Procurement Counsel. Disagreements regarding the determination shall be resolved by the Head of Contracting Office (HCO) after consultation with counsel.

PART 1308—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Subpart 1308.8—Acquisition of Printing and Related Supplies

Sec.
1308.802 Policy.
1308.802–70 Printing.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1308.8—Acquisition of Printing and Related Supplies

1308.802 Policy.

The designee authorized as the Department's central printing authority is set forth in CAM 1301.70.

1308.802–70 Printing.

Insert clause 1352.208–70, *Restrictions on Printing and Duplicating*, in all solicitations and contracts when printing documents may be required in the performance of the contract.

PART 1309—CONTRACTOR QUALIFICATIONS

Subpart 1309.2—Qualifications Requirements

Sec.
1309.202 Policy.
1309.206 Acquisitions subject to qualification requirements.
1309.206–1 General.

Subpart 1309.4—Debarment, Suspension, and Ineligibility

1309.403 Definitions.
1309.405 Effect of listing.
1309.405–1 Continuation of current contracts.
1309.405–2 Restrictions on subcontracting.
1309.406 Debarment.
1309.406–1 General.
1309.406–3 Procedures.
1309.407 Suspension.
1309.407–1 General.
1309.407–3 Procedures.

Subpart 1309.5—Organizational and Consultant Conflicts of Interest

1309.503 Waiver.
1309.503–70 Waiver.
1309.506 Procedures.
1309.507 Solicitation provisions and contract clauses.
1309.507–1 Solicitation provisions.
1309.507–2 Contract clauses.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1309.2—Qualifications Requirements

1309.202 Policy.

(a) The designee authorized to establish qualification requirements is set forth in CAM 1301.70.

(b) The designee authorized to waive the requirements of FAR 9.202 (a)(1)(ii) through (4) for up to 2 years with respect to the item subject to the qualification requirement is set forth in CAM 1301.70. This waiver authority does not apply to the qualification requirements contained in a qualified product list, qualified manufacturer list, or qualification bidders list.

(c) The designee authorized to approve proceeding with a procurement, rather than delay the award in order to provide a potential offeror an opportunity to demonstrate its ability to meet the standards specified in the qualifications, is set forth in CAM 1301.70.

1309.206 Acquisitions subject to qualification requirements.

1309.206–1 General.

When the designee authorized in CAM 1301.70 determines that an emergency exists, or elects before or after award not to enforce a qualification requirement it had established, the qualification requirement may not be thereafter enforced unless the agency complies with FAR 9.202(a).

Subpart 1309.4—Debarment, Suspension, and Ineligibility

1309.403 Definitions.

The designees authorized as the Debarring and Suspending Officials are set forth in CAM 1301.70.

1309.405 Effect of listing.

(a) Contracting officers shall review the Excluded Parties List System (EPLS) listing for contractors after the opening of bids or receipt of proposals and, again, immediately prior to award.

(b) The designee authorized to determine that a compelling reason exists to do business with a debarred/suspended contractor is set forth in CAM 1301.70. This designation does not apply to FAR 23.506(e).

1309.405–1 Continuation of current contracts.

(a) The designee authorized to direct the discontinuance of a contract or subcontract because of a debarment, suspension or proposed debarment is set forth in CAM 1301.70.

(b) A written determination must be issued by the designee authorized in CAM 1301.70 before the following actions can be taken with a contractor that is debarred, suspended or proposed for debarment:

(1) Place any orders exceeding the maximum on an indefinite delivery contract;

(2) Place orders under Federal supply schedule contracts, blanket purchase orders or basic ordering agreements; or

(3) Add new work or exercise options that extend the duration of a current contract or order.

1309.405–2 Restrictions on subcontracting.

The designee authorized to provide, in writing, compelling reasons for allowing Government consent to subcontracts with a contractor who is debarred, suspended or proposed for debarment is set forth in CAM 1301.70.

1309.406 Debarment.

1309.406–1 General.

Debarments and proposed debarments shall be effective throughout the Executive branch of the Government unless the designee authorized in CAM 1301.70 states in writing compelling reasons justifying DOC doing business with the contractor.

1309.406–3 Procedures.

(a) *Investigation and referral.* DOC employees shall immediately refer any cause that might serve as the basis for debarment through the contracting officer to the debarring official.

(b) *Decision-making process.* (1) Procedures shall afford the contractor, and any named affiliates, an opportunity to submit information and argument in opposition to the proposed debarment. This may be done in person, in writing or through a representative.

(2) In actions not based upon a conviction or civil judgment, where the contractor's submission raises a genuine dispute over facts material to the proposed debarment, the following procedures will be followed:

(i) Provide the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses and confront any person the agency presents;

(ii) A transcribed record of the proceeding will be made, unless the agency and contractor mutually agree to waive the requirement for a transcript. This transcribed record is available to the contractor at cost.

(c) *Notice of proposal to debar.* A notice of proposed debarment shall be issued by the debarring official in accordance with FAR 9.406–3(c)(1) through (7).

(d) *Debarring official's decision.* (1) For actions based upon a conviction or civil judgment, or when there is no authentic dispute over material facts, the debarring official's decision shall be based on all of the information in the administrative record plus any contractor-submitted data. If there is no suspension in effect, the decision shall be rendered within 30 working days after receipt of any information and argument submitted by the contractor. The debarring official can extend this timeframe for good cause.

(2)(i) When necessary, written findings of fact shall be prepared as to disputed material facts. The debarring official will utilize the information in

the written findings of fact, the data submitted by the contractor plus any other information in the administrative record to develop the decision.

(ii) While the debarring official may refer matters involving disputed material facts to another official for findings of fact, the debarring official can disregard any such findings in whole or in part upon a determination that they are clearly erroneous.

(iii) After the conclusion of proceedings with respect to disputed facts, the debarring official will make a decision.

(3) When the proposed debarment is not based upon a conviction or civil judgment, the reason for debarment must be based on a preponderance of the evidence.

(e) *Notice of debarring official's decision.* FAR 9.406–3(e)(1) establishes the notification procedures when a debarment has been imposed, while FAR 9.406–3(e)(2) establishes the procedure when a debarment is not imposed.

(f) Procurement counsel shall assist and advise the debarring official at each stage of the decision-making process.

1309.407 Suspension.

1309.407–1 General.

Suspensions shall be effective throughout the executive branch of the Government, unless the designee set forth in CAM 1301.70 states in writing compelling reasons for continuing to do business with a suspended contractor.

1309.407–3 Procedures.

(a) *Investigation and referral.* DOC employees shall immediately refer any cause that might serve as the basis for suspension through the contracting officer to the suspending official.

(b) *Decision-making process.* (1) Procedures shall afford the contractor, and any named affiliates, an opportunity to submit information and argument in opposition to the proposed suspension. This may be done in person, in writing or through a representative.

(2) In actions not based upon an indictment, where the contractor's submission raises a genuine dispute over facts material to the proposed suspension and if no determination has been made, on the basis of Department of Justice advice, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced, the following procedures will be followed:

(i) Provide the contractor an opportunity to appear with counsel, submit documentary evidence, present witnesses and confront any person the agency presents;

(ii) A transcribed record of the proceeding will be made, unless the agency and contractor mutually agree to waive the requirement for a transcript. This transcribed record is available to the contractor at cost.

(c) *Notice of suspension.* A notice of suspension shall be issued by the suspending official in accordance with FAR 9.407–3(c)(1) through (6).

(d) *Suspending official's decision.* (1) For actions based upon an indictment, when there is no authentic dispute over material facts, in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official's decision shall be based on all of the information in the administrative record plus any contractor-submitted data.

(2)(i) When necessary, written findings of fact shall be prepared as to the disputed material facts. The suspending official will utilize the information in the written findings of fact, the data submitted by the contractor plus any other information in the administrative record to develop the decision.

(ii) While the suspending official may refer matters involving disputed material facts to another official for findings of fact, the suspending official can disregard any such findings in whole or in part upon a determination that they are clearly erroneous.

(iii) After the conclusion of proceedings with respect to disputed facts, the suspending official will make a decision.

(3) The suspension may be modified or terminated by the suspending official. However such a decision shall be without prejudice to the subsequent imposition of:

(i) Suspension by any other agency; or

(ii) Debarment by any agency.

(4) The suspending official's decision shall be sent to the contractor and any affiliates involved, in writing, by certified mail, return receipt requested.

(e) Procurement counsel shall assist and advise the suspending official at each stage of the decision-making process.

Subpart 1309.5—Organizational and Consultant Conflicts of Interest

1309.503 Waiver.

1309.503–70 Waiver.

(a) The need for a waiver of an organizational conflict of interest (OCI) may be identified by the contracting officer or by a written request submitted by an offeror or contractor. The contracting officer shall review all of the relevant facts and shall refer the matter to the Senior Bureau Procurement Official, who shall make a written recommendation to the Head of Contracting Activity whether a waiver should be granted to allow for a contract award or for continuation of an existing contract.

(b) Criteria for Waiver of OCIs. Issuance of a waiver shall be limited to those situations in which:

(1) The work to be performed under contract is vital to the agency;

(2) There is no party other than the conflicted party that can perform the contract at issue; and

(3) Contractual and/or technical review and supervision methods cannot be employed to mitigate the conflict.

1309.506 Procedures.

The contracting officer shall resolve an actual or potential OCI in a manner consistent with the approval or direction of the designee authorized in CAM 1301.70. If the responsible contracting officer is also the authorized designee in CAM 1301.70, the contracting officer must obtain approval from the Senior Bureau Procurement Official.

1309.507 Solicitation provisions and contract clauses.

1309.507–1 Solicitation provisions.

(a) Insert provision 1352.209–70, *Potential Organizational Conflict of Interest*, substantially as written, in solicitations when the contracting officer determines there is a potential organizational conflict of interest.

(b) Insert the clause with its Alternate I when the contracting officer determines the basic clause should not be modified.

1309.507–2 Contract clauses.

(a) In accordance with FAR 9.507–2, insert clause 1352.209–71, *Limitation of Future Contracting*, substantially as written, when the contractor's eligibility for future prime contract or subcontract awards shall be restricted because of services being provided as stated in FAR 9.505–1 through 9.505–4.

(1) Insert the basic clause when the contractor will be providing systems engineering and/or technical direction. (*See* FAR 9.505–1)

(2) Insert the clause with its Alternate I when the contractor will be preparing specifications or work statements. (*See* FAR 9.505–2)

(3) Insert the clause with its Alternate II when the contractor will be providing technical evaluation or advisory and assistance services. (*See* FAR 9.505–3)

(4) Insert the clause with its Alternate III when the contractor will be obtaining access to proprietary information. (*See* FAR 9.505–4)

(5) Insert the clause with its Alternate IV when the contract is a task order contract. The contracting officer may modify Alternate IV to include a list of systems for which task orders may be issued and indicate which organizational conflict of interest provision in paragraph (a)(2) of this clause shall apply.

(6) Insert the clause with its Alternate V when the contract provides for delivery orders. The contracting officer shall indicate in each delivery order which organizational conflict of interest provision in paragraph (a)(2) of this clause shall apply.

(7) Insert the language in Alternate VI when it is necessary to have the restrictions of this clause included in all or some subcontracts, teaming arrangements, and other agreements calling for performance of work related to the contract.

(b) Insert clause 1352.209–72, *Restrictions against Disclosure*, in service contracts, including architect-engineer contracts, and supply and construction contracts requiring a restriction on the release of information developed or obtained in connection with performance of the contract.

(c) Insert the clause 1352.209–73, *Compliance with the Laws*, in all solicitations and contracts.

(d) Insert the clause 1352.209–74, *Organizational Conflict of Interest*, in all solicitations and contracts.

(e) Insert clause 1352.209–75, *Title 13 and Non-Disclosure Requirements*, in all solicitations and contracts for services where the contractor will have access to Title 13 data.

PART 1311—DESCRIBING AGENCY NEEDS

Subpart 1311.1—Selecting and Developing Requirements Documents

Sec.

1311.103 Market acceptance.

Subpart 1311.5—Liquidated Damages

1311.501 Policy.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1311.1—Selecting and Developing Requirements Documents

1311.103 Market acceptance.

The designee authorized as the head of the agency is set forth in CAM 1301.70.

Subpart 1311.5—Liquidated Damages

1311.501 Policy.

The designee authorized as the head of the agency is set forth in CAM 1301.70.

PART 1312—ACQUISITION OF COMMERCIAL ITEMS

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1312.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items

1312.302 Tailoring of provisions and clauses for the acquisition of commercial items.

The authority for approving a request for waiver to tailor a clause, or otherwise include any additional terms or conditions in a solicitation or contract in a manner that is inconsistent with customary commercial practice, is set forth in CAM 1301.70.

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 1313—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 1313.1—Procedures

Sec.
1313.106 Soliciting competition, evaluation of quotations or offers, award and documentation.
1313.106–2–70 Evaluation of solicitations.

Subpart 1313.2—Actions At or Below the Micro Purchase Threshold

1313.201 General.

Subpart 1313.3—Simplified Acquisitions Methods

1313.301 Governmentwide commercial purchase card.
1313.302 Purchase orders.
1313.302–1–70 Non-commercial purchase orders.
1313.302–3 Obtaining contractor acceptance and modifying purchase orders.
1313.303 Blanket purchase agreements (BPAs).
1313.303–5 Purchases under BPAs.
1313.305 Imprest funds and third party drafts.
1313.305–1 General.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1313.1—Procedures

1313.106 Soliciting competition, evaluation of quotations or offers, award and documentation.

1313.106–2–70 Evaluation of solicitations.

All solicitations using simplified acquisition procedures in FAR Part 13 must include provision 1352.213–70, *Evaluation Utilizing Simplified Acquisition Procedures*, or similar language setting out evaluation criteria.

Subpart 1313.2—Actions At or Below the Micro Purchase Threshold

1313.201 General.

DOC employees, other than warranted contracting officers, must be delegated micro-purchase authority by the designee set forth in CAM 1301.70 according to FAR 1.603–3(b), and must be trained pursuant to CAM 1313.301.

Subpart 1313.3—Simplified Acquisitions Methods

1313.301 Governmentwide commercial purchase card.

The Department's procedures for the use and control of the Governmentwide commercial purchase card are set forth in CAM 1313.301.

1313.302 Purchase orders.

1313.302–1–70 Non-commercial purchase orders.

Insert provision 1352.213–71, *Instructions for Submitting Quotations under the Simplified Acquisition Threshold—Non-Commercial*, or similar language in all solicitations for non-commercial purchase orders under the simplified acquisition threshold. The contracting officer shall indicate whether electronic submissions of quotations will be accepted. Paragraph (b)(4) of provision 1352.213–71 may be tailored based on the evaluation factors.

1313.302–3 Obtaining contractor acceptance and modifying purchase orders.

A contractor's written acceptance of a purchase order modification is required, unless the contracting officer determines otherwise.

1313.303 Blanket Purchase Agreements (BPAs).

1313.303–5 Purchases under BPAs.

(a) Individual purchases shall not exceed the simplified acquisition threshold, subject to the following:

(1) The limitations for individual purchases against BPAs established against Federal Supply Schedule contracts shall be those set forth in the terms and conditions of the schedule contract.

(2) The limitations for individual purchases for commercial item acquisitions against BPAs established under FAR Subpart 13.5 ''Test Program for Certain Commercial Items'' is the simplified acquisition threshold set forth in FAR Subpart 13.5.

1313.305 Imprest funds and third party drafts.

1313.305–1 General.

(a) *Third-party drafts.* Third-party drafts are not authorized for use by Department of Commerce agencies.

(b) *Imprest Funds.* The *Imprest Fund Policy Directive,* issued November 9, 1999, by the Department of Treasury, required that all Federal agencies eliminate agency use of imprest funds by October 1, 2001, except where provided under the *Imprest Fund Policy Directive.* Requests for exceptions to the requirements of the Imprest Fund Policy Directive should be addressed to DOC's Director of Financial Management. In the case of an approved exception, DOC's procedures for using imprest funds can be found in the Cash Management Policies and Procedures Handbook, available at the Department of Commerce, Office of Financial Management Web site. A copy of all approved exceptions shall be submitted to the Senior Bureau Procurement Official.

PART 1314—SEALED BIDDING

Subpart 1314.2—Solicitation of Bids

Sec.
1314.201 Preparation of invitation for bids.
1314.201–7 Contract clauses.

Subpart 1314.4—Opening of Bids and Awards of Contracts

1314.404 Rejection of bids.
1314.404–1 Cancellation of invitations after opening.
1314.407 Mistakes in bids.
1314.407–3 Other mistakes disclosed before award.
1314.409 Information to bidders.
1314.409–1 Award of unclassified contracts.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1314.2—Solicitation of Bids

1314.201 Preparation of invitation for bids.

1314.201–7 Contract clauses.

The designee authorized to waive the requirement for inclusion of FAR clause 52.214–27 ''Price Reduction for Defective Cost and Pricing Data—Modifications—Sealed Bidding'' in a contract with a foreign government or agency of that government is set forth in CAM 1301.70.

Subpart 1314.4—Opening of Bids and Awards of Contracts

1314.404 Rejection of bids.

1314.404–1 Cancellation of invitations after opening.

The designee authorized to make the determinations prescribed in FAR 14.401–1(c) and (f) are set forth in CAM 1301.70.

1314.407 Mistakes in bids.

1314.407–3 Other mistakes disclosed before award.

The designee authorized to make the determinations prescribed in FAR 14.407–3(a), (b), (c) and (d) is set forth in CAM 1301.70. Concurrence of Procurement Counsel shall be obtained before issuance of any determination under this section.

1314.409 Information to bidders.

1314.409–1 Award of unclassified contracts.

Requests for records shall be governed by the procedures outlined in DAO 205–14 and 15 CFR part 4.

PART 1315—CONTRACTING BY NEGOTIATION

Subpart 1315.2—Solicitation and Receipt of Proposals and Information

Sec.
1315.204 Contract format.
1315.204–570 Part IV representations and instructions.
1315.209 Solicitation provisions and contract clauses.

Subpart 1315.3—Source Selection

1315.303 Responsibilities.
1315.305 Proposal evaluation.

Subpart 1315.4—Contract Pricing

1315.407 Special cost or pricing areas.
1315.407–4 Should-cost review.

Subpart 1315.6—Unsolicited Proposals

1315.602 Policy.
1315.603 General.
1315.604 Agency points of contact.
1315.606 Agency procedures.
1615.606–2 Evaluation.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1315.2—Solicitation and Receipt of Proposals and Information

1315.204 Contract format.

The designee authorized to grant exemptions from the uniform contract format is set forth in CAM 1301.70.

1315.204–570 Part IV representations and instructions.

(a) *Section L, Instructions, conditions, and notices to offerors or respondents.* (1) The contracting officer shall insert the provision 1352.215–70, *Proposal Preparation*, in all solicitations. Contracting officers should tailor the provision to best meet the Government's needs. Information requested from offerors in Volume II–Technical Proposal, must correspond to the evaluation factors. Contracting officers should not request information that will not be evaluated in accord with the stated technical evaluation factors. Should electronic submission be allowed by the CO, specific instructions must be added.

(2) Insert a provision similar to 1352.215–71, *Instructions for Oral Presentations*, in solicitations when oral presentations will be used. Contracting officers shall tailor the provision to suit their acquisition.

(3) The contracting officer shall insert the provision 1352.215–72, *Inquiries*, in solicitations as determined by the CO. This provision may be modified to satisfy the needs of specific procurements.

(b) *Section M, Evaluation factors for award.* (1) The contracting officer shall insert provision 1352.215–73, *Evaluation Quantities-Indefinite Quantity Contract*, in solicitations for indefinite quantity and requirements contracts, as appropriate. This provision may be modified to satisfy the needs of specific procurements.

(2) The contracting officer shall insert the provision similar to 1352.215–74, *Best Value Evaluation*, for competitive, best value procurements, tailoring the language as appropriate. If clause 1352.215–74, *Best Value Evaluation*, is used, then clause 1352.215–75 *Evaluation Criteria*, must be used.

(3) The contracting officer shall insert a provision in all solicitations similar to 1352.215–75, *Evaluation Criteria*, to specify evaluation criteria, tailoring the language as appropriate. If the basis for award is lowest price technically acceptable, this must be stated.

(4) The contracting officer shall insert provision 1352.215–76, *Cost or Pricing Data*, in all solicitations when cost or pricing data is required under FAR subpart 15.4.

1315.209 Solicitation provisions and contract clauses.

The designee authorized to waive the examination of records by the Comptroller General is set forth in CAM 1301.70.

Subpart 1315.3—Source Selection

1315.303 Responsibilities.

The contracting officer is designated as the source selection authority for competitive negotiated acquisitions of less than $10,000,000. The source selection authority for large dollar competitive negotiated acquisitions of

$10,000,000 or more is the head of the operating unit. The head of the operating unit may re-delegate the authority to a Department manager who is at an organizational level above the contracting officer and who has sufficient rank and professional experience to effectively carry out the functions of a source selection authority.

1315.305 Proposal evaluation.

At the discretion of the contracting officer, cost information may be provided to members of the technical evaluation team.

Subpart 1315.4—Contract Pricing

1315.407 Special cost or pricing areas.

1315.407–4 Should-cost review.

The should-cost review report shall include all elements listed in FAR 15.407–4(a)(1) and be provided to the contracting officer for use in negotiations.

Subpart 1315.6—Unsolicited Proposals

1315.602 Policy.

In accord with FAR 16.602, the DOC encourages the submission of new and innovative ideas which support the DOC mission.

1315.603 General.

DOC will accept for review and consideration unsolicited proposals from any entity. DOC will not pay any costs associated with the preparation of unsolicited proposals. Proposals which do not meet the definition and applicable content and marking requirements of FAR 15.6 will not be considered under any circumstances and will be returned to the submitter. Unsolicited proposals may not be submitted electronically.

1315.604 Agency points of contact.

(a) Unsolicited proposals are to be submitted to the appropriate DOC contracting office. Any person or entity considering the submission of an unsolicited proposal should first determine, based on the subject matter of the proposal, to which DOC operating unit the proposal applies. Proposers should contact the applicable operating unit contracting office to determine procedures for submission and to whom to send the proposal.

(b) Program offices must immediately transmit any unsolicited proposals sent to them to their contracting office. If there is a question concerning which operating unit should evaluate an unsolicited proposal, the contracting office shall identify the proper office, in coordination with the Office of Acquisition Management, if necessary, and transmit the proposal to the applicable contracting office.

1315.606 Agency procedures.

(a) The operating unit contracting office is designated as the point of contact for receipt of unsolicited proposals. Persons within DOC (*e.g.* technical personnel) who receive unsolicited proposals shall forward all documents to their cognizant contracting office.

(b) Within ten working days after receipt by the contracting office of an unsolicited proposal, the contracting office shall review the proposal and determine whether the proposal meets the content and marking requirements of FAR 15.6. If the proposal does not meet these requirements, it shall be returned to the submitter, giving the reasons for noncompliance.

1315.606–2 Evaluation.

(a) If the contracting officer determines, upon initial review, that the unsolicited proposal meets all criteria in FAR 15.606–1, the contracting officer will acknowledge receipt of the proposal, coordinate evaluation with the program office, and provide to the submitter an estimated date that evaluation of the proposal is expected to be completed. The contracting officer shall transmit the proposal to the program office for evaluation, marking it in accord with FAR 15.609(d). If the estimated date for completion of the evaluation cannot be met, the submitter should be informed in a timely manner and provided with a revised evaluation completion date.

(b) The evaluating office shall not reproduce or disseminate the proposal to other offices without the consent of the

contracting officer. If the evaluating office requires additional information from the proposer, the evaluator shall request the information through the contracting officer, who will contact the proposer. The evaluator shall not communicate directly with the proposer.

(c) Evaluators shall notify the contracting officer of their recommendations when the evaluation is complete. Following evaluation, the contracting officer shall proceed in accord with FAR 15.607.

PART 1316—TYPES OF CONTRACTS

Subpart 1316.1—Selecting Contract Types

Sec.
1316.103 Negotiating contract type.
1316.103–70 Identifying contract type.

Subpart 1316.2—Fixed-Price Contracts

1316.203 Fixed-price contracts with economic price adjustment.
1316.203–4 Contract clauses.
1316.206 Fixed-ceiling-price contracts with retroactive price redetermination.
1316.206–3 Limitations.

Subpart 1316.3—Cost-Reimbursement Contracts

1316.307 Contract clauses.

Subpart 1316.4—Incentive Contracts

1316.405 Cost-reimbursement incentive contracts.
1316.405–2 Cost-plus-award-fee contracts.
1316.406 Contract clauses.

Subpart 1316.5—Indefinite-Delivery Contracts

1316.501–2–70 Task orders.
1316.505 Ordering.
1316.506 Solicitation provisions and contract clauses.

Subpart 1316.6—Time-and-Materials, Labor-Hour, and Letter Contracts

1316.601 Time-and-materials contracts.
1316.601–70 Contract clauses.
1316.602 Labor-hour contracts.
1316.602–70 Contract clauses.
1316.603 Letter contracts.
1316.603–2 Application.
1316.603–3 Limitations.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1316.1—Selecting Contract Types

1316.103 Negotiating contract type.

1316.103–70 Identifying contract type.

The type of contract shall be stated in each contract awarded.

Subpart 1316.2—Fixed-Price Contracts

1316.203 Fixed-price contracts with economic price adjustment.

1316.203–4 Contract clauses.

Contracting officers shall use an economic price adjustment clause based on cost indexes of labor or material after obtaining approval for use of the clause from the head of the contracting office.

1316.206 Fixed-ceiling-price contract with retroactive price redetermination.

1316.206–3 Limitations.

The designee authorized to approve use of fixed-ceiling-price contracts with retroactive price redetermination is set forth in CAM 1301.70.

Subpart 1316.3—Cost-Reimbursement Contracts

1316.307 Contract clauses.

(a) Insert a clause that is substantially the same as 1352.216–70, *Estimated and Allowable Costs*, in all cost-reimbursement contracts.

(b) Insert a clause similar to 1352.216–71, *Level of Effort (Cost-Plus-Fixed-Fee, Term Contract)*, in Cost-Plus-Fixed-Fee, Level of Effort contracts.

Subpart 1316.4—Incentive Contracts

1316.405 Cost-reimbursement incentive contracts.

1316.405–2 Cost-plus-award-fee contracts.

Insert clause 1352.216–72, *Determination of Award Fee*, in all cost-plus-award-fee contracts.

1316.406 Contract clauses.

Insert a clause substantially the same as 1352.216–73, *Distribution of Award Fee*, in all cost-plus-award-fee solicitations and contracts, as determined by the contracting officer.

Subpart 1316.5—Indefinite-Delivery Contracts

1316.501–2–70 Task orders.

Insert clause 1352.216–74, *Task Orders*, or a substantially similar clause in task order solicitations and contracts, making changes, as appropriate. Contracting officers are encouraged to make appropriate modifications to the time requirements and procedures to meet the Government's needs.

1316.505 Ordering.

The department's Task and Delivery Order Ombudsman is designated in CAM 1301.70.

1316.506 Solicitation provisions and contract clauses.

(a) Insert clause 1352.216–75, *Minimum and Maximum Contract Amounts*, in all indefinite quantity contracts, including requirements contracts, if feasible.

(b) Insert a clause similar to 1352.216–76, *Placement of Orders*, in indefinite-delivery solicitations and contracts.

Subpart 1316.6—Time-and-Materials, Labor-Hour, and Letter Contracts

1316.601 Time-and-materials contracts.

The designee authorized to approve a time-and-materials contract prior to the execution of the base period when the base period plus any option periods exceeds three years is set forth in CAM 1301.70.

1316.601–70 Contract clauses.

Insert clause 1352.216–77, *Ceiling Price*, in all time-and-materials contracts.

1316.602 Labor-hour contracts.

1316.602–70 Contract clauses.

Insert clause 1352.216–77, *Ceiling Price*, in all labor-hour contracts, including, if feasible, requirements contracts.

1316.603 Letter contracts.

1316.603–2 Application.

(a) With the written approval from the authorized designee in CAM 1301.70, in extreme cases, the contracting officer may authorize an additional period for contract definitization.

(b) 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 contracting officer may determine a reasonable price or fee with approval from the authority designated in CAM 1301.70.

1316.603–3 Limitations.

The designee authorized to determine that a letter contract is suitable so that work can begin immediately is set forth in CAM 1301.70.

PART 1317—SPECIAL CONTRACTING METHODS

Subpart 1317.1—Multi-Year Contracting

Sec.
1317.104 General.
1317.105 Policy.
1317.105–1 Uses.
1317.108 Congressional notification.

Subpart 1317.2—Options

1317.203 Solicitations.

Subpart 1317.5—Interagency Acquisitions Under the Economy Act

1317.502 General.
1317.502–70 Policy.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1317.1—Multi-Year Contracting

1317.104 General.

The designee authorized to modify requirements of FAR Subpart 17.1 and FAR 52.217–2 is set forth in CAM 1301.70.

1317.105 Policy.

1317.105–1 Uses.

The designee authorized to make the determination to enter into a multi-year contract is set forth in CAM 1301.70.

1317.108 Congressional notification.

Written notification to Congress shall be handled in accordance with the policies and procedures outlined in DAO 218–2.

Subpart 1317.2—Options

1317.203 Solicitations.

The designee authorized to limit option quantities for additional supplies greater than 50 percent of the initial quantity of the same contract line item is set forth in CAM 1301.70.

Subpart 1317.5—Interagency Acquisitions Under the Economy Act

1317.502 General.

1317.502–70 Policy.

All Interagency Acquisitions shall adhere to the policy set forth in CAM 1317.570.

PART 1318—EMERGENCY ACQUISITIONS

Subpart 1318.2—Emergency Acquisition Flexibilities

Sec.

1318.201 Contingency operation.
1318.202 Defense or recovery from certain attacks.
1318.270 Emergency acquisition flexibilities.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1318.2—Emergency Acquisition Flexibilities

1318.201 Contingency operation.

The designee authorized to serve as the Head of the Agency under FAR 18.201(b) and (c) is set forth in CAM 1301.70.

1318.202 Defense or recovery from certain attacks.

The designee authorized to serve as the Head of the Agency under FAR 18.202(a), (b) and (c) is set forth in CAM 1301.70.

1318.270 Emergency acquisition flexibilities.

(a) *Authorizing emergency acquisition flexibilities.* The process for authorizing the use of emergency procurement flexibilities within the Department of Commerce may vary depending on the nature and type of the emergency situation. However, generally, if a Senior Bureau Procurement Official (BPO) determines that emergency acquisition flexibilities are required to meet contracting needs during an emergency situation, the BPO must obtain the Senior Procurement Executive's concurrence. In the event that increased warrant authority is needed, the BPO should contact the Senior Procurement Executive.

(b) *Continuity of Operations Plan.* Each Contracting Activity shall have an updated Continuity of Operations Plan, in place designating emergency personnel with warrant levels.

(c) *Management controls.* Senior BPOs must take affirmative steps to ensure that emergency flexibilities are used solely for requirements that have a clear and direct relationship to the emergency situation, and that appropriate management controls are established and maintained to support the use of the increased thresholds. The Office of Acquisition Management will conduct periodic reviews of transactions made pursuant to the expanded authorities to evaluate whether the transactions:

(1) Were in support of the emergency situation;

(2) Were made by an authorized individual;

(3) Were appropriately documented; and

(4) Provided the maximum practicable opportunity for small business participation.

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 1319—SMALL BUSINESS PROGRAMS

Subpart 1319.2—Policies

Sec.
1319.201 General policy.
1319.202 Specific policies.
1319.202–70 Small business set-aside review form.

Subpart 1319.5—Set-Asides for Small Business

1319.502 Setting aside acquisitions.
1319.502–3 Partial set-asides.
1319.505 Rejecting Small Business Administration recommendations.

Subpart 1319.6—Certificates of Competency and Determination of Responsibility

1319.602 Procedures.
1319.602–1 Referral.

Subpart 1319.7—The Small Business Subcontracting Program

1319.705 Responsibilities of the contracting officer under the subcontracting assistance program.
1319.705–4 Reviewing the subcontracting plan.

Subpart 1319.8—Contracting With the Small Business Administration (the 8(a) Program)

1319.800 General.
1319.811 Preparing the contracts.
1319.811–3 Contract clauses.
1319.812 Contract administration.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1319.2—Policies.

1319.201 General policy.

(a) The DOC Office of Small and Disadvantaged Business Utilization (OSDBU) is headed by a Director who shall report and be responsible to the Deputy Secretary on matters of policy and legislative requirements.

(b) Each Contracting Office shall appoint Small Business Specialists to assist the HCA in effectively implementing the small business programs, including achieving program goals.

1319.202 Specific policies.

Procurement actions valued above $100,000 will be reviewed by the Director, OSDBU, or designee for the purpose of making recommendations for solicitation/award under FAR Part 19.

1319.202–70 Small business set-aside review form.

Form CD 570, Small Business Set-Aside Review, shall be submitted for approval to the Operating Unit Counsel Small Business Specialist, and forwarded to the OSDBU for approval. If applicable, the Form CD 570 will be submitted to the SBA Procurement Center Representative (PCR) for review. The Form CD 570 is required for:

(a) Procurement actions valued above $100,000;

(b) Modifications to existing contracts that add new work valued over $550,000 or that increase the total contract cost to over $550,000;

(c) Consolidation of two or more procurement requirements for goods and services.

Subpart 1319.5—Set-Asides for Small Business

1319.502 Setting aside acquisitions.

1319.502–3 Partial set-asides.

A partial set-aside shall not be made if there is a reasonable expectation that only two capable concerns (one large and one small) will respond with offers unless the set-aside is authorized by the designee set forth in CAM 1301.70.

1319.505 Rejecting Small Business Administration recommendations.

(a) The designee authorized to render a decision on the Small Business Administration's appeal of the contracting officer's decision is set forth in CAM 1301.70.

(b) In response to SBA's appeal to the agency head, the designee authorized

in CAM 1301.70 shall forward justification for their decision to the agency head.

(c) The designee authorized in CAM 1301.70 shall reply to the SBA within 30 working days after receiving the appeal. The decision of the designee shall be final.

Subpart 1319.6—Certificates of Competency and Determination of Responsibility

1319.602 Procedures.

1319.602–1 Referral.

When the contracting officer determines that the successful small business offeror lacks certain elements of responsibility, the contracting officer will withhold award and refer the matter to the cognizant Small Business Administration Government Contracting Area Office. A copy of the referral shall be provided to the Director of the OSDBU.

Subpart 1319.7—The Small Business Subcontracting Program

1319.705 Responsibilities of the contracting officer under the subcontracting assistance program.

1319.705–4 Reviewing the subcontracting plan.

The prime contractor's proposed subcontracting plan shall be reviewed by the contracting officer for adequacy, ensuring that the required information, goals, and assurances are included. The contracting officer may obtain advice and recommendations from the SBA procurement center representative, the contracting activity's small business specialist and the DOC OSDBU. The CO shall give the reviewers sufficient time and information to review the plan and ask questions.

Subpart 1319.8—Contracting With the Small Business Administration (the 8(a) Program)

1319.800 General.

(a) By Partnership Agreement between the Small Business Administration (SBA) and the Department of Commerce, the SBA delegated authority to the Senior Procurement Executive to enter into 8(a) prime contracts and purchase orders. To implement this authority, the Senior Procurement Executive has authorized a class FAR deviation to applicable portions of FAR Subpart 19.8 and FAR Part 52. Under the class deviation, the authority to enter into 8(a) prime contracts and purchase orders is re-delegated to contracting officers.

(b) When awarding 8(a) contracts and purchase orders, contracting officers shall operate in accordance with the terms of the Partnership Agreement and take full advantage of the streamlined procedures in the agreement. Contracting officers shall review the responsibilities and procedures for 8(a) awards as outlined in the Partnership Agreement and work closely with their respective Small Business Specialists and the OSDBU.

(c) The Partnership Agreement contains the procedures for submitting an offer letter to the appropriate SBA office. Contracting officers shall provide a copy of all offering letters to the OSDBU when they are transmitted to SBA.

1319.811 Preparing the contracts.

1319.811–3 Contract clauses.

(a) The contracting officer shall insert the clause 1352.219–70, *Section 8(a) Direct Award (Deviation)*, in direct contracts and purchase orders processed under the Partnership Agreement. The clauses at FAR 52.219–11, Special 8(a) Contract Conditions, 52.219–12, Special 8(a) Subcontract Conditions, and 52.219–17, Section 8(a) Award, *shall not be used*.

(b) The contracting officer shall insert the clause 1352.219–71, *Notification to Delay Performance (Deviation)*, in solicitations and purchase orders issued under the Partnership Agreement.

(c) The contracting officer shall insert the clause 1352.219–72, *Notification of Competition Limited to Eligible 8(a) Concerns, Alternate III (Deviation)*, when the acquisition is processed under the Partnership Agreement.

1319.812 Contract administration.

Awards under the Partnership Agreement are subject to 15 U.S.C. 637(a)(21). These contracts shall contain the clause 1352.219–70, *Section 8(a) Direct Award (Deviation)*, which requires the contractor to notify the SBA and the contracting officer when ownership of the firm is being transferred.

PART 1322—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 1322.1—Basic Labor Policies

Sec.
1322.101 Labor relations.
1322.101–1 General.
1322.101–3 Reporting labor disputes.
1322.101–4 Removal of items from contractor's facilities affected by work stoppages.
1322.103 Overtime.
1322.103–4 Approvals.

Subpart 1322.3—Contract Work Hours and Safety Standards Act

1322.302 Liquidated damages and overtime pay.

Subpart 1322.4—Labor Standards for Contracts Involving Construction

1322.404 Davis-Bacon Act wage determination.
1322.404–6 Modification of wage determination.
1322.406 Administration and enforcement.
1322.406–8 Investigations.

Subpart 1322.6—Walsh-Healey Public Contracts Act

1322.604 Exemptions.
1322.604–2 Regulatory exemptions.

Subpart 1322.8—Equal Employment Opportunity

1322.805 Procedures.
1322.807 Exemptions.

Subpart 1322.10—Service Contract Act of 1965, as Amended

1322.1001 Definitions.

Subpart 1322.13—Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans

1322.1305 Waivers.

Subpart 1322.14—Employment of Workers With Disabilities

1322.1403 Waivers.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1322.1—Basic Labor Policies

1322.101 Labor relations.

1322.101–1 General.

The designee authorized to designate programs or requirements for contractors notifying the Government of actual or potential labor disputes is set forth in CAM 1301.70.

1322.101–3 Reporting labor disputes.

(a) The designee authorized to report any potential or actual labor disputes that may interfere with performing any contracts under its cognizance is designated in CAM 1301.70.

(b) The contracting officer shall seek legal advice and assistance from Procurement Counsel when a potential or actual labor dispute that may interfere with the contract performance occurs.

1322.101–4 Removal of items from contractors' facilities affected by work stoppages.

The contracting officer shall obtain approval from the head of the contracting office and seek legal advice before initiating any action in accordance with FAR 22.101–4.

1322.103 Overtime.

1322.103–4 Approvals.

Approval of use of overtime may be granted by the approving official as set forth in CAM 1301.70.

Subpart 1322.3—Contract Work Hours and Safety Standards Act

1322.302 Liquidated damages and overtime pay.

The designee authorized to find that the administratively determined liquidated damages due under FAR 22.302(a) are incorrect or that the contactor or subcontractor inadvertently violated the Contract Work Hours and

Safety Standards Act is set forth in CAM 1301.70.

Subpart 1322.4—Labor Standards for Contracts Involving Construction

1322.404 Davis-Bacon Act wage determination.

1322.404–6 Modification of wage determination.

The designee authorized to request an extension beyond 90 days after bid opening from the Department of Labor Administrator, Wage and Hour Division is set forth in CAM 1301.70.

1322.406 Administration and enforcement.

1322.406–8 Investigations.

The designee authorized to process a contracting officer's report on labor standards investigations is set forth in CAM 1301.70.

Subpart 1322.6—Walsh-Healey Public Contracts Act

1322.604 Exemptions.

1322.604–2 Regulatory exemptions.

The designee authorized to request that the Secretary of Labor exempt a contract or class of contracts from Walsh-Healey Act stipulations is set forth in CAM 1301.70.

Subpart 1322.8—Equal Employment Opportunity

1322.805 Procedures.

The designee authorized to approve award without pre-award clearance is set forth in CAM 1301.70.

1322.807 Exemptions.

The designee authorized to exempt a contract from all or part of Executive Order 11246 for national security purposes is set forth in CAM 1301.70.

Subpart 1322.10—Service Contract Act of 1965, as Amended

1322.1001 Definitions.

The DOC labor advisor is the Assistant General Counsel for Administration/Employment & Labor Law Division.

Subpart 1322.13—Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans

1322.1305 Waivers.

(a) The designee authorized to waive any requirement in FAR 22.13 if it is determined that the contract is essential to national security is set forth in CAM 1301.70.

(b) The contracting officer must submit requests for waivers to the designee authorized under 1322.1305 (a). The request shall include a justification for the waiver and be available in electronic format.

Subpart 1322.14—Employment of Workers With Disabilities

1322.1403 Waivers.

(a) The designee authorized to waive any or all terms of the clause at FAR 52.222–36 is set forth in CAM 1301.70.

(b) The designee authorized, with the concurrence of the Deputy Assistant Secretary of Labor, to waive any requirement of FAR Subpart 22.14 when it is determined that the contract is essential to the national security, is set forth in CAM 1301.70.

(c) The contracting officer must submit requests for waivers to the designee authorized under 48 CFR 1322.1403 (a) and (b). The request shall include a justification for the waiver and be available in electronic format.

PART 1323—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

Subpart 1323.2—Energy and Water Efficiency and Renewable Energy

Sec.
1323.204 Procurement exemptions.

Subpart 1323.4—Use of Recovered Materials

1323.404 Agency affirmative procurement programs.
1323.404–70 DOC affirmative procurement program.

Subpart 1323.5—Drug-Free Workplace

1323.506 Suspension of payments, termination of contract and debarment and suspension actions.

Subpart 1323.7—Contracting for Environmentally Preferable and Energy-Efficient Products and Services

1323.705 Electronic products environmental assessment tool.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1323.2—Energy and Water Efficiency and Renewable Energy

1323.204 Procurement exemptions.

The designee authorized to exempt the procurement of an ENERGY STAR or Federal Energy Management Program (FEMP)-designated product as described in FAR 23.203 is set forth in CAM 1301.70.

Subpart 1323.4—Use of Recovered Materials

1323.404 Agency affirmative procurement programs.

1323.404–70 DOC affirmative procurement program.

The Department of Commerce's affirmative procurement program is described in CAM 1323.70.

Subpart 1323.5—Drug-Free Workplace

1323.506 Suspension of payments, termination of contract and debarment and suspension actions.

The designee authorized to waive a determination to suspend contract payments, terminate a contract for default, or debar or suspend a contractor for Drug-Free Workplace violations, is set forth in CAM 1301.70. This authority may not be delegated.

Subpart 1323.7—Contracting for Environmentally Preferable and Energy-Efficient Products and Services

1323.705 Electronic products environmental assessment tool.

The procedures for granting exceptions to the requirement in FAR 23.705 are set forth in CAM 1323.70.

PART 1324—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 1324.1—Protection of Individual Privacy

Sec.
1324.103 Procedures.

Subpart 1324.2—Freedom of Information Act

1324.203 Policy.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1324.1—Protection of Individual Privacy

1324.103 Procedures.

DOC rules implementing the Privacy Act of 1974 are described in 15 CFR Part 4.

Subpart 1324.2—Freedom of Information Act

1324.203 Policy.

DOC's implementation of the Freedom of Information Act is described in 15 CFR part 4 and DAO 205–14.

PART 1325—FOREIGN ACQUISITION

Subpart 1325.1—Buy American Act—Supplies

Sec.
1325.103 Exceptions.
1325.105 Determining reasonableness of cost.

Subpart 1325.2—Buy American Act—Construction Materials

1325.204 Evaluating offers of foreign construction material.

Subpart 1325.10—Additional Foreign Acquisition Regulations

1325.1001 Waiver of right to examination of records.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1325.1—Buy American Act—Supplies

1325.103 Exceptions.

(a) The designee authorized to make a determination that domestic preference would be inconsistent with the public interest in a case where the DOC has an agreement with a foreign government providing a blanket exception to the Buy America Act is set forth in CAM 1301.70.

(b)(1) The contracting officer shall submit documentation supporting a nonavailability determination to the DOC's representative to the Civilian Agency Acquisition Council (CAAC). The DOC representative shall forward the documentation to the CAAC for possible removal of the product from the product nonavailablity list at FAR 25.104.

(2) The contracting officer shall submit documentation supporting a determination that nonavailabilty of an article is likely to affect future acquisitions to the DOC's representative to the CAAC for possible addition to the product nonavailability list at FAR 25.104.

1325.105 Determining reasonableness of cost.

The designee authorized to make a written determination that the use of higher evaluation factors than those in FAR 25.105(b) is appropriate is set forth in CAM 1301.70.

Subpart 1325.2—Buy American Act—Construction Materials

1325.204 Evaluating offers of foreign construction material.

The designee authorized to specify a percentage higher than the 6 percent that the contracting officer must add to the cost of any foreign construction material proposed for exception from the requirements of the Buy America Act is set forth in CAM 1301.70.

Subpart 1325.10—Additional Foreign Acquisition Regulations

1325.1001 Waiver of right to examination of records.

The designee authorized to execute a determination and findings in accordance with FAR 25.1001(a)(2)(iii) set forth in CAM 1301.70.

PART 1326—OTHER SOCIOECONOMIC PROGRAMS

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1326.2—Disaster or Emergency Assistance Activities

1326.203 Transition of work.

The designee authorized to determine that transitioning response, relief, and/or reconstruction activity to a local firm, or firms, is not feasible or practicable as set forth in CAM 1301.70.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 1327—PATENTS, DATA, AND COPYRIGHTS

Subpart 1327.2—Patents and Copyrights

Sec.
1327.201 Patent and copyright infringement liability.
1327.201–2 Contract clauses.

Subpart 1327.3—Patent Rights Under Government Contracts

1327.303 Contract clauses.
1327.304 Procedures.
1327.304–4 Appeals.
1327.305 Administration of patent rights clauses.
1327.305–2 Administration by the Government.

Subpart 1327.4—Rights in Data and Copyrights

1327.404 Basic rights in data clause.
1327.404–4 Contractor's release, publication, and use of data.
1327.404–5 Unauthorized, omitted, or incorrect markings.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1327.2—Patents and Copyrights

1327.201 Patent and copyright infringement liability.

1327.201–2 Contract clauses.

The designee authorized to approve the insertion of clause 52.227–5, *Waiver of Indemnity*, in solicitations and contracts is set forth in CAM 1301.70.

Subpart 1327.3—Patent Rights Under Government Contracts

1327.303 Contract clauses.

(a) The designee authorized to determine, 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 is set forth in CAM 1301.70.

(b) The designee authorized to determine 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 is set forth in CAM 1301.70.

(c) The designee authorized to determine, 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 is set forth in CAM 1301.70.

1327.304 Procedures.

1327.304–4 Appeals.

The designee authorized to provide the contractor with a written statement of the basis for taking the actions described in FAR 27.304–5(a) is set forth in CAM 1301.70.

1327.305 Administration of patent rights clauses.

1327.305–2 Administration by the Government.

The contracting officer shall promptly furnish all invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information relating to patent rights clauses to the DOC Patent Attorney.

Subpart 1327.4—Rights in Data and Copyrights

1327.404 Basic rights in data clause.

1327.404–4 Contractor's release, publication, and use of data.

(a) Insert clause 1352.227–70, *Rights in Data, Assignment of Copyright*, in all solicitations and contracts if FAR Clause 52.227–17 has been used in the solicitation or contract and the contracting officer wants the contractor to assign copyright to the Government.

(b) In appropriate cases, the contracting officer may 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.

1327.404–5 Unauthorized, omitted, or incorrect markings.

The designee authorized to concur with the contracting officer's determination that markings are not authorized is set forth in CAM 1301.70.

PART 1328—BONDS AND INSURANCE

Subpart 1328.1—Bonds and Other Financial Protections

Sec.
1328.101 Bid guarantees.
1328.101–1 Policy on use.
1328.102 Waiver of performance and payment bonds for contracts involving the construction, alteration, and repair of NOAA's fleet of vessels.
1328.102–1 Waiver policy.
1328.102–2 Waiver authority.
1328.102–3 Contract clause.
1328.105 Other types of bonds.
1328.106 Administration.
1328.106–2 Substitution of surety bonds.
1328.106–6 Furnishing information.

Subpart 1328.2—Sureties and Other Security for Bonds

1328.203 Acceptability of individual sureties.
1328.203–7 Exclusion of individual sureties.

Subpart 1328.3—Insurance

1328.305 Overseas workers' compensation and war-hazard insurance.
1328.310 Contract clause for work on a Government installation.
1328.310–70 Solicitation provisions and contract clauses.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1328.1—Bonds and Other Financial Protections

1328.101 Bid guarantees.

1328.101–1 Policy on use.

The designee authorized to make a class waiver for the requirement to obtain a bid guarantee when a performance bond or a performance and payment bond is required is set forth in CAM 1301.70.

1328.102 Waiver of performance and payment bonds for contracts involving the construction, alteration, and repair of NOAA's fleet of vessels.

1328.102–1 Waiver policy.

(a) Pursuant to the authority vested in the Secretary of Commerce, the requirements of 40 U.S.C. 3131 through 3133 may be waived by virtue of the authority vested in him or her pursuant to the Consolidated and Further Continuing Appropriations Act, 2015, Public Law 113–235, 128 Stat. 2130, Div. B, Title I, Sec. 111 (2014), with respect to contracts for the repair, alteration, and construction of NOAA's hydrographic survey, oceanographic research, and fisheries survey vessels operated by NOAA Office of Marine and Aviation Operations in the Atlantic and Pacific regions including the Pacific Islands. The Department's policy and procedures for use of the waiver authority is set forth in CAM 1328.102.

(b) Contracting officers are required to consider any unusual circumstances that may arise in which either payment or performance bonds, or both, will be advantageous to the Government in connection with these contracts prior to issuing solicitations.

[80 FR 27267, May 13, 2015]

1328.102–2 Waiver authority.

The designee authorized to approve bond waivers is set forth in CAM 1328.102.

[80 FR 27267, May 13, 2015]

1328.102–3 Contract clause.

The contracting officer shall insert the clause at 1352.228–77, *Contractor Assurance of Subcontractor Payments*, in solicitations and contracts when performance and payment bonds are waived.

[80 FR 27267, May 13, 2015]

1328.105 Other types of bonds.

The designee authorized to approve using other types of bonds in connection with acquiring particular supplies or services is set forth in CAM 1301.70.

1328.106 Administration.

1328.106–2 Substitution of surety bonds.

The designee authorized to approve substituting a new surety bond for the previously approved original bond is set forth in CAM 1301.70.

1328.106–6 Furnishing information.

When a payment bond has been provided for a contract, the designee authorized to furnish a certified copy of the bond and the contract to any person who makes a proper request is set forth in CAM 1301.70.

Subpart 1328.2—Sureties and Other Security for Bonds

1328.203 Acceptability of individual sureties.

(a) Contracting officers shall obtain the opinion of the Procurement Counsel as to the adequacy of the documents pledging the assets of an individual surety prior to accepting bid guarantee and payment and performance bonds.

(b) Evidence of possible criminal or fraudulent activities by an individual surety shall be referred to the DOC Office of Inspector General. Policies and procedures for the initiation and conduct of investigations by the Office of Inspector General are prescribed in DAO 207–10, *Inspector General Investigations*.

1328.203–7 Exclusion of individual sureties.

The designee authorized to exclude an individual from acting as a surety on bonds submitted by offerors on procurements by the executive branch of the Federal Government is set forth in CAM 1301.70.

Subpart 1328.3—Insurance

1328.305 Overseas workers' compensation and war-hazard insurance.

The designee authorized to recommend a waiver to the Secretary of Labor is set forth in CAM 1301.70.

1328.310 Contract clause for work on a Government installation.

1328.310–70 Solicitation provisions and contract clauses.

(a) Insert clause 1352.228–70, *Insurance Coverage*, in all contracts when:

(1) Government property is involved;

(2) The contract amount is expected to be over the simplified acquisition threshold, and

(3) The contract will require work on a Government installation

(b)(1) The clause is not required in fixed-price solicitations and contracts if:

(i) Only a small amount of work is required on the Government installation (*e.g.*, a few brief visits per month); or

(ii) All the work on the Government installation is to be performed outside the United States, its possessions and Puerto Rico.

(2) The contracting officer may increase the dollar limits established in the clause when it is determined to be in the best interest of the Government. Prior to increasing the dollar limits the contracting officer shall seek the advice of Procurement Counsel.

(c) Insert clause 1352.228–71, *Deductibles Under Required Insurance Coverage—Cost-Reimbursement*, in all cost-reimbursement contracts when the clause at 1352.228–70, *Insurance Coverage*, is used.

(d) Insert clause 1352.228–72, *Deductibles Under Required Insurance Coverage—Fixed Price*, in all fixed-price contracts when the clause at 1352.228–70, *Insurance Coverage*, is used.

(e) Insert clauses 1352.228–73 through 1352.228–75, unless otherwise indicated by the specific instructions for their use below, in any contract for the lease of aircraft.

(f) Insert clause 1252.228–73, *Loss of or Damage to Leased Aircraft*, in any contract for the lease of aircraft, except in the following circumstances:

(1) When the hourly rental rate does not exceed $250 and the total rental cost for any single transaction is not in excess of $2,500:

(2) When the cost of hull insurance does not exceed 10 percent of the contract rate; or

(3) When the lessor's insurer does not grant a credit for uninsured hours, thereby preventing the lessor from granting the same to the Government.

(g) Insert clause 1352.228–74, *Fair Market Value of Aircraft*, in all aircraft lease/rentals.

(h) The contracting officer shall insert the clause at 1352.228–75, *Risk and Indemnities*, in any contract for the lease of aircraft when the Government will have exclusive use of the aircraft for a period of less than thirty days.

(i) Insert clause 1352.228–76, *Approval of Group Insurance Plans*, in all cost reimbursable contracts.

(j) The contractor shall submit the plan to the CO for approval under cost-reimbursement contracts, before buying insurance under a group insurance plan. Any change in benefits provided under an approved plan that can reasonably be expected to increase significantly the cost to the Government shall require similar approval.

PART 1329—TAXES

Subpart 1329.1—General

Sec.
1329.101 Resolving tax problems.

Subpart 1329.2—Federal Excise Taxes

1329.203 Other Federal tax exemptions.
1329.203–70 DOC Federal tax exemption.

Subpart 1329.3—State and Local Taxes

1329.303 Application of State and local taxes to government contractors and subcontractors.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1329.1—General

1329.101 Resolving tax problems.

Legal questions relating to tax issues should be referred to the Procurement Counsel.

Subpart 1329.2—Federal Excise Taxes

1329.203 Other Federal tax exemptions.

1329.203–70 DOC Federal tax exemption.

(a) The Office of Acquisition Management has obtained a permit from the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives enabling DOC and its contractors to purchase spirits (*e.g.*, specially denatured spirits) tax-free for non-beverage Government use.

(b) When purchasing spirits for non-beverage use by DOC personnel, the contracting officer shall attach a copy of the permit to the contract. Upon receipt of the spirits, the contractor shall return the permit to the contracting officer unless future orders are anticipated.

Subpart 1329.3—State and Local Taxes

1329.303 Application of State and local taxes to government contractors and subcontractors.

The designee authorized to review a proposed designation of a contractor as an agent of the Government is set forth in CAM 1301.70.

PART 1330—COST ACCOUNTING STANDARDS ADMINISTRATION

Subpart 1330.2—CAS Program Requirements

Sec.
1330.201 Contract requirements.
1330.201–5 Waiver.
1330.202 Disclosure requirements.
1330.202–2 Impracticality of submission.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1330.2—CAS Program Requirements

1330.201 Contract requirements.

1330.201–5 Waiver.

The designee authorized to waive the applicability of Cost Accounting

Standards for a particular contract or subcontract is set forth in CAM 1301.70.

1330.202 Disclosure requirements.

1330.202–2 Impracticality of submission.

The DOC Head of Agency for Procurement is authorized to determine that it is impractical to secure a Disclosure Statement, although submission is required, and to authorize contract award without obtaining the Statement.

PART 1331—CONTRACT COST PRINCIPLES AND PROCEDURES

Subpart 1331.1—Applicability

Sec.
1331.101 Objectives.

Subpart 1331.2—Contracts With Commercial Organizations

1331.205 Selected costs.
1331.205–6 Compensation for personal services.
1331.205–32 Precontract costs.
1331.205–70 Duplication of effort.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1331.1—Applicability

1331.101 Objectives.

The designee authorized to approve individual deviations concerning cost principles is set forth in CAM 1301.70.

Subpart 1331.2—Contracts With Commercial Organizations

1331.205 Selected costs.

1331.205–6 Compensation for personal services.

The designee authorized to waive cost allowability limitations under certain circumstances regarding compensation of foreign nationals is set forth in CAM 1301.70.

1331.205–32 Precontract costs.

If precontract costs are anticipated, pursuant to negotiations and in anticipation of contract award, insert clause 1352.231–70 *Precontract Costs*, in the contract.

1331.205–70 Duplication of effort.

The Department will not pay any costs for work that is duplicative of costs charged against any other contract, subcontract or Government source. Insert clause 1352.231–71, *Duplication of Effort*, in all cost-reimbursement, time and materials, and labor hour solicitations and contracts when applicable.

PART 1332—CONTRACT FINANCING

Sec.
1332.003 Simplified acquisition procedures financing.
1332.006 Reduction or suspension of contract payments upon finding of fraud.
1332.006–1 General.
1332.006–3 Responsibilities.
1332.006–4 Procedures.
1332.006–5 Reporting.

Subpart 1332.1—Non-Commercial Item Purchase Financing

1332.114 Unusual contract financing.

Subpart 1332.2—Commercial Item Purchase Financing

1332.201 Statutory authority.
1332.202 General.
1332.202–1 Policy.

Subpart 1332.4—Advance Payments for Non-Commercial Items

1332.402 General.
1332.404 Exclusions.
1332.407 Interest.

Subpart 1332.5—Progress Payments Based on Costs

1332.501 General.
1332.501–2 Unusual progress payments.

Subpart 1332.7—Contract funding

1332.702 Policy.
1332.702–70 Forms.

Subpart 1332.8—Assignment of claims

1332.802 Conditions.

Subpart 1332.9—Prompt Payment

1332.903 Responsibilities.
1332.906 Making payments.

Subpart 1332.11—Electronic Funds Transfer

1332.1108 Payment by Governmentwide commercial purchase card.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

1332.003 Simplified acquisition procedures financing.

Contract financing may be provided for purchases made under the authority of FAR Part 13. Contract financing shall be made in accordance with FAR Part 32.

1332.006 Reduction or suspension of contract payments under finding of fraud.

1332.006–1 General.

The designee authorized to exercise the responsibility to reduce or suspend contract payments is set forth in CAM 1301.70.

1332.006–3 Responsibilities.

DOC personnel shall immediately report to the Office of Inspector General any apparent or suspected instances where a contractor's request for advance, partial or progress payments is based on fraud in accordance with DAO 207–10, *Inspector General Investigations*.

1332.006–4 Procedures.

(a) The Agency Head as described under 1332.006–4 is set forth in CAM 1301.70.

(b) The Office of Inspector General shall perform the function of the Remedy Coordination Official.

1332.006–5 Reporting.

In accordance with 41 U.S.C. 255, the head of an agency shall prepare a report for each fiscal year in which a recommendation has been received pursuant to FAR 32.006–4(a).

Subpart 1332.1—Non-Commercial Item Purchase Financing

1332.114 Unusual contract financing.

The designee authorized to approve unusual contract financing arrangements is set forth in CAM 1301.70.

Subpart 1332.2—Commercial Item Purchase Financing

1332.201 Statutory authority.

Payment for commercial items may be made under such terms and conditions as the designee authorized in CAM 1301.70 determines are appropriate or customary in the commercial marketplace and are in the best interest of the United States.

1332.202 General.

1332.202–1 Policy.

The designee authorized to approve unusual contract financing is set forth in CAM 1301.70.

Subpart 1332.4—Advance Payments for Non-Commercial Items

1332.402 General.

(a) Advanced payment may be authorized for contracts, other than those at FAR 32.403(a) and (b), only if other types of financing are not reasonably available to the contractor in adequate amounts.

(b) The designee authorized to determine when advance payment is in the public interest or facilitates national defense is set forth in CAM 1301.70.

1332.404 Exclusions.

Advance payments may be authorized for items listed in FAR 32.404(a).

1332.407 Interest.

The designee authorized to approve advance payment without interest is as set forth in CAM 1301.70.

Subpart 1332.5—Progress Payments Based on Costs

1332.501 General.

1332.501–2 Unusual progress payments.

The designee authorized to approve a contractor's request for unusual progress payments is set forth in CAM 1301.70.

Subpart 1332.7—Contract Funding

1332.702 Policy.

Contracting officers shall obtain assurances of available funds only from properly authorized designated certifying officers in accordance with Part 4, Section 1110 of the Treasury Financial Manual.

1332.702–70 Forms.

Contracting officers must obtain an electronic or hardcopy procurement request form on which the availability of adequate funds have been certified by a designated certifying officer. This form must have the name of the certifying official and the certified available funds, as well as the technical and other specifications of the request, administrative approvals, clearances, and information for processing payment.

Subpart 1332.8—Assignment of Claims

1332.802 Conditions.

The designee authorized to receive the written notice of assignment is set forth in CAM 1301.70.

Subpart 1332.9—Prompt Payment

1332.903 Responsibilities.

The designee authorized to establish Prompt Payment policies and procedures is set forth in CAM 1301.70.

1332.906 Making payments.

The designee authorized to allow invoice payments earlier than 7 days prior to the due date as specified in the contract is set forth in CAM 1301.70.

Subpart 1332.11—Electronic Funds Transfer

1332.1108 Payment by Governmentwide commercial purchase card.

Use of the Governmentwide commercial purchase card is subject to the requirements of the FAR, other internal Departmental policies, as well as operating unit policies and procedures related to the purchase card. All purchases made with the purchase card must comply with all procedures and documentation requirements that apply to the procurement action.

PART 1333—PROTESTS, DISPUTES, AND APPEALS

Subpart 1333.1—Protests

Sec.
1333.101 Definitions.
1333.102 General.
1333.103 Protests to the agency.
1333.104 Protests to GAO.
1333.104–70 Protests to GAO and Court of Federal Claims.

Subpart 1333.2—Disputes and Appeals

1333.203 Applicability.
1333.206 Initiation of a claim.
1333.211 Contracting officer's decision.
1333.212 Contracting officer's duties upon appeals.
1333.215 Contract clauses.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1333.1—Protests

1333.101 Definitions.

Protest Decision Authority means agency officials above the level of the contracting officer who have been designated by the Procurement Executive to issue agency protest decisions under Executive Order 12979.

1333.102 General.

(a) Contracting officers shall promptly notify the Procurement Counsel, and seek legal advice upon receiving notice that a protest has been filed in any forum.

(b) The designee authorized to determine that a solicitation, proposed award, or award under protest does not comply with the requirements of law or regulation, and to take the actions specified at FAR 33.102 (b) is set forth in CAM 1301.70. Corrective action shall only be taken after consultation with Procurement Counsel.

1333.103 Protests to the agency.

(a) Insert provision 1352.233–70, *Agency Protests*, in all DOC solicitations, except these issued by the U.S. Patent and Trademark Office.

(b) All agency protest decisions shall be reviewed by Procurement Counsel before submission to the protester.

1333.104 Protests to GAO.

1333.104–70 Protests to GAO and Court of Federal Claims.

(a) Insert clause 1352.233–71, *GAO and Court of Federal Claims Protests,* in all DOC solicitations, except those for the U.S. Patent and Trademark Office.

(b) Only Procurement Counsel shall communicate with the Government Accountability Office (GAO), the Court of Federal Claims and the Department of Justice regarding applicable protests. Procurement Counsel shall be responsible for preparation and submission of the agency report to the GAO and litigation reports to the Department of Justice.

(c) The designee authorized to authorize, on a nondelegable basis, the award of a contract when the agency has received notice from the GAO of a preaward protest filed directly with the GAO is set forth in CAM 1301.70.

(d) The designee authorized to authorize, on a nondelegable basis, contract performance notwithstanding protest after award is set forth in CAM 1301.70.

(e) The designee authorized to report and explain the reasons why the agency has not fully implement GAO recommendations with respect to a protest is set forth in CAM 1301.70.

Subpart 1333.2—Disputes and Appeals

1333.203 Applicability.

The designee authorized to determine that the application of the Contract Disputes Act of 1978 to a contract with an international organization or a subsidiary body of that organization would not be in the public interest is set forth in CAM 1301.70.

1333.206 Initiation of a claim.

Contracting officers shall promptly notify Procurement Counsel and seek legal advice upon receiving a contractor claim.

1333.211 Contracting officer's decision.

All contracting officer decisions on claims shall be reviewed by Procurement Counsel before submission to the contractor.

1333.212 Contracting officer's duties upon appeals.

Only Procurement Counsel will communicate with the Civilian Board of Contract Appeals or the Department of Justice regarding appeals of contracting officer decisions. Procurement Counsel shall be responsible for preparation and submission of all filings with the Board.

1333.215 Contract clauses.

Alternate I of FAR 52.233–1, *Disputes*, may be used at the discretion of the contracting officer.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 1334—MAJOR SYSTEM ACQUISITION

Subpart 1334.0—General

Sec.
1334.003 Responsibilities.
1334.005 General requirements.
1334.005–6 Full production.

Subpart 1334.2—Earned Value Management System

1334.201 Policy.
1334.201–70 Policy.
1334.202 Integrated baseline reviews.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1334.0—General

1334.003 Responsibilities.

(a) The designee authorized to carry out the responsibilities described under FAR 34.003 is set forth in CAM 1301.70.

(b) Agency procedures related to major system acquisitions are set forth in DAO 208–3.

1334.005 General requirements.

1334.005–6 Full production.

The designee authorized to reaffirm mission need and program objectives and grant approval to proceed with the award of a contract for full production of a successfully tested major system is set forth in CAM 1301.70.

Subpart 1334.2—Earned Value Management System

1334.201 Policy.

1334.201–70 Policy.

(a) In accordance with the Department's Information Technology Investment Performance Measurement and Performance Reporting Policy, the use of an Earned Value Management System (EVMS) is required for major acquisitions for information technology development in which the development/modernization/enhancement costs are anticipated to equal or exceed $25 million over the life of the acquisition. The Chief Information Officer may require EVMS on other acquisitions if the project merits special attention due to sensitivity, mission criticality, or risk potential.

(b) If a project manager considers the use of an EVMS to be necessary for a major acquisition that does not meet the $25 million threshold, the project manager should conduct a cost/benefit analysis and consult with the OCIO on the advisability of requiring an EVMS.

(c) Project managers, contracting officers, and contracting officer representatives responsible for major acquisitions requiring an EVMS must successfully complete an Earned Value Management course that meets the requirements of the OCIO.

(d) The use of firm-fixed-price type contracts, subcontracts and other agreements are generally not suited to developmental efforts and the use of an EVMS is of limited utility under such arrangements. In the rare cases where a fixed-price type contract is contemplated for a developmental effort, the project manager and contracting officer must consult with the OCIO for guidance to determine whether an EVMS will be required.

(e) The use of an EVMS is generally discouraged for contracts, subcontracts, and other agreements where the period of performance is less than 12 months in duration. Additionally, application of an EVMS to work efforts that are not discrete in nature should be considered on a case-by-case basis.

(f) In cases where the nature of the work does not lend itself to the meaningful use of an EVMS, the OCIO may waive the EVMS requirement if appropriate.

1334.202 Integrated baseline reviews.

An Integrated Baseline Review shall be conducted when an Earned Value Management System is required.

PART 1335—RESEARCH AND DEVELOPMENT CONTRACTING

Sec.
1335.001 Definitions.

1335.006 Contracting methods and contract type.
1335.014 Government property and title.
1335.016 Broad agency announcement.
1335.016–70 DOC procedures for the use of broad agency announcements.
1335.017 Federally funded research and development centers.
1335.017–2 Establishing or changing an FFRDC.
1335.017–4 Reviewing FFRDCs

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

1335.001 Definitions.

Human subject means a living individual about whom an investigator (whether professional or student) conducting research obtains:

(1) Data through intervention or interaction with the individual, or

(2) Identifiable private information.

Intervention includes both physical procedures by which data are gathered (for example, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes. Interaction includes communication or interpersonal contact between investigator and subject. ''Private information'' includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a medical record). Private information must be individually identifiable (*i.e.*, the identity of the subject is or may readily be ascertained by the investigator or associated with the information) in order for obtaining the information to constitute research involving human subjects.

Research means a systematic investigation, including research, development, testing and evaluation, designed to develop or contribute to generalizable knowledge. Activities which meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program which is considered research for other purposes. For example, some demonstration and service programs may include research activities.

1335.006 Contracting methods and contract type.

(a) Insert provision 1352.235–70, *Protection of Human Subjects*, in all solicitations where research services under the contract might involve the use of human subjects. The provision is mandatory where human subjects may be used in performance of the award and may not be modified without consultation with Program Counsel.

(b) Insert clause 1352.235–71, *Protection of Human Subjects—Exemption*, in all contracts where the agency has determined based on documentation submitted by the offeror in response to provision 1352.235–70, *Protection of Human Subjects*, that the research involving human subjects is exempt from the requirements of 15 CFR part 27 and does not require Institutional Review Board (IRB) review. The provision is mandatory where an appropriate agency official has determined that the research involving human subjects to be carried out in performance of the award is exempt from 15 CFR part 27, and may not be modified without consultation with Program Counsel.

(c) Insert clause 1352.235–72, *Protection of Human Subjects—Institutional Approval*, in all contracts where the agency has determined based on documentation submitted by the offeror in response to provision 1352.235–70, *Protection of Human Subjects*, that the research involving human subjects is not exempt from the requirements of 15 CFR part 27 and requires review by a cognizant Institutional Review Board (IRB). The provision is mandatory where an appropriate Agency official has determined that the research involving human subjects to be carried out in performance of the award is not exempt from 15 CFR part 27 and requires review by a cognizant IRB, and may not be modified without consultation with Program Counsel.

(d) Insert clause 1352.235–73, *Protection of Human Subjects—After Initial Contract Award*, in all contracts where at the time of award no research involving human subjects is anticipated, but where decisions made in the course of the research may necessitate the addition of research involving human subjects to the work performed. The provision is mandatory where it is possible

that the use of human subjects may be required in performance of the award but is not anticipated at the time of award, and may not be modified without consultation with Program Counsel.

1335.014 Government property and title.

The designee authorized to determine that the policies in FAR 35.014(b)(1)–(4) will not apply regarding title to equipment purchased by nonprofit institutions of higher learning and nonprofit organizations whose primary purpose is the conduct of scientific research is set forth in CAM 1301.70.

1335.016 Broad agency announcement.

1335.016–70 DOC procedures for the use of broad agency announcements.

Procedures for the use of broad agency announcements within the Department of Commerce are set forth in CAM 1335.016.

1335.017 Federal funded research and development centers.

1335.017–2 Establishing or changing an FFRDC.

The designee authorized to approve the establishment of an FFRDC, or change its basic purpose and mission, is set forth in CAM 1301.70.

1335.017–4 Reviewing FFRDCs.

The designee authorized to approve the continuation or termination of the sponsorship of an FFRDC is set forth in CAM 1301.70.

PART 1336—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 1336.2—Special Aspects of Contract for Construction

Sec.

1336.203 Government estimate of construction costs.
1336.270 Special requirements for ship construction.

Subpart 1336.6—Architect-Engineer Services

1336.602 Selection of firms for architect-engineer contracts.
1336.602–2 Evaluation boards.
1336.602–4 Selection authority.
1336.602–5 Short selection process for contracts not to exceed the simplified acquisition threshold.
1336.605 Government cost estimate for architect-engineer work.
1336.609 Contract clauses.
1336.609–1 Design within funding limitations.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1336.2—Special Aspects of Contracting for Construction

1336.203 Government estimate of construction costs.

After award, the independent Government estimated price can be released, upon request, to those firms or individuals who submitted proposals.

1336.270 Special requirements for ship construction

See 48 CFR 1371 for special requirements for acquisition involving ship construction and ship repair.

Subpart 1336.6—Architect-Engineer Services

1336.602 Selection of firms for architect-engineer contracts.

1336.602–2 Evaluation boards.

Permanent and *ad hoc* architect-engineer evaluation boards may include preselection boards. When necessary, members of permanent, *ad hoc*, and preselection boards may be appointed from private practitioners of architecture, engineering, or related professions. Private practitioners may be appointed as deemed necessary by the BPO or higher agency official. The permanent and ad hoc evaluation boards should be comprised of at least a majority of government personnel.

1336.602–4 Selection authority.

Each contracting office shall designate the selection authority based on the complexity of each procurement.

1336.602–5 Short selection process for contracts not to exceed the simplified acquisition threshold.

(a) In contracts not expected to exceed the simplified acquisition threshold, either or both of the short selection processes set out at FAR 36.602–5 may be used.

(b) Each contracting office shall designate the selection authority based on the complexity of each procurement. The selection authority shall review the selection report and approve it or return it to the chairperson for appropriate revision.

1336.605 Government cost estimate for architect-engineer work.

After award, the independent Government estimated price can be released, upon request, to those firms or individuals who submitted proposals.

1336.609 Contract clauses.

1336.609–1 Design within funding limitations.

The designee authorized to make the determination described at FAR 36.609–1(c)(1) to enable exclusion of the clause at FAR 52.236–22 from the contract is set forth in CAM 1301.70.

PART 1337—SERVICE CONTRACTING

Subpart 1337.1—Service Contracts—General

Sec.

1337.110 Solicitation provisions and contract clauses.
1337.110–70 Personnel security processing requirements.
1337.110–71 Additional DOC clauses related to service contracting.

Subpart 1337.2—Advisory and Assistance Services

1337.204 Guidelines for determining availability of personnel.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1337.1—Service Contracts—General

1337.110 Solicitation provisions and contract clauses.

1337.110–70 Personnel security processing requirements.

(a) CAM 1337.70 establishes procedures for personnel security processing for contractors performing services on or within a Department of Commerce facility or through an information technology (IT) system, as required by the Department of Commerce *Security Manual* and Department of Commerce *Security Program Policy and Minimum Implementation Standards*.

(b) Insert clause 1352.237–70, *Security Processing Requirements—High or Moderate Risk Contracts*, in all service contracts designated as High or Moderate risk that will be performed on a DOC facility or when the contractor will access a DOC IT system.

(c) Insert clause 1352.237–71, *Security Processing Requirements—Low Risk Contracts*, in all service contracts designated as Low Risk that will be performed on or within a Department of Commerce facility or when the contractor will access a DOC IT system.

(d) Insert clause 1352.237–72, *Security Processing Requirements—National Security Contracts*, in all service contracts designated as National Security Contracts that will be performed on or within a Department of Commerce facility or when the contractor will access a DOC IT system.

(e) Insert clause 1352.237–73, *Foreign National Visitor and Guest Access to Departmental Resources*, in all DOC solicitations and contracts for services where foreign national access to any DOC facility or DOC IT system is required. The language of the clause may only be modified by adding more restrictive agency or operating unit counsel-specific guidance.

1337.110–71 Additional DOC clauses related to service contracting.

(a) Insert a clause substantially similar to 1352.237–74, *Progress Reports*, where progress reports are required in order to make periodic payments based upon contract progress made, or if the

contracting officer otherwise determines that progress reports are needed.

(b) Insert a clause substantially similar to 1352.237–75, *Key Personnel*, when contract performance requires identification of contractor key personnel.

Subpart 1337.2—Advisory and Assistance Services

1337.204 Guidelines for determining availability of personnel.

The designee authorized to make the determinations described under FAR 37.204 is set forth in CAM 1301.70.

PART 1339—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 1339.1—General

Sec.
1339.107 Contract clauses.
1339.107–70 Information security.

Subpart 1339.2—Electronic and Information Technology

1339.270 Solicitation provisions and contract clauses.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1339.1—General

1339.107 Contract clauses.

Insert clause 1352.239–70, *Software License Addendum*, in all contracts when the primary purpose is to purchase new software licenses or renew existing licenses.

1339.107–70 Information security.

(a) For all service acquisitions over the micro-purchase threshold, contracting professionals shall coordinate with the designated Contracting Officer Representative (COR) to complete the *Information Security in Acquisition Checklist*.

(b) When the *Information Security in Acquisition Checklist* indicates that Clause 1352.239–73, *Security Requirements for Information Technology Resources*, is needed, contracting officers shall insert the clause in the solicitation and contracts. If the checklist indicates that the Certification and Accreditation requirement in Clause 1352.239–73 is not required, the contracting officer shall include the statement ''*The Certification and Accreditation (C&A) requirements of Clause 1352.239–73 do not apply, and a Security Accreditation Package is not required*'' in the statement of work.

(c) Contracting professionals shall insert the appropriate risk designation clause from CAM 1337.70 into DOC solicitations and contracts for services depending upon the level of contractor access privileges to DOC IT systems. In addition, contracting professionals shall document the official contract file to include the rationale for the designated risk level.

Subpart 1339.2—Electronic and Information Technology

1339.270 Solicitation provisions and contract clauses.

(a) Insert provision substantially similar to 1352.239–71, *Electronic and Information Technology*, in solicitations for Electronic and Information (EIT) to which it applies.

(b) Insert clause 1352.239–72, *Security Requirements for Information Technology Resources*, in all DOC solicitations and contracts for Information Technology services. The clause language may only be modified by adding more restrictive agency- or operating unit counsel -specific guidance

PART 1341—ACQUISITION OF UTILITY SERVICES

Subpart 1341.2—Acquiring Utility Services

Sec.
1341.201 Policy.
1341.202 Procedures.
1341.204 GSA areawide contracts.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1341.2—Acquiring Utility Services

1341.201 Policy.

The designee authorized to enter into a contract pursuant to 42 U.S.C. 8287

(regarding shared energy savings, including cogeneration) is set forth in CAM 1301.70.

1341.202 Procedures.

The designee authorized to approve a determination that a written contract cannot be obtained from a utility supplier refusing to execute a tendered contract, and that the issuance of a purchase order is not feasible, is set forth in CAM 1301.70.

1341.204 GSA areawide Contracts.

The designee authorized to determine that the use of an areawide contract is not advantageous to the Government is set forth in CAM 1301.70.

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 1342—CONTRACT ADMINISTRATION

Subpart 1342.1—Contract Audit Services

Sec.
1342.102 Assignment of contract audit services.
1342.102–70 Interagency contract administration and audit services.

Subpart 1342.2—Contract Administration Services

1342.202 Assignment of contract administration.

Subpart 1342.5—Postaward Orientation

1342.503 Postaward conferences.
1342.503–70 Notice of postaward conference.

Subpart 1342.6—Corporate Administrative Contracting Officer

1342.602 Assignment and location.

Subpart 1342.7—Indirect Cost Rates

1342.703 General.
1342.703–2 Certificate of indirect costs.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1342.1—Contract Audit Services

1342.102 Assignment of contract audit services.

1342.102–70 Interagency contract administration and audit services.

(a) Generally, the final invoice shall not be approved until a close-out audit has been performed and all outstanding issues have been negotiated or resolved on the following types of contracts valued at $500,000 and above:

(1) Cost-reimbursement type contracts;

(2) The cost-reimbursement portion of fixed-price contracts;

(3) Letter contracts which provide for reimbursement of costs;

(4) Time-and-materials contracts; and

(5) Labor-hour contracts.

(b) If a close-out audit is not required, an audit may be requested regardless of the contract value when the contracting officer determines that an audit is justified under one of the following circumstances:

(1) There is some evidence of fraud or waste;

(2) The contractor's performance under the contract has been questionable;

(3) The contractor had a high incidence of unallowable costs under a previous contract;

(4) The contract is with a newly-established firm, or a firm that has just begun dealing with the Government.

Subpart 1342.2—Contract Administration Services

1342.202 Assignment of contract administration.

The designee authorized to approve delegations of CAO functions not listed in FAR 42.302 is set forth in CAM 1301.70.

Subpart 1342.5—Postaward Orientation

1342.503 Postaward conferences.

1342.503–70 Notice of postaward conference.

Insert a provision similar to 1352.242–70, *Postaward Conference*, in solicitations when the contracting officer determines that a postaward conference is needed.

Subpart 1342.6—Corporate Administrative Contracting Officer

1342.602 Assignment and location.

The designee authorized to approve the need for a corporate administrative contracting officer is set forth in CAM 1301.70.

Subpart 1342.7—Indirect Cost Rates

1342.703 General.

1342.703–2 Certificate of indirect costs.

The designee authorized to waive the requirement for contractor certification of proposed final indirect cost rates is set forth in CAM 1301.70.

PART 1344—SUBCONTRACTING POLICIES AND PROCEDURES

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1344.3—Contractors' Purchasing Systems Reviews

1344.302 Requirements.

The designee authorized to lower or raise the $25 million sales threshold for performing a review to determine if a contractor purchasing system review is needed is set forth in CAM 1301.70.

PART 1345—GOVERNMENT PROPERTY

Subpart 1345.1—General

Sec.
1345.107 Contract clauses.
1345.107–70 Government furnished property.

Subpart 1345.6—Reporting, Reutilization, and Disposal

1345.604 Disposal of surplus property.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1345.1—General

1345.107 Contract clauses.

1345.107–70 Government furnished property.

Insert clause 1352.245–70, *Government Furnished Property*, when Government property is to be furnished to the contractor and the contractor will be accountable for, and have stewardship of, the property.

Subpart 1345.6—Reporting, Reutilization, and Disposal

1345.604 Disposal of surplus property.

Surplus property shall be disposed of in accordance with procedures outlined in the DOC Personal Property Management Manual.

PART 1346—QUALITY ASSURANCE

Subpart 1346.4—Government Contract Quality Assurance

Sec.
1346.401 General.

Subpart 1346.5—Acceptance

1346.503 Place of acceptance.

Subpart 1346.6—Material Inspection and Receiving Reports

1346.601 General.

Subpart 1346.7—Warranties

1346.704 Authority for use of warranties.
1346.705 Limitations.
1346.710 Contract clauses.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

Subpart 1346.4—Government Contract Quality Assurance

1346.401 General.

Agency procedures for documenting government inspection are set forth under Subpart 1346.6.

Subpart 1346.5—Acceptance

1346.503 Place of acceptance.

Insert a clause substantially similar to 1352.246–70, *Place of Acceptance*, in contracts and solicitations to indicate where the acceptance of supplies and/or services will take place.

Subpart 1346.6—Material Inspection and Receiving Reports

1346.601 General.

Each DOC operating unit shall develop instructions and procedures regarding material inspection and receiving reports as appropriate.

Subpart 1346.7—Warranties

1346.704 Authority for use of warranties.

Contracting officers are authorized to approve the use of warranties.

1346.705 Limitations.

Warranties in cost reimbursement contracts are authorized.

1346.710 Contract clauses.

The warranty clauses and alternates under FAR Subpart 46.710 may be used in solicitations and contracts.

PART 1348—VALUE ENGINEERING

Subpart 1348.1—Policies and Procedures

Sec.
1348.102 Policies.

Subpart 1348.2—Contract Clauses

1348.201 Clauses for supply or service contracts.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1348.1—Policies and Procedures

1348.102 Policies.

(a) Contracting activities shall send contractor-submitted Value Engineering Change Proposals (VECPs) to the appropriate technical personnel for review.

(b) Technical personnel shall conduct a comprehensive review of VECPs for technical feasibility, usefulness, and adequacy of the contractor's estimate of cost savings; make a written report; and recommend acceptance or rejection to the contracting officer.

(c) The designee authorized to grant exemptions from value engineering provisions in appropriate supply, service, architect-engineer and construction contracts is set forth in CAM 1301.70.

Subpart 1348.2—Contract Clauses

1348.201 Clauses for supply or service contracts.

The designee authorized to grant exemptions from the requirements of FAR Part 48 for a contract or class of contracts is set forth in CAM 1301.70.

PART 1349—TERMINATION OF CONTRACTS

Subpart 1349.1—General Principles

Sec.
1349.106 Fraud or other criminal conduct.

Subpart 1349.4—Termination for Default

1349.402 Termination of fixed-price contracts for default.
1349.402–3 Procedure for default.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1349.1—General Principles

1349.106 Fraud or other criminal conduct.

If the terminating contracting officer (TCO) suspects fraud or other criminal conduct related to the settlement of a terminated contract, the TCO shall immediately discontinue negotiations and prepare a written report concerning the matter. The report shall be submitted to the Bureau Procurement Official, the Office of Inspector General, and the DOC suspension and debarring official. An informational copy shall be provided to Procurement Counsel.

Subpart 1349.4—Termination for Default

1349.402 Termination of fixed-price contracts for default.

1349.402–3 Procedure for default

No action relating to a default termination, including issuance of a show cause letter, cure notice, or notice of default, shall be taken unless notice has been provided to Procurement

Counsel and the Procurement Executive, and the action has been reviewed for legal sufficiency.

PART 1350—EXTRAORDINARY CONTRACTUAL ACTIONS

Subpart 1350.1—Extraordinary Contractual Actions

Sec.

1350.102 Delegation of and limitation on exercise of authority.

1350.102–1 Delegation of authority.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1350.1—Extraordinary Contractual Actions

1350.102 Delegation of and limitation on exercise of authority.

1350.102–1 Delegation of authority.

(a) The designee authorized to approve requests to obligate the government in excess of $55,000 under the extraordinary emergency authority set forth in CAM 1301.70. Such authority may not be delegated below the secretarial level for requests to obligate the Government in excess of $55,000.

(b) The designee authorized to approve any amendment without consideration that increases the contract price or unit price is set forth in CAM 1301.70.

(c) The designee authorized to indemnify against unusually hazardous or nuclear risks, including extension of such indemnification to subcontracts, is set forth in CAM 1301.70.

SUBCHAPTER H—CLAUSES AND FORMS

PART 1352—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Sec.

1352.000 Scope of part.

Subpart 1352.1—Instructions for Using Provisions and Clauses

1352.102 Incorporating provisions and clauses.

Subpart 1352.2—Text of Provisions and Clauses

1352.200 Scope of subpart.
1352.201–70 Contracting officer's authority.
1352.201–71 Ratification release.
1352.201–72 Contracting officer's representative (COR).
1352.208–70 Restrictions on printing and duplicating.
1352.209–70 Potential organizational conflict of interest.
1352.209–71 Limitation of future contracting.
1352.209–72 Restrictions against disclosure.
1352.209–73 Compliance with the laws.
1352.209–74 Organizational conflict of interest.
1352.209–75 Title 13 and non-disclosure requirements.
1352.213–70 Evaluation utilizing simplified acquisition procedures.
1352.213–71 Instructions for submitting quotations under the simplified acquisition threshold—non-commercial.
1352.215–70 Proposal preparation.
1352.215–71 Instructions for oral presentations.
1352.215–72 Inquiries.
1352.215–73 Evaluation quantities-indefinite quantity contract.
1352.215–74 Best value evaluation.
1352.215–75 Evaluation criteria.
1352.215–76 Cost or pricing data.
1352.216–70 Estimated and allowable costs.
1352.216–71 Level of effort (cost-plus-fixed-fee, term contract).
1352.216–72 Determination of award fee.
1352.216–73 Distribution of award fee.
1352.216–74 Task orders.
1352.216–75 Minimum and maximum contract amounts.
1352.216–76 Placement of orders.
1352.216–77 Ceiling price.
1352.219–70 Section 8(a) direct award (Deviation).
1352.219–71 Notification to delay performance (Deviation).
1352.219–72 Notification of competition limited to eligible 8(a) concerns, Alternate III (Deviation).
1352.227–70 Rights in data, assignment of copyright.
1352.228–70 Insurance coverage.
1352.228–71 Deductibles under required insurance coverage—cost reimbursement.
1352.228–72 Deductibles under required insurance coverage—fixed price.
1352.228–73 Loss of or damage to leased aircraft.
1352.228–74 Fair market value of aircraft.
1352.228–75 Risk and indemnities.
1352.228–76 Approval of group insurance plans.
1352.228–77 Contractor assurance of subcontractor payments.
1352.231–70 Precontract costs.
1352.231–71 Duplication of effort.
1352.233–70 Agency protests.
1352.233–71 GAO and Court of Federal Claims protests.
1352.235–70 Protection of human subjects.
1352.235–71 Protection of human subjects—exemption.
1352.235–72 Protection of human subjects—institutional approval.
1352.235–73 Research involving human subjects—after initial contract award.
1352.237–70 Security processing requirements—high or moderate risk contracts.
1352.237–71 Security processing requirements—low risk contracts.
1352.237–72 Security processing requirements—national security contracts.
1352.237–73 Foreign national visitor and guest access to departmental resources.
1352.237–74 Progress reports.
1352.237–75 Key personnel.
1352.239–70 Software license addendum.
1352.239–71 Electronic and information technology.
1352.239–72 Security requirements for information technology resources.
1352.242–70 Postaward conference.
1352.245–70 Government furnished property.
1352.246–70 Place of acceptance.
1352.270–70 Period of performance.
1352.270–71 Pre-bid/pre-proposal conference and site visit.
1352.271–70 Inspection and manner of doing work.
1352.271–71 Method of payment and invoicing instructions for ship repair.
1352.271–72 Additional item requirements (AIR)—growth work.
1352.271–73 Schedule of work.
1352.271–74 Foreseeable cost factors pertaining to different shipyard locations.
1352.271–75 Delivery and shifting of the vessel.
1352.271–76 Performance.

1352.271–77 Delays.
1352.271–78 Minimization of delay due to Government furnished property.
1352.271–79 Liability and insurance.
1352.271–80 Title.
1352.271–81 Discharge of liens.
1352.271–82 Department of Labor occupational safety and health standards for ship repair.
1352.271–83 Government review, comment, acceptance and approval.
1352.271–84 Access to the vessel.
1352.271–85 Documentation of requests for equitable adjustment.
1352.271–86 Lay days.
1352.271–87 Changes—ship repair.
1352.271–88 Guarantees.
1352.271–89 Temporary services.
1352.271–90 Insurance requirements.

Subpart 1352.3—Provisions and Clauses Matrix

1352.301 Solicitation provisions and contract clauses (Matrix).

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

1352.000 Scope of part.

This part sets forth solicitation provisions and contract clauses, in addition to those prescribed in FAR Part 52, for use in DOC acquisitions.

Subpart 1352.1—Instructions for Using Provisions and Clauses

1352.102 Incorporating provisions and clauses.

As stated in the FAR, provisions and clauses should be incorporated by reference in solicitations and contracts to the maximum practical extent, rather than being incorporated in full text. Incorporation by reference is the listing only by title, regulatory citation, and date of the provision or clause. The full text of the referenced solicitation provision or contract clause is contained in the Code of Federal Regulations (CFR). FAR provisions and clauses are located at 48 CFR chapter 1 and CAM provisions and clauses are located at 48 CFR chapter 13.

Subpart 1352.2—Text of Provisions and Clauses

1352.200 Scope of subpart.

This subpart sets forth the text of all CAR provisions and clauses and provides a cross-reference to the location in the CAR that prescribes their use.

1352.201–70 Contracting Officer's Authority.

As prescribed in 48 CFR 1301.602–170, insert the following clause:

CONTRACTING OFFICER'S AUTHORITY.

The Contracting Officer is the only person authorized to make or approve any changes in any of the requirements of this contract, and, notwithstanding any provisions contained elsewhere in this contract, the said authority remains solely in the Contracting Officer. In the event the contractor makes any changes at the direction of any person other than the Contracting Officer, the change will be considered to have been made without authority and no adjustment will be made in the contract terms and conditions, including price.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.201–71 Ratification release.

As prescribed in 48 CFR 1301.602–3, insert the following clause:

RATIFICATION RELEASE (APR 2010)

(a) The Government agrees to pay the contractor $_____ for the following items/services:

(b) In consideration for the sum stated above, which is to be paid to the Contractor, or its assignees, the Contractor, upon payment of the said sum by the UNITED STATES OF AMERICA (hereinafter called the Government), does remise, release, and discharge the Government, its officers, agents, and employees of and from all liabilities, obligations, claims, and demands whatsoever under or arising from the said contract, except:

(1) Specified claims in stated amounts or in estimated amounts where the amounts are not susceptible of exact statement by the Contractor, as follows: (or state ''None'').

(2) Claims, together with reasonable expenses incidental thereto, based upon the liabilities of the Contractor to third parties

arising out of the performance of this contract, which are not known to the Contractor on the date of the execution of this release and of which the Contractor gives notice in writing to the Contracting Officer within the period specified in said contract.

(3) Claims for reimbursement of costs (other than expenses of the Contractor by reason of his indemnification of the Government against patent liability) including reasonable expenses incidental thereto, incurred by the Contractor under any provisions of the said contract relating to patents.

(c) The Contractor agrees, in connection with patent matters and with claims which are not released as set forth above, that it will comply with provisions of the said contract, including without limitation, those provisions relating to notification to the Contracting Officer and relating to the defense or prosecution of litigation.

Contractor's Signature: _____

Date: _____

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.201–72 Contracting Officer's Representative (COR).

As prescribed in 48 CFR 1301.670–70, insert the following clause:

CONTRACTING OFFICER'S REPRESENTATIVE (COR) (APR 2010)

(a) _____ is hereby designated as the Contracting Officer's Representative (COR). The COR may be changed at any time by the Government without prior notice to the contractor by a unilateral modification to the contract. The COR is located at:

_____

_____

_____

Phone Number: _____

E-mail: _____

(b) The responsibilities and limitations of the COR are as follows:

(1) The COR is responsible for the technical aspects of the contract and serves as technical liaison with the contractor. The COR is also responsible for the final inspection and acceptance of all deliverables and such other responsibilities as may be specified in the contract.

(2) The COR is not authorized to make any commitments or otherwise obligate the Government or authorize any changes which affect the contract price, terms or conditions. Any contractor request for changes shall be referred to the Contracting Officer directly or through the COR. No such changes shall be made without the express written prior authorization of the Contracting Officer. The Contracting Officer may designate assistant or alternate COR(s) to act for the COR by naming such assistant/alternate(s) in writing and transmitting a copy of such designation to the contractor.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.208–70 Restrictions on printing and duplicating.

As prescribed in 48 CFR 1308.802–70, insert the following clause:

RESTRICTIONS ON PRINTING AND DUPLICATING (APR 2010)

(a) The contractor is authorized to duplicate or copy production units provided the requirement does not exceed 5,000 production units of any one page or 25,000 production units in the aggregate of multiple pages. Such pages may not exceed a maximum image size of 10¾ by 14¼ inches. A ''production unit'' is one sheet, size 8½ × 11 inches (215 × 280 mm), one side only, and one color ink. Production unit requirements are outlined in the Government Printing and Binding Regulations.

(b) This clause does not preclude writing, editing, preparation of manuscript copy, or preparation of related illustrative material as a part of this contract, or administrative duplicating/copying (for example, necessary forms and instructional materials used by the contractor to respond to the terms of the contract).

(c) Costs associated with printing, duplicating, or copying in excess of the limits in paragraph (a) of this clause are unallowable without prior written approval of the Contracting Officer. If the contractor has reason to believe that any activity required in fulfillment of the contract will necessitate any printing or substantial duplicating or copying, it shall immediately provide written notice to the Contracting Officer and request approval prior to proceeding with the activity. Requests will be processed by the Contracting Officer in accordance with FAR 8.802.

(d) The contractor shall include in each subcontract which may involve a requirement for any printing, duplicating, and copying in excess of the limits specified in paragraph (a) of this clause, a provision substantially the same as this clause, including this paragraph (d).

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.209–70 Potential organizational conflict of interest.

As prescribed in 48 CFR 1309.507–1(a), insert the following provision, modified appropriately:

POTENTIAL ORGANIZATIONAL CONFLICT OF INTEREST (APR 2010)

(a) There is a potential organizational conflict of interest (*see* FAR Subpart 9.5, Organizational and Consultant Conflicts of Interest) due to [*state the nature of the potential conflict*]. Accordingly:

(1) Restrictions are needed to ensure that (*state the nature of the proposed restraint and the applicable time period*).

(2) As a part of the proposal, the offeror shall provide the Contracting Officer with complete information regarding previous or ongoing work that is in any way associated with the contemplated acquisition.

(b) If award is made to the offeror, the resulting contract may include an organizational conflict of interest limitation applicable to subsequent Government work, at either a prime contract level, at any subcontract tier, or both. During evaluation of proposals, the Government may, after discussions with the offeror and consideration of ways to avoid the conflict of interest, insert a provision in the resulting contract that shall disqualify the offeror from further consideration for award of specified future contracts.

(c) The organizational conflict of interest clause included in this solicitation may be modified or deleted during negotiations.

Alternate I (Date). At the discretion of the Contracting Officer, substitute the following paragraph (b) for paragraphs (b) and (c) in the basic provision:

(b) The organizational conflict of interest clause in this solicitation may not be modified or deleted.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.209–71 Limitation of future contracting.

As prescribed in 48 CFR 1309.507–2(a), insert the following clause:

LIMITATION OF FUTURE CONTRACTING (APR 2010)

(a) The following restrictions and definitions apply to prevent conflicting roles, which may bias the contractor's judgment or objectivity, or to preclude the contractor from obtaining an unfair competitive advantage in concurrent or future acquisitions.

(1) Descriptions or definitions:

(i) ''Contractor'' means the business entity receiving the award of this contract, its parents, affiliates, divisions and subsidiaries, and successors in interest.

(ii) ''Development'' means all efforts towards solution of broadly defined problems. This may encompass research, evaluating technical feasibility, proof of design and test, or engineering of programs not yet approved for acquisition or operation.

(iii) ''Proprietary Information'' means all information designated as proprietary in accordance with law and regulation, and held in confidence or disclosed under restriction to prevent uncontrolled distribution. Examples include limited or restricted data, trade secrets, sensitive financial information, and computer software; and may appear in cost and pricing data or involve classified information.

(iv) ''System'' means the system that is the subject of this contract.

(v) ''System Life'' means all phases of the system's development, production, or support.

(vi) ''Systems Engineering'' means preparing specifications, identifying and resolving interface problems, developing test requirements, evaluating test data, and supervising design.

(vii) ''Technical Direction'' means developing work statements, determining parameters, directing other contractors' operations, or resolving technical controversies.

(2) Restrictions: The contractor shall perform systems engineering and/or technical direction, but will not have overall contractual responsibility for the system's development, integration, assembly and checkout, or production. The parties recognize that the contractor shall occupy a highly influential and responsible position in determining the system's basic concepts and supervising their execution by other contractors. The contractor's judgment and recommendations must be objective, impartial, and independent. To avoid the prospect of the contractor's judgment or recommendations being influenced by its own products or capabilities, it is agreed that the contractor is precluded for the life of the system from award of a DOC contract to supply the system or any of its major components, and from acting as a subcontractor or consultant to a DOC supplier for the system or any of its major components.

Alternate I (Date). As prescribed in CFR 1309.507–2(a)(2), either substitute paragraph (a)(2) of the basic clause with one or both of the following paragraphs, or use one or both in addition to the basic paragraph (a)(2).

(a)(2)(i) The contractor shall prepare and submit complete specifications for non-developmental items to be used in a competitive acquisition. The contractor shall not furnish these items to DOC, either as a prime contractor or subcontractor, for the duration of the initial production contract plus [*insert a specific period of time or an expiration date*].

(ii) The contractor shall either prepare or assist in preparing a work statement for use in competitively acquiring the [*identify the system or services*], or provide material leading directly, predictably, and without delay to such a work statement. The contractor may not supply [*identify the services, the system, or the major components of the system*] for a period [*state the duration of the constraint, however, the duration of the initial production contract shall be the minimum*], as either the prime or subcontractor unless it becomes the sole source, has participated in the design or development work, or more than one contractor has participated in preparing the work statement.

Alternate II (Date). As prescribed in 48 CFR 1309.507–2(a)(3), either substitute paragraph (a) (2) of the basic clause with the following paragraph, or add the following in addition to the basic restriction. Redesignate the paragraphs as needed if more than one restriction applies.

(a)(2) The contractor shall participate in the technical evaluation of other contractors' proposals or products. To ensure objectivity, the contractor is precluded from award of any supply or service contract or subcontract for the system or its major components. This restriction shall be effective for (*insert a definite period of time*).

Alternate III (Date). As prescribed in 48 CFR 1309.507–2(a)(4), add the following paragraph (b) to the basic clause:

(b) The contractor may gain access to proprietary information of other companies during contract performance. The contractor agrees to enter into company-to-company agreements to protect another company's information from unauthorized use or disclosure for as long as it is considered proprietary by the other company, and to refrain from using the information for any purpose other than that for which it was furnished. For information purposes, the contractor shall furnish copies of these agreements to the Contracting Officer. These agreements are not intended to protect information which is available to the Government or to the contractor from other sources and information furnished voluntarily without restriction.

Alternate IV (Date). As prescribed in 48 CFR 1309.507–2(a)(5), add the following paragraph (b) to the basic clause substantially as written. If Alternate III is also used, designate this paragraph (c).

(b) The contractor agrees to accept and to complete all issued task orders, and to not contract with Government prime contractors or first-tier subcontractors in such a way as to create an organizational conflict of interest.

Alternate V (Date). As prescribed in 48 CRF 1309.507–2(a)(6), add the following paragraph (b) to the basic clause. If more than one Alternate is used, redesignate this paragraph accordingly.

(b) The contractor agrees to accept and to complete issued delivery orders, provided that no new organizational conflicts of interest are created by the acceptance of such orders. The Contracting Officer shall identify any and all organizational conflicts of interest in each order. The contractor shall not contract with Government prime contractors or first-tier subcontractors in such a way as to create an organizational conflict of interest.

Alterative VI (Date). As prescribed in 48 CFR 1309.507–2(a)(7), add the following paragraph (b) to the basic clause. If either Alternate III or IV or both are used, redesignate this paragraph accordingly.

(b) The above restrictions shall be included in all subcontracts, teaming arrangements, and other agreements calling for performance of work which is subject to the organizational conflict of interest restrictions identified in this clause, unless excused in writing by the Contracting Officer.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.209–72 Restrictions against disclosure.

As prescribed in 48 CFR 1309.507–2(b), insert the following clause:

RESTRICTIONS AGAINST DISCLOSURE (APR 2010)

(a) The contractor agrees, in the performance of this contract, to keep the information furnished by the Government or acquired/developed by the contractor in performance of the contract and designated by the Contracting Officer or Contracting Officer's Representative, in the strictest confidence. The contractor also agrees not to publish or otherwise divulge such information, in whole or in part, in any manner or form, nor to authorize or permit others to do so, taking such reasonable measures as are necessary to restrict access to such information while in the contractor's possession, to those employees needing such information to perform the work described herein, *i.e.*, on a ''need to know'' basis. The contractor agrees

to immediately notify the Contracting Officer in writing in the event that the contractor determines or has reason to suspect a breach of this requirement has occurred.

(b) The contractor agrees that it will not disclose any information described in subsection (a) to any person unless prior written approval is obtained from the Contracting Officer. The contractor agrees to insert the substance of this clause in any consultant agreement or subcontract hereunder.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.209–73 Compliance with the laws.

As prescribed in 48 CFR 1309.507–2(c), insert the following clause:

COMPLIANCE WITH THE LAWS (APR 2010)

The contractor shall comply with all applicable laws, rules and regulations which deal with or relate to performance in accord with the terms of the contract.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.209–74 Organizational conflict of interest.

As prescribed in 48 CFR 1309.507–2(d), insert the following clause:

ORGANIZATIONAL CONFLICT OF INTEREST (APR 2010)

(a) *Purpose.* The purpose of this clause is to ensure that the contractor and its subcontractors:

(1) Are not biased because of their financial, contractual, organizational, or other interests which relate to the work under this contract, and

(2) Do not obtain any unfair competitive advantage over other parties by virtue of their performance of this contract.

(b) *Scope.* The restrictions described herein shall apply to performance or participation by the contractor, its parents, affiliates, divisions and subsidiaries, and successors in interest (hereinafter collectively referred to as ''contractor'') in the activities covered by this clause as a prime contractor, subcontractor, co-sponsor, joint venturer, consultant, or in any similar capacity. For the purpose of this clause, affiliation occurs when a business concern is controlled by or has the power to control another or when a third party has the power to control both.

(c) *Warrant and Disclosure.* The warrant and disclosure requirements of this paragraph apply with full force to both the contractor and all subcontractors. The contractor warrants that, to the best of the contractor's knowledge and belief, there are no relevant facts or circumstances which would give rise to an organizational conflict of interest, as defined in FAR Subpart 9.5, and that the contractor has disclosed all relevant information regarding any actual or potential conflict. The contractor agrees it shall make an immediate and full disclosure, in writing, to the Contracting Officer of any potential or actual organizational conflict of interest or the existence of any facts that may cause a reasonably prudent person to question the contractor's impartiality because of the appearance or existence of bias or an unfair competitive advantage. Such disclosure shall include a description of the actions the contractor has taken or proposes to take in order to avoid, neutralize, or mitigate any resulting conflict of interest.

(d) *Remedies.* The Contracting Officer may terminate this contract for convenience, in whole or in part, if the Contracting Officer deems such termination necessary to avoid, neutralize or mitigate an actual or apparent organizational conflict of interest. If the contractor fails to disclose facts pertaining to the existence of a potential or actual organizational conflict of interest or misrepresents relevant information to the Contracting Officer, the Government may terminate the contract for default, suspend or debar the contractor from Government contracting, or pursue such other remedies as may be permitted by law or this contract.

(e) *Subcontracts.* The contractor shall include a clause substantially similar to this clause, including paragraphs (f) and (g), in any subcontract or consultant agreement at any tier expected to exceed the simplified acquisition threshold. The terms ''contract,'' ''contractor,'' and ''Contracting Officer'' shall be appropriately modified to preserve the Government's rights.

(f) *Prime Contractor Responsibilities.* The contractor shall obtain from its subcontractors or consultants the disclosure required in FAR Part 9.507–1, and shall determine in writing whether the interests disclosed present an actual, or significant potential for, an organizational conflict of interest. The contractor shall identify and avoid, neutralize, or mitigate any subcontractor organizational conflict prior to award of the contract to the satisfaction of the Contracting Officer. If the subcontractor's organizational conflict cannot be avoided, neutralized, or mitigated, the contractor must obtain the written approval of the Contracting Officer prior to entering into the subcontract. If the contractor becomes aware of a subcontractor's potential or actual organizational conflict of interest after contract award, the contractor agrees that the Contractor may be required to eliminate the subcontractor from its team, at the contractor's own risk.

(g) *Waiver*. The parties recognize that this clause has potential effects which will survive the performance of this contract and that it is impossible to foresee each circumstance to which it might be applied in the future. Accordingly, the contractor may at any time seek a waiver from the Head of the Contracting Activity by submitting such waiver request to the Contracting Officer, including a full written description of the requested waiver and the reasons in support thereof.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.209–75 Title 13 and non-disclosure requirements.

As prescribed in 48 CFR 1309.507–2(e), insert the following clause:

TITLE 13 AND NON-DISCLOSURE REQUIREMENTS (APR 2010)

The Census Bureau's data are protected by Title 13 of the United States Code. The contractor may not use Title 13 data for any purpose other than the intended purpose for which it is supplied or obtained. All contractor personnel who will have access to Title 13 data must take an oath and complete the Census Bureau Form BC–1759 (Special Sworn Status) that requires nondisclosure of Title 13 data. An authorized Census employee or a Notary Public must administer the oath of nondisclosure.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.213–70 Evaluation utilizing simplified acquisition procedures.

As prescribed in 48 CFR 1313.106–2–70, insert the following provision:

EVALUATION UTILIZING SIMPLIFIED ACQUISITION PROCEDURES (DATE)

The Government will issue an order resulting from this request for quotation to the responsible offeror whose quotation results in the best value to the Government, considering both price and non-price factors. The following factors will be used to evaluate quotations:

[This section is to be tailored to conform to individual procurements. Text is provided as an example only. Stating relative importance of the evaluation factors is not required.]

(1) Personnel Qualifications. The experience, education, and qualifications of personnel proposed to work on the contract will be evaluated to determine their ability to perform their proposed duties.

(2) Technical Approach and Capability. The offeror's approach to performing contract requirements and its capability to successfully perform the contract will be evaluated.

(3) Past Performance. The offeror's past performance on related contracts will be evaluated to determine, as appropriate, successful performance of contract requirements, quality and timeliness of delivery of goods and services, cost management, communications between contracting parties, proactive management and customer satisfaction.

(4) Price.

(End of clause)

1352.213–71 Instructions for submitting quotations under the simplified acquisition threshold—non-commercial.

As prescribed in 48 CFR 1313.302–1–70, insert the following provision:

INSTRUCTIONS FOR SUBMITTING QUOTATIONS UNDER THE SIMPLIFIED ACQUISITION THRESHOLD—NON-COMMERCIAL (DATE)

(a) *North American Industry Classification System (NAICS) code and small business size standard*. The NAICS code and small business size standard for this acquisition is _____.

(b) *Submission of quotations*. Submit quotations to the office specified in this solicitation at or before the exact time specified in this solicitation. At a minimum, quotations must show—

(1) The solicitation number;

(2) The name, address, and telephone number of the offeror;

(3) Acknowledgment of solicitation amendments;

(4) A technical description showing that the offeror can supply the requirements in the specifications or statement of work in sufficient detail to allow the Government to evaluate the quotation in accordance with the evaluation factors stated in the solicitation.

(5) Past performance information, when included as an evaluation factor, to include recent and relevant contracts for the same or similar items and reference information (including contract numbers, points of contact with telephone numbers and other relevant information).

(6) Price and any supporting details for the price, as requested in the solicitation.

(c) Offerors are responsible for submitting quotations, and any modifications thereto, so as to reach the Government office designated in the solicitation by the time specified. The offeror's initial quotation should contain the offeror's best terms from a price and technical standpoint. The Government

may reject any or all quotations if such action is in the public interest; accept other than the lowest quotation; and waive informalities and minor irregularities in quotations received.

(End of clause)

1352.215–70 Proposal preparation.

As prescribed in 48 CFR 1315.204–570(a)(1), insert the following provision, tailored as applicable:

PROPOSAL PREPARATION (DATE)

(a) General Instructions. Proposals are expected to conform to solicitation provisions and be prepared in accordance with this section. To aid in evaluation, the proposal shall be clearly and concisely written, neatly presented, indexed (cross-indexed as appropriate), and logically assembled. All pages of each part shall be appropriately numbered and identified with the name of the offeror, the date of the offer, and the solicitation number. Each volume shall be clearly marked by volume number and title.

(b) *Overall Arrangement of Proposal.* (1) VOLUME I—BUSINESS PROPOSAL

(i) Volume I, Business Proposal, consists of the actual offer to enter into a contract to perform the desired work. It also includes required representations, certifications, and acknowledgments, if applicable; justifications for noncompetitive proposed subcontracts; identification of technical data to be withheld; and any other required administrative information.

(ii) Format and Content. Volume I, Business Proposal, shall include the following documents (in the order listed):

(A) Proposal Form:

(*1*) Use of the Form—The Proposal Form (Standard Form 33 or 1449), is to be executed fully and used as the cover sheet (or first page) of Volume I. Include three (3) original signed copies of the form in the original Volume I.

(*2*) Acceptance Period—The acceptance period entered on the Proposal Form by the offeror shall not be less than that prescribed in the solicitation, which shall apply if no other period is offered.

(*3*) Signature Authority—The person signing the Proposal Form must have the authority to commit the offeror to all of the provisions of the proposal, fully recognizing that the Government has the right, by terms of the Solicitation, to make an award without discussion if it so elects.

(B) Other documentation identified in Section (A) above. The offeror shall submit one original of Volume I, marked as such.

(2) VOLUME II—TECHNICAL PROPOSAL

(i) *General.* (A) Volume II, technical proposal, consists of the offeror's proposal delineating its capabilities and how it intends to perform contract requirements. The Technical proposal will be evaluated in accord with the criteria contained in Section M.

(B) In order that the technical proposal may be evaluated strictly on the merit of the material submitted, no contractual price information is to be included in Volume II. However, the type and quantity of labor and materials is to be included in the Technical Proposal, without any associated cost information.

(C) The technical proposal must be typed, double-spaced, with one inch margins, using elite font, 12 pitch type (or equivalent) and printed, unreduced in size, on 8½″ by 11″ paper, not exceeding ____ pages, single-sided, exclusive of resumes and related corporate experience documentation. Any pages in excess of ____ will be disregarded, and will not be included in the proposal evaluation. Failure of the offeror to comply with the page limitations, resulting in the excess pages not being evaluated, shall not constitute grounds for a protest.

(ii) Format and Content. Volume II, Technical Proposal, shall include the following contents:

(A) Table of Contents

(B) List of Tables and Figures

(C) Summary of Technical Proposal

(D) Technical Proposal

(E) Exceptions and Deviations. These major headings may be subdivided or supplemented by the offeror as appropriate.

(*1*) Summary. This section shall provide a summary that addresses each of the technical evaluation factors set out in Section M.

(*2*) Technical Proposal. The offeror shall clearly address each of the technical evaluation criteria in Section M, and, at a minimum, cover each subfactor.

(*3*) Exceptions and Deviations. This section shall identify and explain any exceptions or deviations taken to any part of the solicitation or conditional assumptions made with respect to the technical requirements of the solicitation. Offerors should note that taking exceptions to the Government's requirements may indicate an unwillingness or inability to perform the contract, and the proposal may be evaluated as such.

(iii) Specific areas to be addressed:

[This section is to be tailored to conform to the technical evaluation factors. Text is provided as an example. Provide instructions concerning what information is required in order to evaluate proposals in accord with the evaluation factors. Do not request information that is not covered in an evaluation factor.]

Evaluation Factor 1—Technical Approach. Provide information on how the project is to be organized, staffed, and managed that demonstrates the offeror's understanding and effective management of important events or

tasks. If applicable, the offeror shall (i) describe the facilities and equipment which will be used in the performance of the contract, and (ii) how the management and coordination of consultant and subcontractor efforts will be accomplished. Fully discuss how the contract requirements will be met and the means used to accomplish them. Merely repeating the contract requirements and stating that they will be accomplished, without discussing how the offeror will accomplish them, is not acceptable.

Evaluation Factor 2—Experience. In a general fashion, describe the offeror's experience and qualifications to perform the contract requirements. Explain how the experience provides confidence that the offeror can perform all contract requirements.

Evaluation Factor 3—Key Personnel. Provide the names, titles, and a description of the duties of those individuals proposed as key personnel to be assigned to the contract. For each key person, submit a resume that provides information concerning their education, background, recent work experience, and accomplishments. Specify the approximate percentage of time each individual will be available for this project, and, if necessary, explain why the key person possesses the qualifications to perform the proposed position.

Evaluation Factor 4—Past Performance. Complete the Past Performance Questionnaire (Attachment X) for all contracts containing requirements similar in scope those in the Statement of Work performed in whole or part over the last ____ years. References can include both Government and commercial contracts and subcontracts.

The offeror shall submit one original of Volume II, marked as such, and _____ copies.

(3) Volume III—Price/cost proposal

(i) Price/Cost proposals must generally adhere to the pricing structure established in Section B, Schedule of Prices. The offeror shall submit one original of Volume III, marked as such, and _____ copies.

[INSERT FOR COST TYPE CONTRACTS:]

(ii) The offeror must also submit the following detailed information to support its proposed costs, as applicable:

(A) Direct Labor: Breakdown of direct labor cost by named person or labor category including number of labor-hours and current actual average hourly rates based on a work year of 2,080 hours. Indicate whether current rates or escalated rates are used. If escalation is included, state the degree (percent) and methodology. Direct labor or levels of effort are to be identified as labor-hours and not as a percentage of an individual's time. Indicate fringe benefit rate, if separate from indirect cost rate.

(B) Other Direct Costs: Specify the amount proposed for duplication/reproduction, meetings and conferences, postage, communication and any other applicable items. Travel, subsistence and local transportation shall be supported with a breakdown, which shall include: number of trips anticipated, number of person days, cost-per-trip-per person, destination(s) proposed, number of person(s) scheduled for travel, mode of transportation, and mileage allowances, if privately-owned vehicles will be used.

(C) Materials: Cost breakdown of materials or equipment must be supported with the methodology used and vendor quotations supplied as applicable.

(D) Consultants: If consultants are proposed, state the total estimated price of the services to be required and the consultant's quoted daily or hourly rate. Include Consulting Agreements entered into between consultant(s) and the offeror, or invoices submitted by consultant(s) for similar services previously provided to the offeror.

(E) Subcontracts: If proposed, cost information for each subcontractor shall be furnished in the same format and level of detail as prescribed for the prime offeror. Additionally, in relation to such subcontracts, the offeror shall submit the following information:

(*1*) A description of the items to be furnished by the subcontractor;

(*2*) Identification of the proposed subcontractor and an explanation of why and how the proposed subcontractor was selected, including the extent of competition;

(*3*) The proposed subcontract price and cost detail and performance/delivery schedule; and

(*4*) Identification of the type of subcontract to be used.

(F) Indirect Rates: Offerors lacking Government-approved indirect cost rates must provide detailed background data indicating the cost elements included in the applicable pool and a statement that such treatment is in accordance with the company's established accounting practice. Offerors with established rate agreements with cognizant Federal agencies shall submit one copy of such agreements.

(G) Profit: Specify the profit proposed and the rationale justifying the amount of profit.

[INSERT FOR FIXED-PRICE TYPE CONTRACTS:]

(iii) Each offeror's price proposal must be based on the offeror's own technical proposal, the Government's specifications, and other contractual requirements. If the prices to be used are based on a published price list or catalog, the offeror shall so state, and provide a copy of the document with its price proposal. If the prices are to be based on established market prices, not otherwise published, or are prices applicable only to the proposed contract, the offeror shall so state.

(iv) The Government expects that this contract will be awarded based upon adequate

price competition. However, in order to determine that offered prices are fair and reasonable, the Government reserves the right to request that the offeror to provide cost breakdowns to support proposed prices. Information to support unit prices should include, but not be limited to, the following:

(A) Salary/wage information with associated payroll expenses, for personnel to be used in performance of the contract;

(B) Cost for equipment, supplies, and consumable materials;

(C) A breakout of related support costs, such as equipment maintenance, rental, transportation, *etc.*;

(D) Overhead costs;

(E) General Administrative expenses; and

(F) Profit

(End of clause)

1352.215–71 Instructions for oral presentations.

As prescribed in 48 CFR 1315.204–570(a)(2), insert the following provision:

INSTRUCTIONS FOR ORAL PRESENTATIONS (DATE)

The Government intends to conduct oral presentations with the offerors in the competitive range as part of the evaluation process.

Oral presentations will be conducted at the following location:

[INSERT LOCATION]

The Contracting Officer will determine the order of oral presentations and the schedule. The Contracting Officer will contact each offeror to schedule the date and time for oral presentations and provide detailed instructions. Once a presentation date and time are confirmed, rescheduling is at the discretion of the Contracting Officer.

(End of clause)

1352.215–72 Inquiries.

As prescribed in 48 CFR 1315.204–570(a)(3), insert the following provision:

INQUIRIES (DATE)

Offerors must submit all questions concerning this solicitation in writing to ___. Questions should be received no later than ___ calendar days after the issuance date of this solicitation. Any responses to questions will be made in writing, without identification of the questioner, and will be included in an amendment to the solicitation. Even if provided in other form, only the question responses included in the amendment to the solicitation will govern performance of the contract.

(End of clause)

1352.215–73 Evaluation quantities—indefinite quantity contract.

As prescribed in 48 CFR 1315.204–570(b)(1), insert the following provision:

EVALUATION QUANTITIES—INDEFINITE QUANTITY CONTRACT (DATE)

To evaluate offers for award purposes, the Government will apply the offeror's proposed fixed-prices/rates to the estimated quantities included in the solicitation (and add to this amount other direct costs, if applicable).

(End of clause)

1352.215–74 Best value evaluation.

As prescribed in 48 CFR 1315.204–570(b)(2), insert the following provision:

BEST VALUE EVALUATION (DATE)

(a) Award will be made to the offeror: whose offer conforms to the solicitation requirements; who is determined responsible in accordance with FAR Subpart 9.1 by possessing the financial and other capabilities to fulfill the requirements of the contract; and whose proposal is judged, by an integrated assessment of price/cost and non-price evaluation factors, to provide the best value to the Government in accordance with CAR 1352.215–75, *Evaluation Criteria*.

(b) The Government intends to award [specify ''a single contract'' or ''multiple contracts''] in response to the solicitation. The Government reserves the right not to award a contract depending on the quality of the proposals submitted and the availability of funds.

(c) Evaluation of Proposals.

(1) Initial Evaluation of Proposals. All offers received will be evaluated in accordance with the stated evaluation factors. The Government reserves the right to make an award without discussions based solely upon initial proposals. Therefore, offerors should ensure that their initial proposal constitutes their best offer in terms of both price and the technical solution being proposed.

If award is not made upon initial proposals, then the Contracting Officer will establish a competitive range comprised of the most highly rated proposals. 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. Only those offerors in the competitive range will be offered an

opportunity to participate further in the procurement.

(2) Discussions/Final Proposal Revisions. The Contracting Officer will engage in discussions with all offerors in the competitive range in accordance with FAR 15.306. At the conclusion of discussions, a final common cut-off date for submission of final proposal revisions will be established. Those offerors remaining in the competitive range will be notified to submit Final Proposal Revisions.

(3) Final Evaluation of Offers. A final proposal evaluation will be performed after receipt of Final Proposal Revisions.

(End of clause)

1352.215–75 Evaluation criteria.

As prescribed in 48 CFR 1315.204–570(b)(2) and (3), insert the following provision:

EVALUATION CRITERIA (DATE)

[This section is to be tailored to conform to individual procurements. Text is provided as an example only.]

In determining which proposal provides the best value to the Government, non-price (technical) evaluation factors are [significantly more important/somewhat more important/approximately equal in importance/somewhat less important/significantly less important] than evaluated price.

[Insert relative importance among the technical evaluation factors.]

Based upon the results of the integrated assessment of the technical and cost/price proposals, the Government may make an award to other than the lowest-priced offeror or the offeror with the highest technical score if the source selection official determines that to do so would result in the best value to the Government.

(a) Technical Evaluation Factors.

Factor 1—TECHNICAL APPROACH. The proposal will be evaluated on how the offeror intends to organize, staff and manage the contract and the means that will be used to accomplish the contract requirements. The degree to which the proposal demonstrates an understanding of the requirements will be evaluated, as well as the offeror's planned management of consultants and subcontractors, if applicable.

Factor 2—EXPERIENCE. The offeror's background, experience, and qualifications will be assessed to determine the likelihood that that offeror can successfully perform the contract requirements and the degree of the risk of non-performance.

Factor 3—KEY PERSONNEL. The education, experience, and accomplishments of key personnel will be evaluated to determine the degree to which they possess the qualifications to perform their proposed duties under the contract.

Factor 4—PAST PERFORMANCE. The offeror's past performance on related contracts will be evaluated to determine, as appropriate, successful performance of contract requirements, quality and timeliness of delivery of goods and services, effective management of subcontractors, cost management, level of communication between the contracting parties, proactive management and customer satisfaction.

The Government reserves the right to assess the past performance of proposed subcontractors.

The Government will use its discretion to determine the sources of past performance information used in the evaluation, and the information may be obtained from references provided by the offeror, the agency's knowledge of contractor performance, other government agencies or commercial entities, or past performance databases.

If an offeror does not have a history of relevant contract experience, or if past performance information is not available, the offeror will receive a neutral past performance rating; however, an offeror without a history of relevant experience may receive a lowered rating for the experience evaluation factor.

(b) Cost/Price Evaluation.

(1) The proposed prices/costs will be evaluated but not scored. The cost evaluation will determine whether the proposed costs are realistic, complete, and reasonable in relation to the solicitation requirements. Proposed costs must be entirely compatible with the technical proposal.

(2) The Government may use the results of cost/price realism analysis to adjust the offeror's proposal to a most probable cost to the Government. The analysis may include information from a government auditing agency, Government technical personnel, and other sources.

(End of clause)

1352.215–76 Cost or pricing data.

As prescribed in 48 CFR 1315.204–570(b)(4), insert the following provision:

COST OR PRICING DATA

Additional Instructions for Preparation of Cost/Price Proposals

(a) *General.* In addition to the information required by CAR 1352.215–70, the cost/price proposal must contain an explanation of the offeror's and proposed subcontractors' fully burdened rates, including direct salary rates, overhead rates, and profit; and information regarding other direct costs.

(b) *Specific Requirements.* (1) Direct Salary Rates: The offeror shall list the categories of professional or technical personnel required to perform the Statement of Work. A brief

definition of the education and experience requirements which qualify an employee for inclusion in a listed category should be provided. Further, if some proposed labor categories are classified by multiple grades within a given discipline (*e.g.*, Architect I and II, or Senior and Junior Engineer), a brief explanation as to how they are differentiated shall be provided.

(2) The offeror, and major subcontractors, should provide individual rates for key personnel. Designation of an individual as a key person is subject to agreement of the parties. Where no key personnel are listed, category average rates are appropriate. Rates should be provided by year for the life of the contract. If rates are escalated, the degree (percent) and methodology must be shown. Escalation increases should reflect recent experience or established personnel policy. Types of salary increases given—merit, cost of living, *etc.*—should be discussed.

(3) Overhead Costs. Generally, the offeror's accounting system and estimating practices will determine the method used to allocate overhead costs. The offeror's established practices, if in accordance with generally accepted accounting principles, will be accepted. Proposed overhead rates should represent the offeror's best estimate of the rates to be experienced during the contract period as projected by company budgets or by recent experience adjusted for factors which will influence trends. A narrative statement outlining the offeror's policies and practices for accumulating overhead costs and the method used to compute the proposed rate or rates is required. In the case of multi-branch firms, joint ventures or affiliates, it is expected that overhead costs applicable to the specific location(s) where work is to be performed will be proposed. Company-wide, joint venture, or affiliate rate averages may not be appropriate. The rates should be tailored to the work location(s).

(4) Profit. (i) A fair and reasonable provision for profit cannot be made by simply applying a certain predetermined percentage to the total estimated cost. Rather, profit should be established as a percentage/dollar amount after considering such factors as:

(A) Degree of risk;

(B) Nature of the work to be performed;

(C) Joint venture responsibilities;

(D) Extent of offeror's investment;

(E) Subcontracting of work; and

(F) Other criteria discussed in FAR 15.404–4.

(ii) Separate percentage rates for profit are also required for major subcontractors.

(5) Markup. The offeror may request a markup on subcontract labor. If it does so, it should state the percentage and provide a justification for that figure.

(6) Other Direct Costs. The offeror shall briefly describe the following:

(i) Travel/Subsistence costs;

(ii) Subcontractor costs; and

(iii) How subcontracting costs were analyzed.

(c) Audit Reports. If the offeror or any subcontractor has been audited by a Government agency within the last two years, or has approved indirect cost rates, provide a copy of the audit report, or, if not available, the name, address, and telephone number of the audit office. Similarly, information on any Government-approved indirect cost rates should be provided.

(End of clause)

1352.216–70 Estimated and allowable costs.

As prescribed in 48 CFR 1316.307(a), insert the following clause:

ESTIMATED AND ALLOWABLE COSTS (DATE)

(a) Estimated Costs. The estimated cost of this contract is $_____ [insert total cost of contract], which consists of $_____ [insert amount of cost that is reimbursable] for reimbursable costs and $_____ [insert amount of fixed fee] for fixed/incentive fee. These costs shall be subject to the provisions of FAR clause 52.232–20, ''Limitation of Cost,'' FAR clause 52.216–7, ''Allowable Cost and Payments,'' and FAR clause 52.216–8, ''Fixed Fee.''

(b) Subject to Availability of Funds [Insert paragraph (b) when the contract is issued subject to the availability of funds].

''The amount of funding for this contract is $_____ [insert amount being funded], which consists of $_____ [insert amount of reimbursable costs funded] for reimbursable costs and $ _____ [insert amount of fixed fee funded] for Fixed/Incentive Fee. These costs shall be subject to the provisions of FAR 52.232–22, ''Limitations of Funds.'' ''

(c) Allowable Costs.

(1) Final annual indirect cost rate(s) and the appropriate base(s) shall be established in accordance with FAR Subpart 42.7, in effect for the period covered by the indirect cost rate proposal.

(2) 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 cognizant Federal agency official) or auditor in accordance with FAR 42.704, subject to adjustment when the final rates are established. The established billing rates are currently as follows:

_____ [Insert billing rate]

(End of clause)

1352.216–71 Level of effort (cost-plus-fixed-fee, term contract).

As prescribed in 48 CFR 1316.307(b), insert the following clause:

LEVEL OF EFFORT (COST-PLUS-FIXED-FEE, TERM CONTRACT) (DATE)

(a) In performance of the effort directed in this contract, the contractor shall provide the total of Direct Productive Labor Hours (DPLH) as specified in Part I, Section B during the term specified in Section _____. DPLH is defined as actual work hours exclusive of vacation, holidays, sick leave, and other absences.

(b) Only the DPLH categories indicated below shall be charged directly to the contract. It is estimated that the DPLH will be expended approximately as follows:

Labor category	Base period	Option period I	Option period II	Option period III
xxxxxxxxx	xxxx	xxxx	xxxx	xxxx
xxxxxxxxx	xxxx	xxxx	xxxx	xxxx
Total Direct Labor	xxxx	xxxx	xxxx	xxxx

(c) The hours specified above are provided as estimates only. If the actual amount of hours incurred falls within 90% to 110% of this estimate, the fee shall not be adjusted.

(d) In the event that the contractor shall be required to provide less than 90% of the estimated DPLH, the fixed fee of the contract shall be equitably adjusted by unilateral modification to the contract. The fixed fee adjustment shall be based solely upon the difference between the DPLH actually provided and 90% of the estimated DPLH, calculated as follows:

Adjusted Fixed Fee = (Actual DPLH/(.9 × Estimated DPLH)) × Specified Fixed Fee

(e) In the event that the contractor shall be required to provide more than 110% of the estimated DPLH, the fixed fee of the Contract shall be equitably adjusted by unilateral modification to the Contract. The fixed fee adjustment shall be based solely upon the difference between the DPLH actually provided and 110% of the estimated DPLH, calculated as follows:

Adjusted Fixed Fee = (Actual DPLH/(1.1 × Estimated DPLH)) × Specified Fixed Fee

(f) These terms and conditions do not supersede the requirements of either FAR clause 52.232–20 ''Limitation of Cost'' or FAR clause 52.232–22 ''Limitation of Funds.''

(End of clause)

1352.216–72 Determination of award fee.

As prescribed in 48 CFR 1316.405–2, insert the following clause:

DETERMINATION OF AWARD FEE (DATE)

Based upon the quality of its performance and the results of the Government's performance evaluation, the contractor may earn an award fee.

(a) The total amount of award fee available under this contract is assigned according to the following:

[Insert appropriate information]

(b) A Performance Evaluation Plan shall be unilaterally established by the Government as part of the contract and used for the determination of award fees. This plan shall include the criteria that will be used to evaluate the contractor's performance and to determine the percentage of award fee (if any) available for each performance period.

(c) The criteria contained within the Performance Evaluation Plan may relate to:

(1) Quality of performance of the contract requirements;

(2) Effective management of the contract; and

(3) Cost controls.

(d) The Performance Evaluation Plan may be revised unilaterally by the Government at any time during the period of performance, however unless mutually-agreed to a revision shall not affect the current evaluation period. Notification of such changes shall be provided to the contractor [insert number] calendar days prior to the start of the evaluation period to which the change will apply.

(e) At the conclusion of each evaluation period, and in accordance with the performance evaluation plan, a determination of the amount of the award fee earned shall be made in writing to the contractor by the Government Fee Determination Official (FDO). The FDO's unilateral determination of the amount of award fee earned in any evaluation period or a determination that no fee was earned shall be conclusive.

(f) The contractor may submit a self-evaluation of its performance in an evaluation period. The FDO shall consider the self-evaluation, as the FDO deems appropriate.

(g) The contractor shall submit a voucher for payment of any earned award fee.

(End of clause)

1352.216–73 Distribution of award fee.

As prescribed in 48 CFR 1316.406, insert the following clause:

DISTRIBUTION OF AWARD FEE (APR 2010)

(a) The total amount of award fee available under this contract is assigned according to the following:

[Insert appropriate information]

(b) Payment of the base fee and award fee shall be made, provided that after payment of 85 percent of the base fee and potential award fee, the Government may withhold further payment of the base fee and award fee until a reserve is set aside in an amount that the Government considers necessary to protect its interest. This reserve shall not exceed 15 percent of the total base fee and potential award fee.

(c) In the event of contract termination for convenience, either in whole or in part, the amount of award fee available shall represent a prorated distribution associated with evaluation period activities or events as determined by the Government.

(d) The Government will promptly make payment of any award fee upon submission by the contractor to the Contracting Officer's authorized representative of a public voucher or invoice in the amount of the total fee earned for the period evaluated. Payment may be made without executing a contract modification.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.216–74 Task orders.

As prescribed in 48 CFR 1316.501–2–70, insert the following clause:

TASK ORDERS (APR 2010)

(a) In task order contracts, all work shall be initiated only by issuance of fully executed task orders issued by the Contracting Officer. The work to be performed under these orders must be within the scope of the contract. The Government is only liable for labor hours and costs expended under the terms and conditions of this contract to the extent that a fully executed task order has been issued and covers the required work and costs. Charges for any work not authorized shall be disallowed.

(b) For each task order under the contract, the Contracting Office shall send a request for proposal to the contractor(s). The request will contain a detailed description of the tasks to be achieved, a schedule for completion of the task order, and deliverables to be provided by the contractor.

(c) The contractor shall submit a proposal defining the technical approach to be taken to complete the task order, work schedule and proposed cost/price.

(d) After any necessary negotiations, the contractor shall submit a final proposal.

(e) Task orders will be considered fully executed upon signature of the Contracting Officer. The contractor shall begin work on the task order in accordance with the effective date of the order.

(f) The contractor shall notify the Contracting Officer of any instructions or guidance given that may impact the cost, schedule or deliverables of the task order. A formal modification to the task order must be issued by the Contracting Officer before any changes can be made.

(g) Task orders may be placed during the period of performance of the contract. Labor rates applicable to hours expended in performance of an order will be the contract rates that are in effect at the time the task order is issued.

(h) If multiple awards are made by the Government, the CO shall provide each awardee a fair opportunity to be considered for each task order over the micro-purchase threshold unless one of the exceptions at FAR 16.505(b) applies.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.216–75 Minimum and maximum contract amounts.

As prescribed in 48 CFR 1316.506(a), insert the following clause:

MINIMUM AND MAXIMUM CONTRACT AMOUNTS (APR 2010)

During the term of the contract, the Government shall place orders totaling a minimum of _____. The amount of all orders shall not exceed _____.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.216–76 Placement of orders.

As prescribed in 48 CFR 1316.506(b), insert the following clause:

PLACEMENT OF ORDERS (APR 2010)

(a) The contractor shall provide goods and/or services under this contract only as directed in orders issued by authorized individuals. In accordance with FAR 16.505, each order will include:

(1) Date of order;

(2) Contract number and order number;

(3) Item number and description, quantity, and unit price or estimated cost or fee;
(4) Delivery or performance date;
(5) Place of delivery or performance (including consignee);
(6) Packaging, packing, and shipping instructions, if any;
(7) Accounting and appropriation data;
(8) Method of payment and payment office, if not specified in the contract;
(9) Any other pertinent information.
(b) In accordance with FAR 52.216–18, *Ordering*, the following individuals (or activities) are authorized to place orders against this contract:

[To be completed by the Contracting Officer at time of award]

(c) If multiple awards have been made, the contact information for the DOC task and delivery order ombudsman is _____.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.216–77 Ceiling price.

As prescribed in 48 CFR 1316.601–70 and 1316.602–70, insert the following clause:

CEILING PRICE (APR 2010)

The ceiling price of this contract is $_____. The contractor shall not make expenditures nor incur obligations in the performance of this contract which exceed the ceiling price specified herein, except at the contractor's own risk.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.219–70 Section 8(a) direct award (Deviation).

As prescribed in 48 CFR 1319.811–3(a), insert the following clause:

SECTION 8(A) DIRECT AWARD (DL) (APR 2010)

(a) This contract is issued as a direct award between the contracting activity and the 8(a) contractor pursuant to a Partnership Agreement between the Small Business Administration (SBA) and the Department of Commerce (DOC). Accordingly, the SBA, even if not identified in Section A of this contract, is the prime contractor and retains responsibility for 8(a) certification, 8(a) eligibility determinations and related issues, and providing counseling and assistance to the 8(a) contractor under the 8(a) program. The cognizant SBA district office is:

[To be completed by the Contracting Officer at time of award]

(b) The contracting activity is responsible for administering the contract and taking any action on behalf of the Government under the terms and conditions of the contract. However, the contracting activity shall give advance notice to the SBA before it issues a final notice terminating performance, either in whole or in part, under the contract. The contracting activity shall also coordinate with SBA prior to processing any novation agreement. The contracting activity may assign contract administration functions to a contract administration office.
(c) The 8(a) contractor agrees:
(1) To notify the Contracting Officer, simultaneously with its notification to SBA (as required by SBA's 8(a) regulations), when the owner or owners upon whom 8(a) eligibility is based plan to relinquish ownership or control of the concern. Consistent with 15 U.S.C. 637(a)(21), transfer of ownership or control shall result in termination of the contract for convenience, unless SBA waives the requirement prior to the actual relinquishing of ownership or control; and
(2) To adhere to the requirements of FAR 52.219–14, Limitations on Subcontracting.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.219–71 Notification to delay performance (Deviation).

As prescribed in 48 CFR 1319.811–3(b), insert the following clause:

NOTIFICATION TO DELAY PERFORMANCE (DEVIATION) (APR 2010)

The contractor shall not begin performance under this purchase order until 2 working days have passed from the date of its receipt. Unless the contractor receives notification from the Small Business Administration that it is ineligible for this 8(a) award, or otherwise receives instructions from the Contracting Officer, performance under this purchase order may begin on the third working day following receipt of the purchase order. If a determination of ineligibility is issued within the 2-day period, the purchase order shall be considered cancelled.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.219–72 Notification of competition limited to eligible 8(a) concerns, Alternate III (Deviation).

As prescribed in 48 CFR 1319.811–3 (c), insert the following clause:

NOTIFICATION OF COMPETITION LIMITED TO ELIGIBLE 8(a) CONCERNS, ALTERNATE III (DEVIATION) (APR 2010)

(a) Offers are solicited only from small business concerns expressly certified by the Small Business Administration (SBA) for participation in the SBA's 8(a) Program and which meet the following criteria at the time of submission of offers—

(1) The Offeror is in conformance with the 8(a) support limitation set forth in its approved business plan; and

(2) The Offeror is in conformance with the Business Activity Targets set forth in its approved business plan or any remedial action directed by the SBA.

(b) By submission of its offer, the Offeror represents that it meets all of the criteria set forth in paragraph (a) of this clause.

(c) Any award resulting from this solicitation shall be made directly by the Contracting Officer to the successful 8(a) offeror selected through the evaluation criteria set forth in this solicitation.

(d)(1) *Agreement.* A small business concern submitting an offer in its own name shall furnish, in performing the contract, only end items manufactured or produced by small business concerns in the United States or its outlying areas. If this procurement is processed under simplified acquisition procedures and the total amount of this contract does not exceed $25,000, a small business concern may furnish the product of any domestic firm. This paragraph does not apply to construction or service contracts.

(2) _____ [*insert name of contractor*] 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.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.227–70 Rights in data, assignment of copyright.

As prescribed in 48 CFR 1327.404–4(a), insert the following clause:

RIGHTS IN DATA, ASSIGNMENT OF COPYRIGHT (APR 2010)

In accordance with 48 CFR 52.227–17, Rights in Data—Special Works, the contractor agrees to assign copyright to data, including reports and other copyrightable materials, first produced in performance of this contract to the United States Government, as represented by the Secretary of Commerce.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.228–70 Insurance coverage.

As prescribed in 48 CFR 1328.310–70(a), insert the following clause:

INSURANCE COVERAGE (APR 2010)

(a) *Workers Compensation and Employer's Liability.* The contractor is required to comply with applicable Federal and State workers' compensation and occupational disease statutes. If occupational diseases are not compensable under those statutes, they shall be covered under the employer's liability section of the insurance policy, except when contract operations are so commingled with a contractor's commercial operations that it would not be practical to require this coverage. Employer's liability coverage of at least $100,000 shall be required, except in states with exclusive or monopolistic funds that do not permit workers' compensation to be written by private carriers.

(b) *General liability.* (1) The contractor shall have bodily injury liability insurance coverage written on the comprehensive form of policy of at least $500,000 per occurrence.

(2) When special circumstances apply in accordance with FAR 28.307–2(b), Property Damage Liability Insurance shall be required in the amount of $_____ [insert zero unless special circumstances apply, if applicable, insert dollar amount.].

(c) *Automobile liability.* The contractor shall have automobile liability insurance written on the comprehensive form of policy. The policy shall provide for bodily injury and property damage liability covering the operation of all automobiles used in connection with performing the contract. Policies covering automobiles operated in the United States shall provide coverage of at least $200,000 per person and $500,000 per occurrence for bodily injury and $20,000 per occurrence for property damage.

(d) *Aircraft public and passenger liability.* When aircraft are used in connection with performing the contract, the contractor shall have aircraft public and passenger liability insurance. Coverage shall be at least $200,000 per person and $500,000 per occurrence for bodily injury, other than passenger liability, and $200,000 per occurrence for property damage. Coverage for passenger liability bodily injury shall 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 Contractor shall provide, vessel collision liability and protection and indemnity liability insurance as determined by the Government.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.228–71 Deductibles under required insurance coverage—cost reimbursement.

As prescribed in 48 CFR 1328.310–70(c), insert the following clause:

DEDUCTIBLES UNDER REQUIRED INSURANCE COVERAGE—COST REIMBURSEMENT (APR 2010)

(a) The contractor is required to present evidence of the amount of any deductibles in its insurance coverage.

(b) For any insurance required pursuant to *1352.228–70, Insurance Coverage,* the contractor's deductible is not allowable as a direct or indirect cost under this contract. The Government is not liable, and cannot be invoiced, for any losses up to the minimum amounts of coverage required in paragraphs (a) through (d) of clause 1352.228–70. If the contractor obtains an insurance policy with deductibles, the contractor, and not the Government, is responsible for any deductible amount up to the minimum amounts of coverage stated.

(c) If the contractor fails to follow all procedures stated in this subsection and in FAR 52.228–7(g), any amounts above the amount of the obtained insurance coverage which are not covered by insurance will not be reimbursable under the contract.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.228–72 Deductibles under required insurance coverage—fixed price.

As prescribed in 48 CFR 1328.310–70(d), insert the following clause:

DEDUCTIBLES UNDER REQUIRED INSURANCE COVERAGE—FIXED PRICE (APR 2010)

When the Government is injured, wholly or partially as a result of the contractor's actions and such actions are covered by the insurance required by *1352.228–70, Insurance Coverage,* the Government is entitled to recover from the contractor the full amount of any such injury attributable to the contractor regardless of a deductible. The Contracting Officer may offset the amount of recovery against any payment due to the contractor.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.228–73 Loss of or damage to leased aircraft

As prescribed in 48 CFR 1328.310–70(e) and 1328.310–70(f), insert the following clause:

LOSS OF OR DAMAGE TO LEASED AIRCRAFT (APR 2010)

(a) The Government assumes all risk of loss of, or damage (except normal wear and tear) to, the leased aircraft during the term of this lease while the aircraft is in the possession of the Government.

(b) In the event of damage to the aircraft, the Government, at its option, shall make the necessary repairs with its own facilities or by contract, or pay the contractor the reasonable cost of repair of the aircraft.

(c) In the event the aircraft is lost or damaged beyond repair, the Government shall pay the contractor a sum equal to the fair market value of the aircraft at the time of such loss or damage, which value may be specifically agreed to in clause 1252.228–74, *Fair Market Value of Aircraft,* less the salvage value of the aircraft. However, the Government may retain the damaged aircraft or dispose of it as it wishes. In that event, the contractor will be paid the fair market value of the aircraft as stated in the clause.

(d) The contractor agrees that the contract price does not include any cost attributable to hull insurance or to any reserve fund it has established to protect its interest in the aircraft. If, in the event of loss or damage to the leased aircraft, the contractor receives compensation for such loss or damage in any form from any source, the amount of such compensation shall be:

(1) Credited to the Government in determining the amount of the Government's liability; or

(2) For an increment of value of the aircraft beyond the value for which the Government is responsible.

(e) In the event of loss of or damage to the aircraft, the Government shall be subrogated to all rights of recovery by the contractor against third parties for such loss or damage and the contractor shall promptly assign such rights in writing to the Government.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.228–74 Fair market value of aircraft.

As prescribed in 48 CFR 1328.310–70(e) and 48 CFR 1328.310–70(g) insert the following in all applicable contracts for leased aircraft:

FAIR MARKET VALUE OF AIRCRAFT (APR 2010)

For purposes of the clause entitled ''Loss of or Damage to Leased Aircraft,'' it is agreed that the fair market value of the aircraft to be used in the performance of this contract shall be the lesser of the two values set out in paragraphs (a) and (b) of this clause:

(a) $_____; or

(b) If the contractor has insured the same aircraft against loss or destruction in connection with other operations, the amount of such insurance coverage on the date of the loss or damage is the maximum amount for which the Government may be responsible under this contract.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.228–75 Risk and indemnities.

As prescribed in 48 CFR 1328.310–70(e) and 48 CFR 1328.310–70(h), insert the following in all applicable contracts for leased aircraft:

RISK AND INDEMNITIES (APR 2010)

The contractor hereby agrees to indemnify and hold harmless the Government, its officers and employees from and against all claims, demands, damages, liabilities, losses, suits and judgments (including all costs and expenses incident thereto) which may be suffered by, accrue against, be charged to or recoverable from the Government, its officers and employees by reason of injury to or death of any person other than officers, agents, or employees of the Government or by reason of damage to property of others of whatsoever kind (other than the property of the Government, its officers, agents or employees) arising out of the operation of the aircraft. In the event the contractor holds or obtains insurance in support of this covenant, evidence of insurance shall be delivered to the Contracting Officer.

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.228–76 Approval of group insurance plans.

As prescribed in 48 CFR 1328.310–70(i), insert the following clause:

APPROVAL OF GROUP INSURANCE PLANS (APR 2010)

Under cost-reimbursement contracts, before buying insurance under a group insurance plan, the contractor shall submit the plan for approval to the Contracting Officer. Any change in benefits provided under an approved plan that can reasonably be expected to increase significantly the cost to the Government shall require similar approval.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.228–77 Contractor assurance of subcontractor payments.

As prescribed in 48 CFR 1328.102–3, insert the following clause:

Contractor Assurance of Subcontractor Payments May 2015

(a) To protect the interests of subcontractors participating in the performance of this contract, the Government requires the assurance that all monies due to subcontractors is timely and properly made prior to the submission of the contractor's final invoice.

(b) By accepting this award, in writing or by performance, the offeror/contractor represents that—it will provide full payment to all subcontractors utilized in the performance of the resultant contract prior to the submission of its final invoice.

(c) No later than five (5) days after contract award the contractor shall provide the Contracting Officer with a list of all subcontractors to be utilized in the performance of this contract. The contractor must provide updates to the Contracting Officer throughout the contract, should changes be made.

(d) The following shall be completed and provided accordingly:

SUBCONTRACTOR LIST—CONTRACT NO._____

Name of subcontractor business	Subcontractor point of contact with contact information (number/e-mail)	Contract line item(s) to which subcontract work is tied	Applicable trade (electrical, mechanical, etc.)

SUBCONTRACTOR LIST—CONTRACT NO._____—Continued

Name of subcontractor business	Subcontractor point of contact with contact information (number/e-mail)	Contract line item(s) to which subcontract work is tied	Applicable trade (electrical, mechanical, etc.)

(e) Reports by subcontractors of delayed or non-payment during the performance of the contract may impact the Government's continued payment of contractor invoices on a percentage of completion basis. (CAR clause, 1352.271–71, *Method of Payment and Invoicing Instructions for Ship Repair*).

(f) The contractor shall include the following statement on its final invoice—''By submission of this invoice, assurance is herein provided that all monies due to any and all subcontractors used in the performance of this contract have been paid in full prior to the submission of this final invoice.''

(g) Failure to pay subcontractors could adversely affect the contractor's past performance evaluation for this contract and have a negative impact on its eligibility for future contract awards.

(h) The Government may seek any available remedies in the event the contractor fails to comply with the provisions of this clause.

[80 FR 27268, May 13, 2015]

1352.231–70 Precontract costs.

As prescribed in 48 CFR 1331.205–32, insert the following clause:

PRECONTRACT COSTS (APR 2010)

The contractor is entitled to reimbursement for allowable, allocable, and reasonable costs incurred during the period of _____ to the award date of this contract in an amount not to exceed $_____.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.231–71 Duplication of effort.

As prescribed in 48 CFR 1331.205–70, insert the following clause:

DUPLICATION OF EFFORT (APR 2010)

The contractor hereby certifies that costs for work to be performed under this contract and any subcontract hereunder are not duplicative of any costs charged against any other Government contract, subcontract, or other Government source. The contractor agrees to advise the Contracting Officer, in writing, of any other Government contract or subcontract it has performed or is performing which involves work directly related to the purpose of this contract. The contractor also certifies and agrees that any and all work performed under this contract shall be directly and exclusively for the use and benefit of the Government, and not incidental to any other work, pursuit, research, or purpose of the contractor, whose responsibility it will be to account for it accordingly.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.233–70 Agency protests.

As prescribed in 48 CFR 1333.103(a), insert the following provision:

AGENCY PROTESTS (APR 2010)

(a) An agency protest may be filed with either: (1) The contracting officer, or (2) at a level above the contracting officer, with the appropriate agency Protest Decision Authority. *See* 64 FR 16,651 (April 6, 1999).

(b) Agency protests filed with the Contracting Officer shall be sent to the following address: [Insert Contracting Officer name and Address]

(c) Agency protests filed with the agency Protest Decision Authority shall be sent to the following address: [Insert appropriate Protest Decision Authority name and Address]

(d) A complete copy of all agency protests, including all attachments, shall be served upon the Contract Law Division of the Office of the General Counsel within one day of filing a protest with either the Contracting Officer or the Protest Decision Authority.

(e) Service upon the Contract Law Division shall be made as follows: U.S. Department of Commerce, Office of the General Counsel, Chief, Contract Law Division, Room 5893, Herbert C. Hoover Building, 14th Street and Constitution Avenue, NW., Washington, DC 20230. FAX: (202) 482–5858.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.233–71 GAO and Court of Federal Claims protests.

As prescribed in 48 CFR 1333.104–70(a), insert the following provision:

GAO AND COURT OF FEDERAL CLAIMS PROTESTS (APR 2010)

(a) A protest may be filed with either the Government Accountability Office (GAO) or the Court of Federal Claims unless an agency protest has been filed.

(b) A complete copy of all GAO or Court of Federal Claims protests, including all attachments, shall be served upon (i) the Contracting Officer, and (ii) the Contract Law Division of the Office of the General Counsel, within one day of filing a protest with either GAO or the Court of Federal Claims.

(c) Service upon the Contract Law Division shall be made as follows: U.S. Department of Commerce, Office of the General Counsel, Chief, Contract Law Division, Room 5893, Herbert C. Hoover Building, 14th Street and Constitution Avenue, NW., Washington, DC 20230. FAX: (202) 482–5858.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.235–70 Protection of human subjects.

As prescribed in 48 CFR 1335.006(a), insert the following provision:

PROTECTION OF HUMAN SUBJECTS (APR 2010)

(a) Research involving human subjects is not permitted under this award unless expressly authorized in writing by the Contracting Officer. Such authorization will specify the details of the approved research involving human subjects and will be incorporated by reference into this contract.

(b) The Federal Policy for the Protection of Human Subjects (the ''Common Rule''), adopted by the Department of Commerce at 15 CFR part 27, requires contractors to maintain appropriate policies and procedures for the protection of human subjects in research. The Common Rule defines a ''human subject'' as a living individual about whom an investigator conducting research obtains data through intervention or interaction with the individual, or identifiable private information. The term ''research'' means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. The Common Rule also sets forth categories of research that may be considered exempt from 15 CFR part 27. These categories may be found at 15 CFR 27.101(b).

(c) In the event the human subjects research involves pregnant women, prisoners, or children, the contractor is also required to follow the guidelines set forth at 45 CFR part 46 subpart B, C and D, as appropriate, for the protection of members of a protected class.

(d) Should research involving human subjects be included in the proposal, prior to issuance of an award, the contractor shall submit the following documentation to the Contracting Officer:

(1) Documentation to verify that contractor has established a relationship with an appropriate Institutional Review Board (''cognizant IRB''). An appropriate IRB is one that is located within the United States and within the community in which the human subjects research will be conducted;

(2) Documentation to verify that the cognizant IRB possesses a valid registration with the United States Department of Health and Human Services' Office for Human Research Protections (''OHRP'');

(3) Documentation to verify that contractor has a valid Federal-wide Assurance (FWA) issued by OHRP.

(e) Prior to starting any research involving human subjects, the contractor shall submit appropriate documentation to the Contracting Officer for institutional review and approval. This documentation may include:

(1) Copies of the human subjects research protocol, all questionnaires, surveys, advertisements, and informed consent forms approved by the cognizant IRB;

(2) Documentation of approval for the human subjects research protocol, questionnaires, surveys, advertisements, and informed consent forms by the cognizant IRB;

(3) Documentation of continuing IRB approval by the cognizant IRB at appropriate intervals as designated by the IRB, but not less than annually; and/or

(4) Documentation to support an exemption for the project from the Common Rule [*Note:* this option is not available for activities that fall under 45 CFR part 46 subpart C].

(f) In addition, if the contractor modifies a human subjects research protocol, questionnaire, survey, advertisement, or informed consent form approved by the cognizant IRB, the contractor shall submit a copy of all modified material along with documentation of approval for said modification by the cognizant IRB to the Contracting Officer for institutional review and approval. The contractor shall not implement any IRB approved-modification without written approval by the Contracting Officer.

(g) No work involving human subjects may be undertaken, conducted, or costs incurred

and/or charged to the project, until the Contracting Officer approves the required appropriate documentation in writing.

(End of provision)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.235–71 Protection of human subjects—exemption.

As prescribed in 48 CFR 1335.006(b), insert the following clause:

PROTECTION OF HUMAN SUBJECTS (APR 2010)

(a) Contractor has satisfied the requirements set forth in solicitation #_____, related to the Protection of Human Subjects in research. The Government has determined that the research involving human subjects to be conducted under this contract is exempt from the requirements of the Common Rule for the Protection of Human Subjects. The exemption memorandum executed by the Government and the attachments are hereby incorporated by reference into this contract. If contractor uses an informed consent form for the exempt research, contractor must use the informed consent form contained in the attachments in its conduct of research involving human subjects under this contract.

(b) If the conditions upon which the exemption is based should change in any way, contractor shall immediately notify the Contracting Officer in writing of the specified change. The Government will review the change and make a determination as to whether the change requires a change to the exemption approval. Contractor shall not proceed until notified in writing of the Contracting Officer's approval. Contractor shall obtain prior written approval from the Contracting Officer for any change to the existing human subjects protocol or informed consent form before proceeding.

(c) No other research involving human subjects is permitted under this award unless expressly authorized in writing by the Contracting Officer. Such writing will specify the details of the approved research involving human subjects and will be incorporated by reference into this contract.

(d) The Federal Policy for the Protection of Human Subjects (the ''Common Rule''), adopted by the Department of Commerce at 15 CFR Part 27, requires contractors to maintain appropriate policies and procedures for the protection of human subjects in research. The Common Rule defines a ''human subject'' as a living individual about whom an investigator conducting research obtains data through intervention or interaction with the individual, or identifiable private information. The term ''research'' means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge.

(e) The Common Rule also sets forth categories of research that may be considered exempt from this policy. These categories may be found at 15 CFR 27.101(b).

(f) In the event the human subjects research involves pregnant women, prisoners, or children, contractor is also required to follow the guidelines set forth at 45 CFR part 46 subpart B, C and D, as appropriate, for the protection of members of a protected class.

(g) Should additional research involving human subjects be required under the contract, prior to beginning such research, contractor shall submit the following documentation to the Contracting Officer:

(1) Documentation to verify that contractor has established a relationship with an appropriate Institutional Review Board (''cognizant IRB''). An appropriate IRB is one that is located within the United States and within the community in which the human subjects research will be conducted;

(2) Documentation to verify that the cognizant IRB is registered with the United States Department of Health and Human Services' Office for Human Research Protections (''OHRP'') and is designated as contractor's cognizant IRB;

(3) Documentation to verify that contractor has a valid Federal-wide Assurance (FWA) issued by OHRP; or

(4) Documentation necessary to support a determination that the research is exempt from the requirements of the Common Rule for the Protection of Human Subjects.

(h) Prior to starting any additional research involving human subjects, the contractor shall submit appropriate documentation to the Contracting Officer for institutional review and approval or exemption determination. This documentation may include:

(1) Copies of the human subjects research protocol, all questionnaires, surveys, advertisements, and informed consent forms approved by the cognizant IRB;

(2) Documentation of approval for the human subjects research protocol, questionnaires, surveys, advertisements, and informed consent forms by the cognizant IRB;

(3) Documentation of continuing IRB approval by the cognizant IRB at appropriate intervals as designated by the IRB, but not less than annually; and/or

(4) Documentation to support an exemption for the project from the Common Rule [*Note:* this option is not available for activities that fall under 45 CFR part 46 subpart C].

(i) In addition, if the contractor modifies a human subjects research protocol, questionnaire, survey, advertisement, or informed consent form approved by the cognizant IRB, the contractor shall submit a copy of all

modified material along with documentation of approval for said modification by the cognizant IRB to the Contracting Officer for institutional review and approval. The contractor may not implement any IRB approved modification without written approval by the Contracting Officer.

No work involving human subjects may be undertaken, conducted, or costs incurred and/or charged to the project, until the Contracting Officer approves the required appropriate documentation in writing.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.235–72 Protection of human subjects—institutional approval.

As prescribed in 48 CFR 1335.006(c), insert the following clause:

PROTECTION OF HUMAN SUBJECTS—INSTITUTIONAL APPROVAL (APR 2010)

(a) This contract/order includes non-exempt human subjects research that must be conducted pursuant to the requirements of the Federal Policy for the Protection of Human Subjects (the ''Common Rule''), adopted by the Department of Commerce at 15 CFR part 27. Contractor has submitted documentation establishing review and approval of the human subjects research protocol, including all informed consent forms, advertisements, and other recruitment materials, by a qualified Institutional Review Board (IRB) that has a current Federal-wide Assurance (FWA) issued by the Department of Health and Human Services (DHHS).

(b) By accepting this contract/order, the contractor certifies the accuracy of the documentation provided to its cognizant IRB and to the Government in support of the human subjects research specified therein. Based upon the contractor's documentation, and following the Government institutional review thereof, the following specific involvement of human subjects in research is hereby approved by the Contracting Officer:

Name of IRB: _____
(IRB # _____)
Title of IRB Protocol: _____
Recruiting Letter Approval Date (if appropriate): _____
Consent Form Approval Date: _____
Assurance of Compliance Number: _____

(c) Unless incorporated by written contract modification approved by the Contracting Officer, no other involvement of human subjects in research under this contract may be undertaken or conducted, or costs incurred and/or charged to the project, except as specified in the study plan reviewed and approved by the cognizant IRB and Government. Therefore, if the contractor modifies a human subjects research protocol, advertisement, or informed consent form approved by the cognizant IRB, contractor shall submit a copy of all modified material, along with documentation of approval for said modification by the cognizant IRB, to the Contracting Officer for agency institutional review and approval. Contractor may not implement any IRB-approved modification without written approval by the Contracting Officer.

Documentation of continuing IRB approval is required each year by the renewal date assigned by the cognizant IRB. Documentation of continuing IRB approval must be submitted to the Government for review and approval as soon as it occurs. Continuing approval of the human subjects research must be obtained from the cognizant IRB and provided to the Government until the research is completed or terminated. The contractor may proceed with previously approved human subjects research, if any, under this contract while the Government is conducting continuing review and approval of the human subjects research protocol. In the event that the Government determines, during the course of its review, that the human subjects research in this contract is not in compliance with the regulations set forth at 15 CFR part 27, or this contract, the Contracting Officer may take the appropriate enforcement action, including disallowing costs, suspending or terminating the human subjects protocol or the contract, by notifying the contractor in writing.

(d) It is incumbent upon contractor to ensure that continuing IRB review approval occurs in accordance with 15 CFR part 27. In the event that continuing review approval does not occur as set forth by 15 CFR part 27, contractor is to notify the Contracting Officer immediately.

(e) Contractor must report all adverse events to the cognizant IRB and to the Contracting Officer. In the event that adverse events are reported to the cognizant IRB and the Contracting Officer, the Government may suspend this contract pending a full review of the adverse event by the cognizant IRB.

(f) If the conditions upon which IRB approval is based should change in any way, contractor shall immediately notify the Contracting Officer, in writing, of the specified change.

(g) Failure to comply with this contract clause will be considered material noncompliance with the contract, and the Contracting Officer may take appropriate enforcement action, including disallowing costs, suspension or termination of the contract.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.235–73 Research involving human subjects—after initial contract award.

As prescribed in 48 CFR 1335.006(d), insert the following clause:

RESEARCH INVOLVING HUMAN SUBJECTS—AFTER INITIAL CONTRACT AWARD (APR 2010)

(a) No research involving human subjects is currently included in this contract/task order, and no research involving human subjects is permitted under this contract/task order unless expressly authorized, in writing, by the Contracting Officer.

(b) The Federal Policy for the Protection of Human Subjects (the ''Common Rule''), adopted by the Department of Commerce at 15 CFR part 27, requires that contractors maintain appropriate policies and procedures for the protection of human subjects in research. The Common Rule defines a ''human subject'' as a living individual about whom an investigator conducting research obtains data through intervention or interaction with the individual, or identifiable private information. The term ''research'' means a systematic investigation, including research, development, testing and evaluation, designed to develop or contribute to generalizable knowledge.

(c) The Common Rule also sets forth categories of research that may be considered exempt from this policy. These categories are specified at 15 CFR 27.101(b).

(d) In the event that human subjects research involves pregnant women, prisoners, or children, the contractor is also required to follow the guidelines set forth at 45 CFR part 46 subparts B, C and D, as appropriate, for the protection of members of a protected class.

(e) Should research involving human subjects become necessary for carrying out this contract/task order, prior to undertaking or conducting such human subjects research, contractor shall submit the following documentation to the Contracting Officer:

(1) Documentation to verify that contractor has established a relationship with an appropriate Institutional Review Board (''cognizant IRB''). An appropriate IRB is one that is located within the United States and within the community in which the human subjects research will be conducted;

(2) Documentation to verify that the cognizant IRB is registered with the United States Department of Health and Human Services' Office for Human Research Protections (''OHRP'');

(3) Documentation to verify that contractor has a valid Federal-wide Assurance (FWA) issued by the OHRP.

(f) Prior to starting any research involving human subjects, contractor shall submit appropriate documentation to the Contracting Officer for Government institutional review and approval. This documentation may include:

(1) Copies of the human subjects research protocol, advertisements, recruitment material, and informed consent forms approved by the cognizant IRB;

(2) Documentation of approval for the human subjects research protocol, advertisements, recruitment material, and informed consent forms by the cognizant IRB;

(3) Documentation of continuing IRB approval by the cognizant IRB at appropriate intervals as designated by the IRB, but not less than annually; and/or

(4) Documentation to support an exemption for the project from the Common Rule [*Note:* this option is not available for activities that fall under 45 CFR part 46 subpart C].

(g) In addition, if contractor modifies a human subjects research protocol, advertisement, recruitment material, or informed consent form approved by the cognizant IRB, contractor shall submit a copy of all modified material, along with documentation of approval for said modification by the cognizant IRB, to the Contracting Officer for Agency institutional review and approval. Contractor may not implement any IRB-approved modification without written approval by the Contracting Officer.

(h) No work involving human subjects may be undertaken, conducted, or costs incurred and/or charged to the project, until the Contracting Officer approves the required appropriate documentation in writing.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.237–70 Security processing requirements—high or moderate risk contracts.

As prescribed in 48 CFR 1337.110–70 (b), insert the following clause:

SECURITY PROCESSING REQUIREMENTS—HIGH OR MODERATE RISK CONTRACTS (APR 2010)

(a) Investigative Requirements for High and Moderate Risk Contracts. All contractor (and subcontractor) personnel proposed to be employed under a High or Moderate Risk contract shall undergo security processing by the Department's Office of Security before being eligible to work on the premises of any Department of Commerce owned, leased, or controlled facility in the United States or

overseas, or to obtain access to a Department of Commerce IT system. All Department of Commerce security processing pertinent to this contract will be conducted at no cost to the contractor. The level of contract risk will determine the type and scope of such processing, as noted below.

(1) Investigative requirements for Non-IT Service Contracts are:

(i) High Risk—Background Investigation (BI).

(ii) Moderate Risk—Moderate Background Investigation (MBI).

(2) Investigative requirements for IT Service Contracts are:

(i) High Risk IT—Background Investigation (BI).

(ii) Moderate Risk IT—Background Investigation (BI).

(b) In addition to the investigations noted above, non-U.S. citizens must have a pre-appointment check that includes an Immigration and Customs Enforcement agency check.

(c) Additional Requirements for Foreign Nationals (Non-U.S. Citizens). To be employed under this contract within the United States, non-U.S. citizens must have:

(1) Official legal status in the United States;

(2) Continuously resided in the United States for the last two years; and

(3) Obtained advance approval from the servicing Security Officer of the contracting operating unit in consultation with the DOC Office of Security (OSY) headquarters. (OSY routinely consults with appropriate agencies regarding the use of non-U.S. citizens on contracts and can provide up-to-date information concerning this matter.)

(d) Security Processing Requirement. Processing requirements for High and Moderate Risk Contracts are as follows:

(1) The contractor must complete and submit the following forms to the Contracting Officer's Representative (COR):

(i) Standard Form 85P (SF–85P), Questionnaire for Public Trust Positions;

(ii) FD–258, Fingerprint Chart with OPM's designation in the ORI Block; and

(iii) Credit Release Authorization.

(2) The Sponsor will ensure that these forms have been properly completed, initiate the CD–254, Contract Security Classification Specification, and forward the documents to the cognizant Security Officer.

(3) Upon completion of security processing, the Office of Security, through the servicing Security Officer and the Sponsor, will notify the contractor in writing of an individual's eligibility to be provided access to a Department of Commerce facility or Department of Commerce IT system.

(4) Security processing shall consist of limited personal background inquiries pertaining to verification of name, physical description, marital status, present and former residences, education, employment history, criminal record, personal references, medical fitness, fingerprint classification, and other pertinent information. For non-U.S. citizens, the Sponsor must request an Immigration and Customs Enforcement agency check. It is the option of the Office of Security to repeat the security processing on any contract employee at its discretion.

(e) Notification of Disqualifying Information. If the Office of Security receives disqualifying information on a contract employee, the COR will be notified. The Sponsor, in coordination with the Contracting Officer, will immediately remove the contract employee from duties requiring access to Departmental facilities or IT systems. Contract employees may be barred from working on the premises of a facility for any of the following:

(1) Conviction of a felony crime of violence or of a misdemeanor involving moral turpitude;

(2) Falsification of information entered on security screening forms or on other documents submitted to the Department;

(3) Improper conduct once performing on the contract, including criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct or other conduct prejudicial to the Government, regardless of whether the conduct was directly related to the contract;

(4) Any behavior judged to pose a potential threat to Departmental information systems, personnel, property, or other assets.

(f) Failure to comply with security processing requirements may result in termination of the contract or removal of contract employees from Department of Commerce facilities or denial of access to IT systems.

(g) Access to National Security Information. Compliance with these requirements shall not be construed as providing a contract employee clearance to have access to national security information.

(h) The contractor shall include the substance of this clause, including this paragraph, in all subcontracts.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.237–71 Security processing requirements—low risk contracts.

As prescribed in 48 CFR 1337.110–70(c), insert the following clause:

SECURITY PROCESSING REQUIREMENTS—LOW RISK CONTRACTS (APR 2010)

(a) Investigative Requirements for Low Risk Contracts. All contractor (and subcontractor) personnel proposed to be employed under a Low Risk contract shall undergo security processing by the Department's Office

of Security before being eligible to work on the premises of any Department of Commerce owned, leased, or controlled facility in the United States or overseas, or to obtain access to a Department of Commerce IT system. All Department of Commerce security processing pertinent to this contract will be conducted at no cost to the contractor.

(b) Investigative requirements for Non-IT Service Contracts are:

(1) Contracts more than 180 days—National Agency Check and Inquiries (NACI).

(2) Contracts less than 180 days—Special Agency Check (SAC).

(c) Investigative requirements for IT Service Contracts are:

(1) Contracts more than 180 days—National Agency Check and Inquiries (NACI).

(2) Contracts less than 180 days—National Agency Check and Inquiries (NACI).

(d) In addition to the investigations noted above, non-U.S. citizens must have a background check that includes an Immigration and Customs Enforcement agency check.

(e) Additional Requirements for Foreign Nationals (Non-U.S. Citizens). Non-U.S. citizens (lawful permanent residents) to be employed under this contract within the United States must have:

(1) Official legal status in the United States;

(2) Continuously resided in the United States for the last two years; and

(3) Obtained advance approval from the servicing Security Officer in consultation with the Office of Security headquarters.

(f) DOC Security Processing Requirements for Low Risk Non-IT Service Contracts. Processing requirements for Low Risk non-IT Service Contracts are as follows:

(1) Processing of a NACI is required for all contract employees employed in Low Risk non-IT service contracts for more than 180 days. The Contracting Officer's Representative (COR) will invite the prospective contractor into e-QIP to complete the SF–85. The contract employee must also complete fingerprinting.

(2) Contract employees employed in Low Risk non-IT service contracts for less than 180 days require processing of Form OFI–86C Special Agreement Check (SAC), to be processed. The Sponsor will forward a completed Form OFI–86C, FD–258, Fingerprint Chart, and Credit Release Authorization to the servicing Security Officer, who will send the investigative packet to the Office of Personnel Management for processing.

(3) Any contract employee with a favorable SAC who remains on the contract over 180 days will be required to have a NACI conducted to continue working on the job site.

(4) For Low Risk non-IT service contracts, the scope of the SAC will include checks of the Security/Suitability Investigations Index (SII), other agency files (INVA), Defense Clearance Investigations Index (DCII), FBI Fingerprint (FBIF), and the FBI Information Management Division (FBIN).

(5) In addition, for those individuals who are not U.S. citizens (lawful permanent residents), the Sponsor may request a Customs Enforcement SAC on Form OFI–86C, by checking Block #7, Item I. In Block 13, the Sponsor should enter the employee's Alien Registration Receipt Card number to aid in verification.

(6) Copies of the appropriate forms can be obtained from the Sponsor or the Office of Security. Upon receipt of the required forms, the Sponsor will forward the forms to the servicing Security Officer. The Security Officer will process the forms and advise the Sponsor and the Contracting Officer whether the contract employee can commence work prior to completion of the suitability determination based on the type of work and risk to the facility (*i.e.*, adequate controls and restrictions are in place). The Sponsor will notify the contractor of favorable or unfavorable findings of the suitability determinations. The Contracting Officer will notify the contractor of an approved contract start date.

(g) Security Processing Requirements for Low Risk IT Service Contracts. Processing of a NACI is required for all contract employees employed under Low Risk IT service contracts.

(1) Contract employees employed in all Low Risk IT service contracts will require a National Agency Check and Inquiries (NACI) to be processed. The Contracting Officer's Representative (COR) will invite the prospective contractor into e-QIP to complete the SF–85. Fingerprints and a Credit Release Authorization must be completed within three working days from start of work, and provided to the Servicing Security Officer, who will forward the investigative package to OPM.

(2) For Low Risk IT service contracts, individuals who are not U.S. citizens (lawful permanent residents) must undergo a NACI that includes an agency check conducted by the Immigration and Customs Enforcement Service. The Sponsor must request the ICE check as a part of the NAC.

(h) Notification of Disqualifying Information. If the Office of Security receives disqualifying information on a contract employee, the Sponsor and Contracting Officer will be notified. The Sponsor shall coordinate with the Contracting Officer for the immediate removal of the employee from duty requiring access to Departmental facilities or IT systems. Contract employees may be barred from working on the premises of a facility for any of the following reasons:

(1) Conviction of a felony crime of violence or of a misdemeanor involving moral turpitude.

(2) Falsification of information entered on security screening forms or of other documents submitted to the Department.

(3) Improper conduct once performing on the contract, including criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct or other conduct prejudicial to the Government regardless of whether the conduct was directly related to the contract.

(4) Any behavior judged to pose a potential threat to Departmental information systems, personnel, property, or other assets.

(i) Failure to comply with security processing requirements may result in termination of the contract or removal of contract employees from Department of Commerce facilities or denial of access to IT systems.

(j) Access to National Security Information. Compliance with these requirements shall not be construed as providing a contract employee clearance to have access to national security information.

(k) The contractor shall include the substance of this clause, including this paragraph, in all subcontracts.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.237–72 Security processing requirements—national security contracts.

As prescribed in 48 CFR 1337.110–70(d), use the following clause:

SECURITY PROCESSING REQUIREMENTS—NATIONAL SECURITY CONTRACTS (APR 2010)

(a) Security Investigative Requirements for National Security Contracts. National Security Contracts require contractor employees to gain access to national security information in the performance of their work. Regardless of the contractor employees' location, appropriate security access and fulfillment of cleared facility requirements, as determined by the National Industrial Security Program (NISP) Operation Manual must be met. All contractors are subject to the appropriate investigations indicated below and may be granted appropriate security access by the Office of Security based on favorable results. No national security material or documents shall be removed from a Department of Commerce facility. The circumstances of the work performance must allow the Department of Commerce to retain control over national security information and keep the number of contract personnel with access to the information to a minimum.

(b) All employees working on Special or Critical Sensitive contracts require an updated personnel security background investigation every five (5) years. Employees on Non-Critical Sensitive contracts will require an updated personnel security background investigation every ten (10) years.

(c) *Security procedures.* Position sensitivity/risk assessments must be conducted on all functions that are performed under the contract. Risk assessments for contractor employees are determined in the same manner as assessment of those functions performed by government employees. The Contracting Officer and Contracting Officer's Representative should determine the level of sensitivity or risk with the assistance of the servicing Security Officer.

(1) Contractor employees working on National Security Contracts must have a completed investigation and be granted an appropriate security level clearance by the Office of Security before start of work.

(2) The Contracting Officer's Representative must send the contract employee's existing security clearance information, if applicable, or appropriate investigative request package, to the servicing Security Officer, who will review and forward it to the Office of Security.

(3) The Office of Security must confirm that contract employees have the appropriate security clearance before starting any work under a National Security Contract.

(d) *Security forms required.* For Critical-Sensitive positions with Top Secret access, Critical-Sensitive positions with Secret access, and Non-Critical Sensitive positions with Secret or Confidential access, the following forms are required:

(1) Form SF–86, Questionnaire for National Security Positions, marked ''CON'' in Block 1, Position Title, to distinguish it as a contractor case;

(2) Form FD–258, Fingerprint Chart, with OPM's designation in the ORI Block; and

(3) Credit Release Authorization Form.

(e) Contracting Officer's Representative Responsibilities are:

(1) Coordinate submission of a proper investigative request package with the servicing Security Officer, the Contracting Officer, and the contractor.

(2) Review the request package for completeness, ensuring that the subject of each package is identified as a contract employee, the name of the contractor is identified, and that each package clearly indicates the contract sensitivity designation.

(3) Send the request package to the servicing Security Officer for investigative processing.

(f) Servicing Security Officer Responsibilities are:

(1) Review the package for completeness.

(2) Ensure that the forms are complete and contain all the pertinent information necessary to request the background investigation.

(3) Forward the request for investigation to the Defense Investigative Service Coordinating Office (DISCO).

(4) Maintain records of contractor personnel in their units subject to the NISP.

(5) Ensure that all contractor personnel have been briefed on the appropriate procedures for handling and safeguarding national security information.

(g) The contractor shall include the substance of this clause, including this paragraph, in all subcontracts.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.237–73 Foreign national visitor and guest access to departmental resources.

As prescribed in 48 CFR 1337.110–70 (e), insert the following clause:

FOREIGN NATIONAL VISITOR AND GUEST ACCESS TO DEPARTMENTAL RESOURCES (APR 2010)

(a) The contractor shall comply with the provisions of Department Administrative Order 207–12, Foreign National Visitor and Guest Access Program; Bureau of Industry and Security Export Administrative Regulations Part 734, and [insert operating unit counsel specific procedures]. The contractor shall provide the Government with notice of foreign nationals requiring access to any Department of Commerce facility or through a Department of Commerce IT system.

(b) The contractor shall identify each foreign national who requires access to any Departmental resources, and shall provide all requested information in writing to the Contracting Officer's Representative.

(c) The contractor shall include the substance of this clause, including this paragraph, in all subcontracts.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.237–74 Progress reports.

As prescribed in 48 CFR 1337.110–71(a), insert the following clause:

PROGRESS REPORTS (APR 2010)

The contractor shall submit, to the Government, a progress report every _____ [insert time period] month(s) after the effective date of the contract, and every _____ [insert time period] thereafter during the period of performance. The contractor shall deliver progress reports that summarize the work completed during the performance period, the work forecast for the following period, and state the names, titles and number of hours expended for each of the contractor's professional personnel assigned to the contract, including officials of the contractor. The report shall also include any additional information—including findings and recommendations—that may assist the Government in evaluating progress under this contract. The first report shall include a detailed work outline of the project and the contractor's planned phasing of work by reporting period.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.237–75 Key personnel.

As prescribed in 48 CFR 1337.110–71(b), insert the following clause:

KEY PERSONNEL (APR 2010)

(a) The contractor shall assign to this contract the following key personnel:

(Name) (Position Title)

(Name) (Position Title)

(b) The contractor shall obtain the consent of the Contracting Officer prior to making key personnel substitutions. Replacements for key personnel must possess qualifications equal to or exceeding the qualifications of the personnel being replaced, unless an exception is approved by the Contracting Officer.

(c) Requests for changes in key personnel shall be submitted to the Contracting Officer at least 15 working days prior to making any permanent substitutions. The request should contain a detailed explanation of the circumstances necessitating the proposed substitutions, complete resumes for the proposed substitutes, and any additional information requested by the Contracting Officer. The Contracting Officer will notify the contractor within 10 working days after receipt of all required information of the decision on substitutions. The contract will be modified to reflect any approved changes.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.239–70 Software license addendum.

As prescribed in 48 CFR 1339.107, insert the following clause:

SOFTWARE LICENSE ADDENDUM (APR 2010)

(a) This Addendum incorporates certain terms and conditions relating to Federal procurement actions. The terms and conditions

of this Addendum take precedence over the terms and conditions contained in any license agreement or other contract documents entered into between the parties.

(b) Governing Law: Federal procurement law and regulations, including the Contract Disputes Act, 41 U.S.C. Section 601 *et. seq.*, and the Federal Acquisition Regulation (FAR), govern the agreement between the parties. Litigation arising out of this contract may be filed only in those fora that have jurisdiction over Federal procurement matters.

(c) Attorney's Fees: Attorney's fees are payable by the Federal government in any action arising under this contract only pursuant to the Equal Access in Justice Act, 5 U.S.C. Section 504.

(d) No Indemnification: The Federal government will not be liable for any claim for indemnification; such payments may violate the Anti-Deficiency Act, 31 U.S.C. Section 1341(a).

(e) Assignment: Payments may only be assigned in accordance with the Assignment of Claims Act, 31 U.S.C. Section 3727, and FAR Subpart 32.8, ''Assignment of Claims.''

(f) Invoices: Invoices will be handled in accordance with the Prompt Payment Act (31 U.S.C. Section 3903) and Office of Management and Budget (OMB) Circular A–125, Prompt Payment.

(g) Patent and Copyright Infringement: Patent or copyright infringement suits brought against the United States as a party may only be defended by the U.S. Department of Justice (28 U.S.C. Section 516).

(h) Renewal of Support after Expiration of this Award: Service will not automatically renew after expiration of the initial term of this agreement.

(i) Renewal may only occur in accord with (1) the mutual agreement of the parties; or (2) an option renewal clause allowing the Government to unilaterally exercise one or more options to extend the term of the agreement.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.239–71 Electronic and information technology.

As prescribed in 48 CFR 1339.270(a), insert the following provision:

ELECTRONIC AND INFORMATION TECHNOLOGY (APR 2010)

(a) To be considered eligible for award, offerors must propose electronic and information technology (EIT) that meet the applicable Access Board accessibility standards at 36 CFR 1194 designated below:

_____ 1194.21 Software applications and operating systems

_____ 1194.22 Web-based intranet and internet information and applications

_____ 1194.23 Telecommunications products

_____ 1194.24 Video and multimedia products

_____ 1194.25 Self-contained, closed products

_____ 1194.26 Desktop and portable computers

_____ 1194.31 Functional performance criteria

_____ 1194.41 Information, documentation and support

(b) The standards do not require the installation of specific accessibility-related software or the attachment of an assistive technology device, but merely require that the EIT be compatible with such software and devices so that it can be made accessible if so required by the agency in the future.

(c) Alternatively, offerors may propose products and services that provide equivalent facilitation. Such offers will be considered to have met the provisions of the Access Board standards for the feature or components providing equivalent facilitation. If none of the offers that meet all applicable provisions of the standards could be accepted without imposing an undue burden on the agency or component, or if none of the offerors propose products or services that fully meet all of the applicable Access Board's provisions, those offerors whose products or services meet some of the applicable provisions will be considered eligible for award. Awards will not be made to an offeror meeting all or some of the applicable Access Board provisions if award would impose an undue burden upon the agency.

(d) Offerors must submit representation information concerning their products by completing the VPAT template at *http://www.Section508.gov*.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.239–72 Security requirements for information technology resources.

As prescribed in 48 CFR 1339.270(b), insert the following clause:

SECURITY REQUIREMENTS FOR INFORMATION TECHNOLOGY RESOURCES (APR 2010)

(a) *Applicability*. This clause is applicable to all contracts that require contractor electronic access to Department of Commerce sensitive non-national security or national security information contained in systems, or administrative control of systems by a contractor that process or store information that directly supports the mission of the Agency.

(b) *Definitions.* For purposes of this clause, the term ''Sensitive'' is defined by the guidance set forth in the Computer Security Act of 1987 (Pub. L. 100–235), including the following definition of the term:

(1) Sensitive information is '' * * * any information, the loss, misuse, or unauthorized access to, or modification of which could adversely affect the national interest or the, conduct of Federal programs, or the privacy to which individuals are entitled under section 552a of title 5, United States Code (The Privacy Act), but which has not been specifically authorized under criteria established by an Executive Order or an Act of Congress to be kept secret in the interest of national defense or foreign policy.''

(2) For purposes of this clause, the term ''National Security'' is defined by the guidance set forth in:

(i) The DOC IT Security Program Policy and Minimum Implementation Standards, Section 4.3.

(ii) The DOC Security Manual, Chapter 18.

(iii) Executive Order 12958, as amended, Classified National Security Information. Classified or national security information is information that has been specifically authorized to be protected from unauthorized disclosure in the interest of national defense or foreign policy under an Executive Order or Act of Congress.

(3) Information technology resources include, but are not limited to, hardware, application software, system software, and information (data). Information technology services include, but are not limited to, the management, operation (including input, processing, transmission, and output), maintenance, programming, and system administration of computer systems, networks, and telecommunications systems.

(c) The contractor shall be responsible for implementing sufficient Information Technology security, to reasonably prevent the compromise of DOC IT resources for all of the contractor's systems that are interconnected with a DOC network or DOC systems that are operated by the contractor.

(d) All contractor personnel performing under this contract and contractor equipment used to process or store DOC data, or to connect to DOC networks, must comply with the requirements contained in the DOC *Information Technology Management Handbook* (*see* DOC, Office of the Chief Information Officer Web site), or equivalent/more specific agency or operating unit counsel guidance as specified immediately hereafter [insert agency or operating unit counsel specific guidance, if applicable].

(e) Contractor personnel requiring a user account for access to systems operated by the contractor for DOC or interconnected to a DOC network to perform contract services shall be screened at an appropriate level in accordance with Commerce Acquisition Manual 1337.70, *Security Processing Requirements for Service Contracts.*

(f) Within 5 days after contract award, the contractor shall certify in writing to the COR that its employees, in performance of the contract, have completed initial IT security orientation training in DOC IT Security policies, procedures, computer ethics, and best practices, in accordance with *DOC IT Security Program Policy,* chapter 15, section 15.3. The COR will inform the contractor of any other available DOC training resources. Annually thereafter the contractor shall certify in writing to the COR that its employees, in performance of the contract, have completed annual refresher training as required by section 15.4 of the *DOC IT Security Program Policy.*

(g) Within 5 days of contract award, the contractor shall provide the COR with signed acknowledgement of the provisions as contained in Commerce Acquisition Regulation (CAR), 1352.209–72, *Restrictions Against Disclosures.*

(h) The contractor shall afford DOC, including the Office of Inspector General, access to the contractor's and subcontractor's facilities, installations, operations, documentation, databases, and personnel used in performance of the contract. Access shall be provided to the extent required to carry out a program of IT inspection, investigation, and audit to safeguard against threats and hazards to the integrity, availability, and confidentiality of DOC data or to the function of computer systems operated on behalf of DOC, and to preserve evidence of computer crime.

(i) For all contractor-owned systems for which performance of the contract requires interconnection with a DOC network on which DOC data will be stored or processed, the contractor shall provide, implement, and maintain a System Accreditation Package in accordance with the *DOC IT Security Program Policy.* Specifically, the contractor shall:

(1) Within 14 days after contract award, submit for DOC approval a System Certification Work Plan, including project management information (at a minimum the tasks, resources, and milestones) for the certification effort, in accordance with *DOC IT Security Program Policy* and [Insert agency or operating unit counsel specific guidance, if applicable]. The Certification Work Plan, approved by the COR, in consultation with the DOC IT Security Officer, or Agency/operating unit counsel IT Security Manager/Officer, shall be incorporated as part of the contract and used by the COR to monitor performance of certification activities by the contractor of the system that will process DOC data or connect to DOC networks. Failure to submit and receive approval of the Certification Work Plan may result in termination of the contract.

(2) Upon approval, follow the work plan schedule to complete system certification activities in accordance with DOC *IT Security Program Policy* Section 6.2, and provide the COR with the completed System Security Plan and Certification Documentation Package portions of the System Accreditation Package for approval and system accreditation by an appointed DOC official.

(3) Upon receipt of the Security Assessment Report and Authorizing Official's written accreditation decision from the COR, maintain the approved level of system security as documented in the Security Accreditation Package, and assist the COR in annual assessments of control effectiveness in accordance with DOC *IT Security Program Policy*, Section 6.3.1.1.

(j) The contractor shall incorporate this clause in all subcontracts that meet the conditions in paragraph (a) of this clause.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.242–70 Postaward conference.

As prescribed in 48 CFR 1342.503–70, insert the following provision:

POSTAWARD CONFERENCE (APR 2010)

A postaward conference with the successful offeror may be required. If required, the Contracting Officer will contact the contractor within 10 days of contract award to arrange the conference.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.245–70 Government furnished property.

As prescribed in 48 CFR 1345.107–70, insert the following clause:

GOVERNMENT FURNISHED PROPERTY (APR 2010)

The Government will provide the following item(s) of Government property to the contractor . The contractor shall be accountable for, and have stewardship of, the property in the performance of this contract. This property shall be used and maintained by the contractor in accordance with provisions of the ''Government Property'' clause included in this contract.

Item No.	Description	Quantity	Delivery date	Property/Tag No. (if applicable)
.....	.....	.....	.....	.....

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.246–70 Place of acceptance.

As prescribed in 1346.503, insert the following clause:

PLACE OF ACCEPTANCE (APR 2010)

(a) The Contracting Officer or the duly authorized representative will accept supplies and services to be provided under this contract.

(b) The place of acceptance will be:

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.270–70 Period of performance.

As prescribed in 48 CFR 1370.101, insert the following clause:

PERIOD OF PERFORMANCE (APR 2010)

(a) The base period of performance of this contract is from _____ through _____. If an option is exercised, the period of performance shall be extended through the end of that option period.

(b) The option periods that may be exercised are as follows:

Period	Start date	End date
Option I		
Option II		
Option III		
Option IV		

(c) The notice requirements for unilateral exercise of option periods are set out in FAR 52.217–9.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.270–71 Pre-bid/pre-proposal conference and site visit.

As prescribed in 48 CFR 1370.102, insert the following provision:

PRE-BID/PRE-PROPOSAL CONFERENCE AND SITE VISIT (APR 2010)

(a) The Government is planning a pre-proposal conference, during which potential contractors may obtain a better understanding of the work required.

(b) Offerors are encouraged to submit all questions in writing at least [___] days prior to the conference. Questions will be considered at any time prior to, or during, the conference; however, offerors will be asked to confirm verbal questions in writing. Subsequent to the conference, an amendment to the solicitation containing an abstract of the questions and the Government's answers, and a list of attendees, will be made publicly available.

(c) In order to facilitate conference preparations, contact the person identified in [Block __] on Standard Form [__] of this solicitation to make arrangements for security processing for entry of attendees into the Government facility.

(d) In no event shall failure to attend the pre-proposal conference constitute grounds supporting a protest or contract claim.

(e) Offerors are cautioned that, notwithstanding any remarks, clarifications, or responses provided at the conference, all terms and conditions of the solicitation remain unchanged unless they are changed by written amendment. It is the responsibility of each offeror, prior to submitting a proposal, to seek clarification of any perceived ambiguity in the solicitation or created by an amendment of the solicitation.

(f) The pre-proposal conference will be held:

Date: _____

Time: _____

Location: _____

[Instructions: If the conference also includes a site or equipment inspection visit, insert the following paragraph]:

(g) During the conference, an opportunity to visit the site of the work, and, if applicable, inspect equipment on which maintenance or repairs are to be performed will be offered to attendees.

(h) Offerors are expected to satisfy themselves regarding all conditions that may affect the work required or the cost of contract performance. In no event shall failure to inspect the site and/or equipment constitute grounds for any protest or contract claim.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–70 Inspection and manner of doing work.

As prescribed in 48 CFR 1371.101, insert the following clause:

INSPECTION AND MANNER OF DOING WORK (APR 2010)

(a) All work and material shall be subject to the approval of the Contracting Officer or duly authorized representative. Work shall be performed in accordance with the plans and specifications of this contract as modified by any contract modification.

(b) Unless otherwise specifically provided for in the contract, all operational practices of the contractor and all workmanship and material, equipment and articles used in the performance of work shall be in accordance with American Bureau of Shipping ''Rules for Building and Classing Steel Vessels'', U.S. Coast Guard Marine Engineering Regulations and Material Specifications (46 CFR Subchapter F), U.S. Coast Guard Electrical Engineering Regulations (46 CFR Subchapter J), and U.S. Public Health Service ''Handbook on Sanitation of Vessel Construction'', in effect at the time of the contract award; and the best commercial maritime practices, except where military specifications are specified, in which case such standards of material and workmanship shall be followed.

(c) All material and workmanship shall be subject to inspection and test at all times during the contractor's performance of the work to determine their quality and suitability for the purpose intended and compliance with the contract. In case any material or workmanship furnished by the contractor is found to be defective prior to redelivery of the vessel, or not in accordance with the requirements of the contract, the Government shall have the right prior to redelivery of the vessel to reject such material or workmanship, and to require its correction or replacement by the contractor at the contractor's cost and expense. This Government right is in addition to its rights under any Guarantee clause in this contract. If the contractor fails to proceed promptly with the replacement or correction of such material or workmanship, as required by the Contracting Officer, the Government may, by contract or otherwise, replace or correct such material or workmanship and charge to the contractor the excess cost to the Government. The contractor shall provide and maintain an inspection system acceptable to the Government covering the work specified in the contract. Records of all inspection work by the contractor shall be kept complete and

available to the Government during the performance of the contract and for a period of two (2) years after delivery of the vessel to the Government.

(d) No welding, including tack welding and brazing, shall be permitted in connection with repairs, completions, alterations, or addition to hulls, machinery or components of vessels unless the welder is, at the time, qualified to the standards established by the U.S. Coast Guard, the American Bureau of Shipping, or the Department of the Navy. The welder's qualifications shall be appropriate for the particular service application, filler material type, position of welding, and welding process involved in the work being undertaken. A welder may be required to requalify if the Contracting Officer believes there is a reasonable doubt concerning the welder's ability. Welders' qualifications for this purpose shall be governed by the U.S. Coast Guard Marine Engineering Regulations and Material Specifications (46 CFR Subchapter F). When a welding process other than manual shielded arc is proposed or required, the contractor or fabricator shall submit procedure qualification tests for approval prior to production welding. Procedure qualification tests shall be conducted in accordance with the United States Coast Guard Marine Engineering Regulations and Material Specifications (46 CFR Subchapter F).

(e) The contractor shall exercise reasonable care to protect the vessel from fire, and the contractor shall maintain a reasonable system of inspection over the activities of welders, burners, riveters, painters, plumbers and similar workers, particularly where such activities are undertaken in the vicinity of the vessel's fuel oil tanks, magazines or storerooms containing flammable material. A reasonable number of hose lines shall be maintained by the contractor ready for immediate use on the vessel at all times while the vessel is berthed alongside the contractor's pier or in dry dock or on a marine railway. All tanks or bilge areas under alteration or repair shall be cleaned, washed, and steamed out or otherwise made safe by the contractor if and to the extent necessary as required by good marine practice or by current Occupational Safety and Health Administration regulations. The Contracting Officer's Representative (COR) shall be furnished with a ''gas free'' or ''safe for hot work'' or ''safe for workers'' certificate before any hot work or entry is done. Unless otherwise provided in this contract, the contractor shall at all times maintain a reasonable fire watch about the vessel, including a fire watch on the vessel while work is being performed thereon.

(f) The contractor shall place proper safeguards and/or effect such safety precautions as necessary, including suitable and sufficient lighting, for the prevention of accidents or injury to persons or property during the prosecution of work under this contract and/or from time of receipt of the vessel until acceptance by the Government of the work performed.

(g) Except as otherwise provided in this contract, when the vessel is in the custody of the contractor or in dry dock or on a marine railway and the temperature becomes as low as 35 degrees Fahrenheit, the contractor shall keep all pipelines, fixtures, traps, tanks, and other receptacles on the vessel drained to avoid damage from freezing, or if this is not practicable, the vessel shall be kept heated to prevent such damage. The vessel's stern tube and propeller hubs shall be protected from frost damage by applied heat through the use of a salamander or other proper means, as approved by the COR.

(h) Whenever practicable, the work shall be performed in a manner which does not interfere with the berthing and messing of personnel attached to the vessel. The contractor shall ensure that assigned personnel have access to the vessel at all times. It is understood that such personnel will not interfere with the work or the contractor's workers.

(i) The Government does not guarantee the correctness of the dimensions, sizes, and shapes shown in any sketches, drawings, plans or specifications prepared or furnished by the Government. Prior to submitting an offer, it is the responsibility of the bidder/offeror to verify the dimensions, sizes, and shapes in materials provided by the Government. Where practical, the Government will make the vessel available for inspection prior to bid opening or the date for receipt of proposals. If the contractor, as a result of inspection or otherwise, discovers any error in the sketches, drawings, plans or specifications, it shall immediately inform the Contracting Officer of the error and proceed in accord with instructions received from the Contracting Officer. The Government is not liable for any claims or charges resulting from additional work performed by the contractor as a result of a patent ambiguity in the sketches, drawings, plans or specifications that was not brought to the attention of the Contracting Officer. The contractor shall be responsible for the correctness of the shape, sizes and dimensions of parts furnished by the contractor under the contract.

(j) The contractor shall at all times keep the site of the work on the vessel free from accumulation of waste material or rubbish caused by contractor employees or the work, and at the completion of the work shall remove all rubbish from and about the site of the work and shall leave the work and its immediate vicinity ''broom-clean'' unless more exactly specified in this contract.

(k) While in drydock or on a marine railway, the contractor shall be responsible for the closing, before the end of working hours, of all valves and openings upon which work

is being done by its workers when such closing is practicable. The contractor shall establish a list and keep the COR cognizant of the closure status of all valves and openings upon which the contractor's workers have been working.

(l) Without additional expense to the Government, the contractor shall employ specialty subcontractors where required by the specifications or when necessary for satisfactory performance of the work.

(m)(1) Unless otherwise stated in the contract, the contractor shall notify the COR at least 72 hours in advance:

(i) Prior to starting inspections or tests; and

(ii) When supplies will be ready for Government inspection.

(2) Such notification shall be provided either verbally or in writing at the discretion of the COR.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–71 Method of payment and invoicing instructions for ship repair.

As prescribed in 48 CFR 1371.102, insert the following clause:

METHOD OF PAYMENT AND INVOICING INSTRUCTIONS FOR SHIP REPAIR (APR 2010)

(a) The Government will make payment under this contract based on a percentage of completion. The contractor may invoice for the percentage completed for each work item as work progresses. The amount invoiced shall be calculated based on prices stated in the Schedule, as follows: A work item may not be invoiced until the percentage complete reaches 25 percent. Future invoices for that work item have no limitation as to the percentage of completion required before invoicing, but in no event may invoices be submitted more frequently than every 2 weeks, or for amounts less than $10,000, unless it is the final payment. The minimum percentage of completion (25%) to be reached prior to billing each work item may be waived by the Contracting Officer for large dollar work items on a case-by-case basis.

(b) Invoices submitted by the contractor which are deemed not proper, in accordance with FAR 52.232–25, will be returned. Invoices shall include:

(1) Name and Address of the contractor;

(2) DUNS Number;

(3) Invoice Date;

(4) Contract Number/Modification Number;

(5) CLIN/Work Item Number, to include: Description, Quantity, Unit of Measure, Unit Price and Extended Price;

(6) Shipping and Payment Terms; and,

(7) Contractor Point of Contact, including: Name, Title, Phone Number, and Mailing Address;

(8) The percentage of completion for each CLIN/work item identified;

(9) Name of the Contracting Officer ;

(10) Ship name;

(11) The overall percentage and dollar amount previously billed, currently billed and unbilled.

(c) When invoicing for changed work, the contractor shall identify it as a contract change and shall identify the modification authorizing the change, and the CLIN/Work Item associated with the change.

(d) All items of work invoiced under this contract will be verified and confirmed by the Contracting Officer's Representative as accurate and complete and approved by the designated billing office before payment will be made.

(e) Mail the original invoice to:
[insert]

(f) The contractor's final invoice submitted under the contract must be marked as follows: ''THIS INVOICE CONSTITUTES THE FINAL INVOICE—UPON PAYMENT OF THIS INVOICE NO OTHER MONIES ARE DUE UNDER CONTRACT NUMBER _____.'' (To be assigned at contract award)

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–72 Additional Item Requirements (AIR)—growth work

As prescribed in 48 CFR 1371.103, insert the following clause:

ADDITIONAL ITEM REQUIREMENTS (AIR)—GROWTH WORK (APR 2010)

(a) This clause applies to Additional Item Requirements (AIR), also known as growth and emergent work ordered by the Contracting Officer pursuant to the Changes—Ship Repair clause or mutually agreed upon by the parties. The contractor shall perform AIR at the labor billing rates designated in the Schedule, as described in paragraph (c) of this clause. The AIR handling fee designated in the Schedule shall be the sole fee used for direct material purchases and subcontractor handling. The estimated quantity of labor hours and handling fees represent the Government's best estimate for growth that may be required throughout the contract performance period. All growth work shall be paid at the prices stated in the Schedule.

(b) The contractor shall take into account the potential for ordering all estimated AIR quantities in developing the Production Schedule. The ordering of any portion of the AIR quantities does not in itself warrant an

extension to the original contract completion date; however, for planning purposes, the Government anticipates ordering AIR in accordance with the following schedule:

(1) No more than 75% of the hours during the first half of the contract period of performance.

(2) No more than 50% of the hours during the third quarter of the contract period of performance.

(3) No more than 30% of the hours during the fourth quarter of the contract period of performance.

(c) The AIR labor rate shall be a flat, hourly rate to cover the entire effort and shall be burdened to include:

(1) Direct production labor hour functions only. Direct production labor hours are hours of skilled labor at the journeyman level expended in direct production. Direct production is defined as work performed by a qualified craftsman that is directly related to the alteration, modification, or repair of the item or system identified as needing alteration, modification, or repair. The following functions are identified as direct production: Abrasive Cleaning/Water Blasting, Tank Cleaning, Welding, Burning, Brazing, Blacksmithing, Machining (inside and outside), Carpentry, Electrical/Electronic Work, Crane Operation, Shipfitting, Lagging/Insulating, Painting, Boilermaking, Pipe Fitting, Engineering (Production), Sheetmetal Work, Staging/Scaffolding, and Rigging.

(2) Non-production labor hours (whether charged directly or indirectly by contractor's accounting system) shall be for labor in support of production functions. For purposes of this clause, support functions are defined as functions that do not directly contribute to the alteration, modification, or repair of the item or system identified as needing alteration, modification, or repair. Necessary support functions should be priced into the burdened rate for production labor hours. Examples of support functions include: Testing, Quality Assurance (inspection), Engineering (support), Planning (including involvement of craft foreman/journeyman in planning a task), Estimating (including determination of necessary materials and equipment needed to perform a task), Material Handling, Set-up (moving tools and equipment from shop to ship to perform a task), Fire Watch, General Labor (including general support of journeyman tasks), Cleaning (including debris pickup and removal), Surveying, Security, Transportation, Supervision, and Lofting (sail/pattern making).

(d) Additional Item Requirements do not include replacement work performed pursuant to the Inspection and Manner of Doing Work or Guarantees clauses.

(e) It is the Government's intention to award any growth work identified during the repair to the contractor, if a fair and reasonable price can be negotiated for such work, based upon Schedule rates. If a fair and reasonable price cannot be negotiated, the Government may, at its discretion, obtain services outside of the contract. Such services may be performed while the ship is undergoing repair in the contractor's facility pursuant to the Access to Vessels clause.

(f) The contractor shall submit to the Contracting Officer the following information in all AIR proposals:

(1) Number of labor hours estimated; broken down by specific direct production labor category.

(2) Material estimates, individually broken out and priced. When requested by the Contracting Officer, material quotes shall be provided.

(3) Subcontractor estimates, individually broken out and priced along with the actual subcontractor quotes. The requirement to submit subcontractor quotes may be waived if deemed appropriate by the Contracting Officer.

(4) Material/subcontractor handling fee and the basis for the fee.

(g) The contractor shall not be entitled to payment for any hours ordered pursuant to this clause until such time as a written contract modification is executed.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–73 Schedule of work.

As prescribed in 48 CFR 1371.104, insert the following clause.

SCHEDULE OF WORK (APR 2010)

(a) Notwithstanding other requirements specified in this contract, the contractor shall provide to the Contracting Officer and COR the following documents within five (5) working days of the vessel's arrival at the contractor's facility:

(1) Production Schedule.

(2) Work Package Network.

(3) Total Manpower Loading Curve.

(4) Trade Manning Curves.

(5) Subcontracting List.

(b) The Production Schedule shall list the earliest, latest, and scheduled start and completion date for each work item awarded and shall identify the critical path. The Work Package Network shall show the work items, milestones, key events, and activities and shall clearly identify the critical path. The Total Manpower Loading Curve shall show the required manning for the duration of the contract. The Trade Manning Curves shall show the required manning for each trade for

the duration of the contract. The Subcontracting List shall show work items, milestones, key events, and activities to be accomplished by subcontractors.

(c) Additional Item Requirements ordered and agreed upon, whether or not yet formalized via a change order (contract modification), shall be added to the Production Schedule, Trade Manning Curves, and Subcontracting List and submitted to the Contracting Officer and COR at each weekly Progress Meeting. Any anticipated or unanticipated deviation (greater than five (5) calendar days) from the Production Schedule shall be immediately brought to the attention of the Contracting Officer and COR.

(d) Any unauthorized deviation in the Production Schedule which results in a delay in the completion of work on a vessel past the established performance period completion date may entitle the Government to remedies for late performance, including, but not limited to, liquidated damages.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–74 Foreseeable cost factors pertaining to different shipyard locations.

As prescribed in 48 CFR 1371.105, insert the following provision:

FORESEEABLE COST FACTORS PERTAINING TO DIFFERENT SHIPYARD LOCATIONS (APR 2010)

(a) The Contracting Officer will evaluate certain foreseeable costs that will vary with the location of the commercial shipyard to be used by bidders/offerors under this solicitation. Costs will be calculated based on the bidder's/offeror's shipyard location and these costs will be added, for the purposes of evaluation only, to the bidder's/offeror's overall price.

(b) These elements of foreseeable costs consist of the following:

(1) *Vessel Transit:* (i) Vessel delivery costs will be based on one round trip from the vessel's homeport of _____ to the contractor's facility at a cruising speed of ____ knots. Distances will be based on the NOAA publication, ''Distance Between U.S. Ports''.

(ii) Daily vessel operational cost to navigate the vessel between its homeport and the contractor's offered place of performance is $_____ per day. The number of days to transit to the contractor's offered place of performance from the vessel's homeport will be multiplied by the per-day operational cost.

(iii) No operational costs will be applied if the ship can be delivered to the contractor's facility from its homeport within eight (8) hours port-to-port. If the delivery time exceeds eight (8) hours, but is less than 24 hours, it will be considered one full day. Any fraction of subsequent day(s) will be considered as a full day.

(2) *Shore Leave Costs:* If the contractor's facility is outside of a 50-mile radius of the vessel's homeport—

(i) An assessment of $_____ for each 15-day period or portion thereof, beginning with the vessel's departure from the homeport and concluding with the vessel's return to homeport.

(ii) There will be an additional transportation cost for _____ vessel crew members for one (1) round trip(s) between the contractor's offered place of performance and the vessel's homeport at the cost of coach-type airfare.

(3) *Travel and Per Diem Costs:* If the contractor's facility is outside of a 50-mile radius of the vessel's homeport—

(i) There will be a transportation cost for one (1) Contracting Officer's Representative (COR) for ____ round trip(s) between the contractor's offered place of performance and the COR's official duty station at the cost of coach-type airfare.

(ii) There will be a per diem expense for ____ *calendar days to support one (1) COR while in the city of the place of contract performance, to be determined in accordance with the Joint Federal Travel Regulations (JFTR). The cost of car rental for the estimated performance period will also be included.*

(iii) There will be a transportation cost for one (1) Contracting Officer for ____ round trip(s) between the Contracting Officer's official duty station and the contractor's offered place of performance at the cost of coach-type airfare, plus per diem expenses and a rental car.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–75 Delivery and shifting of the vessel.

As prescribed in 48 CFR 1371.106, insert the following clause:

DELIVERY AND SHIFTING OF THE VESSEL (APR 2010)

(a) The Government shall deliver the vessel to the contractor, at the location specified in the contract.

(b) Whether the specified location of performance is the contractor's own facility or any other authorized facility, it shall be understood to mean the fairway of the facility. The contractor shall provide necessary tugs and pilot services to move the vessel from the fairway to the pier or dock, and, upon completion of all work, from the pier or dock to the fairway of the facility.

(c) While the vessel is in the possession of the contractor, any necessary movement of the vessel incidental to the work specified in the contract shall be furnished by the contractor without additional charge to the Government.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–76 Performance.

As prescribed in 48 CFR 1371.107, insert the following clause:

PERFORMANCE (APR 2010)

(a) The contractor shall not commence work until a notice to proceed has been issued by the Contracting Officer.

(b) The Government shall deliver the vessel described in the contract at such time and location as may be specified in the contract. Upon completion of the work, the Government shall accept delivery of the vessel at such time and location as may be specified in the contract.

(c) Without additional charge to the Government, and without specific requirement in the contract, the contractor shall:

(1) Make available, at the facility, to personnel of the vessel while in drydock or on a marine railway, sanitary facilities adequate for the number of personnel using them and acceptable to the Contracting Officer;

(2) Supply and maintain, in such condition as the Contracting Officer may reasonably require, suitable brows and gangways from the pier, drydock or marine railway to the vessel;

(3) Perform, or pay the cost of, any repair, reconditioning or replacement made necessary as the result of the use by the contractor of any of the vessel's machinery, equipment or fittings, including, but not limited to, winches, pumps, riggings, or pipe lines; and

(4) Furnish suitable offices, office equipment and telephones at or near the site of the work as the Contracting Officer reasonably requires for personnel designated by the Government.

(d) Except as otherwise provided in the contract, the contractor shall furnish all necessary material, labor, supervision, services, equipment, tools, supplies, power, accessories, facilities, and other things and services necessary for accomplishing the work.

(e) The contractor shall conduct dock and sea trials of the vessel as required by the contract. Unless otherwise expressly provided in the contract, during the conduct of these trials the vessel shall be under the control of the vessel's commander and crew with representatives of the contractor and the Government on board to determine whether the work provided by the contractor has been satisfactorily performed. Dock and sea trials not specified which the contractor requires for its own benefit shall not be undertaken by the contractor without prior notice to and approval of the Contracting Officer; any such dock or sea trial shall be conducted at the risk and expense of the contractor. The contractor shall provide and install all fittings and appliances which may be necessary for the dock and sea trials to enable the representatives of the Government to determine whether the requirements of the contract plans and specifications have been met. The contractor shall also be responsible for the care, installation and removal of any instruments and apparatus furnished by the Government for such trials.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–77 Delays.

As prescribed in 48 CFR 1371.108, insert the following clause:

DELAYS (APR 2010)

When, during the performance of this contract, the contractor is required to delay the work on a vessel temporarily, due to orders or actions of the Government respecting stoppage of work to permit shifting the vessel, stoppage of hot work to permit bunkering, fueling, embarking or debarking of passengers or loading or discharging of cargo, and the contractor is not given sufficient advance notice or is otherwise unable to avoid incurring additional costs on account thereof, an equitable adjustment may be made in the contract. Any such request for equitable adjustment shall be asserted in writing as soon as practicable after the delay or disruption, but not later than the day of final payment under the contract.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–78 Minimization of delay due to Government furnished property.

As prescribed in 48 CFR 1371.109, insert the following clause:

MINIMIZATION OF DELAY DUE TO GOVERNMENT FURNISHED PROPERTY (APR 2010)

(a) In order to assure timely performance under this contract, it is imperative that delay in the contract's performance period resulting from late, damaged, or unsuitable

Government furnished property be held to an absolute minimum. In order to achieve minimization of delay, it is agreed that:

(1) Subject to adjustment as provided in paragraph (b) of this clause, the Government shall deliver each item of Government furnished property to the contractor on or before the date specified in the contract or, if later, in sufficient time for the contractor to meet the contract performance period.

(2) The Government may forego furnishing any item of Government property to the contractor. In that event, the contractor shall prepare the vessel in terms of piping, wiring, structure, foundation, ventilation, and any other pre-installation requirements of the item, so that the work on the vessel may continue without delay and disruption resulting from the absence of the item. If the Government does not furnish an item designated as Government furnished property, the contract price may be adjusted accordingly.

(b) The delivery or performance dates for the supplies or services to be furnished by the contractor under this contract are based upon the expectation that Government furnished property suitable for use (except for such property furnished ''as is'') will be delivered to the contractor at the time stated in the specification or, if not so stated, in sufficient time to enable the contractor to meet such delivery or performance dates. If the Government furnished property is not furnished in the time stated in the contract, or, if a date is not specified, and the late delivery does not give the contractor sufficient time to enable the contractor to meet required contract delivery or performance dates, the contractor shall notify the Government in writing of the late delivery. Notification shall include cost and schedule impacts, including delays and disruptions to schedules. This notification shall be submitted as soon as practical or known.

(c) The provisions in subsection (b) of this clause and in FAR 52.245–1, if applicable, provide the exclusive remedies to the contractor resulting from delay in delivery of Government furnished property or delivery of such property in a condition not suitable for its intended use.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–79 Liability and insurance.

As prescribed in 48 CFR 1371.110, insert the following clause:

LIABILITY AND INSURANCE (APR 2010)

(a) The contractor shall exercise reasonable care and use its best efforts to prevent accidents, injury or damage to all employees, persons and property, in and about the work, and to the vessel or part thereof upon which work is done.

(b) The contractor shall be responsible for and make good at its own cost and expense any and all loss of or damage of whatsoever nature to the vessel (or part thereof), its equipment, movable stores and cargo, and Government-owned material and equipment for the repair, completion, alteration of or addition to the vessel in the possession of the contractor, whether at the plant or elsewhere, arising or growing out of the performance of the work, except where the contractor can affirmatively show that such loss or damage was due to causes beyond the contractor's control, was proximately caused by the fault or negligence of agents or employees of the Government, or which loss or damage the contractor by exercise of reasonable care was unable to prevent. However, the contractor shall not be responsible for any such loss or damage discovered after redelivery of the vessel unless the loss or damage is discovered within 90 days after redelivery of the vessel and loss or damage is affirmatively shown to be the result of the fault or negligence of the contractor. To induce the contractor to perform the work for the compensation provided, it is specifically agreed that the contractor's aggregate liability on account of loss of or damage to the vessel (or part thereof), its equipment, movable stores and cargo and Government-owned materials and equipment, shall in no event exceed the sum of $1,000,000.00. As to the contractor, the Government assumes the risk of loss or damage to the Government-owned vessel (or part thereof), its equipment, movable stores and cargo and said Government-owned materials and equipment in excess of $1,000,000.00. This assumption of risk includes but is not limited to loss or damage from negligence of whatsoever degree of the contractor's servants, employees, agents or subcontractors, but specifically excludes loss or damage from willful misconduct or lack of good faith on the part of contractor's personnel, who have supervision or direction of all or substantially all of the contractor's business, or all or substantially all of the contractor's operation at any one plant. However, as to such risk assumed and borne by the Government, the Government shall be subrogated to any claim, demand or cause of action against third persons which exists in favor of the contractor, and the contractor shall, if required, execute a formal assignment or transfer of claims, demands or causes of action. Nothing contained in this paragraph shall create or give rise to any right, privilege or power in any person except the contractor, nor shall any person (except the contractor) be or become entitled thereby to proceed directly against the Government, or join the Government as a co-defendant in any action against the contractor brought to

determine the contractor's liability, or for any other purpose.

(c) The contractor indemnifies and holds harmless the Government, its agencies and instrumentalities, and the vessel against all suits, actions, claims, costs or demands (including without limitation, suits, actions, claims, costs or demands resulting from death, personal injury and property damage) to which the Government, its agencies and instrumentalities, or the vessel may be subject or put by reason of damage or injury (including death) to the property or person of anyone other than the Government, its agencies, instrumentalities and personnel, or the vessel, arising or resulting in whole or in part from the fault, negligence, wrongful act or wrongful omission of the contractor, or any subcontractor, its or their servants, agents or employees; provided that the contractor's obligation to indemnify under this paragraph (c) shall not exceed the sum of $1,000,000.00 on account of any one accident or occurrence in respect of any one vessel. Such indemnity shall include, without limitation, suits, actions, claims, costs or demands of any kind whatsoever, resulting from death, personal injury or property damage occurring during the period of performance of work on the vessel or within 90 days after redelivery of the vessel. Any new equipment warranties that extend beyond the 90 days after redelivery of the vessel shall be assigned to the Government upon redelivery of the vessel. With respect to any such suits, actions, claims, costs or demands resulting from death, personal injury or property damage occurring after the expiration of such period, the rights and liabilities of the Government and the contractor shall be as determined by other provisions of this contract and by law; provided that such indemnity shall apply to death occurring after such period which results from any personal injury received during the period covered by the contractor's indemnity as provided herein.

(d) The contractor shall, at its own expense, procure, and thereafter maintain such casualty, accident and liability insurance, in such forms and amounts as may be approved by the Contracting Officer, insuring the performance of its obligations under paragraph (c) of this clause. In addition, the contractor shall at its own expense procure and thereafter maintain such ship repairer's legal liability insurance as may be necessary to insure the contractor against its liability as ship repairer in the amount of $1,000,000.00, or the value of the vessel as determined by the Contracting Officer, whichever is the lesser, with respect to each vessel on which work is performed. The contractor shall cause the Government to be named as an additional insured under any and all liability insurance policies, however, at the discretion of the Contracting Officer, such insurance need not be procured whenever the job order requires work on parts of a vessel only and the work is to be performed at a plant other than the site of the vessel. Further, the contractor shall procure and maintain in force Worker's Compensation Insurance (or its equivalent) covering its employees engaged in the work and shall ensure the procurement and maintenance of such insurance by all subcontractors engaged in the work. The contractor shall provide evidence of insurance as required by the Government.

(e) The contractor shall receive no allowance in the contract price for inclusion of any premium expense or charge for any reserve made on account of self-insurance for coverage against any risk assumed by the Government under this clause.

(f) As soon as practicable after the occurrence of any loss or damage, the risk of which the Government has assumed, written notice of the damage shall be given by the contractor to the Contracting Officer. The notice shall contain full particulars of the loss or damage. If claim is made or suit is brought thereafter against the contractor as the result or because of such event, the contractor shall immediately deliver to the Government every demand, notice, summons or other process received by it or its representatives. The contractor shall cooperate with the Government, and, upon the Government's request, shall assist in effecting settlements, securing and giving evidence; obtaining the attendance of witnesses, and other assistance required in the conduct of suits. The Government shall pay to the contractor the expense, other than the cost of maintaining the contractor's usual organization, incurred in this assistance. Except at its own cost, the contractor shall not voluntarily make any payment, assume any obligation or incur any expense not imperative for the protection of the vessel or vessels at the time of the event.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–80 Title.

As prescribed in 48 CFR 1371.111, insert the following clause:

TITLE (APR 2010)

(a) Title to all materials and equipment acquired, produced for, or allocated to the performance of this contract and incorporated in or placed on the vessel or any part thereof, shall vest in the Government.

(b) The contractor shall assume, without limitation, the risk of loss for any contractor-furnished materials and equipment until final acceptance by the Government of work performed under the contract.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–81 Discharge of liens.

As prescribed in 48 CFR 1371.112, insert the following clause:

DISCHARGE OF LIENS (APR 2010)

The contractor shall immediately discharge or cause to be discharged any lien or right *in rem* of any kind, other than in favor of the Government, which at any time exists or arises in connection with work done or materials furnished under the contract. If any such lien or right *in rem* is not immediately discharged, the Government may discharge or cause to be discharged such lien or right at the expense of the contractor.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–82 Department of Labor occupational safety and health standards for ship repair.

As prescribed in 48 CFR 1371.113, insert the following clause:

DEPARTMENT OF LABOR OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR SHIP REPAIR (APR 2010)

The contractor, in performance of all work under the contract, shall comply with the requirements of 29 CFR 1910.15. Nothing contained in this contract shall be construed as relieving the contractor from any obligations which it may have for compliance with the aforesaid regulations.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–83 Government review, comment, acceptance and approval.

As prescribed in 48 CFR 1371.114, insert the following clause:

GOVERNMENT REVIEW, COMMENT, ACCEPTANCE AND APPROVAL (APR 2010)

(a) Documentation, including drawings and other engineering products and reports, required by the contract to be submitted for review, comment, acceptance or approval will be acted upon by the Government within 30 calendar days after receipt by the Government, unless another period of time is specified.

(b) The Government shall respond to Condition Reports, as defined in the Specifications, within five (5) working days, unless the Government notifies the contractor that a longer period of time will be required. If the contractor requests a response in less than five (5) working days, the Government will attempt to accommodate the request, but does not guarantee a response in less than the time limits stated above.

(c) Review, comment, acceptance or approval by the Government as required under this contract and applicable specifications shall not relieve the contractor of its obligation to comply with the specifications and with all other requirements of the contract, nor shall it impose upon the Government any liability it would not have had in the absence of such review, comment and acceptance or approval.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–84 Access to the vessel.

As prescribed in 48 CFR 1371.115, insert the following clause:

ACCESS TO THE VESSEL (APR 2010)

(a) As authorized by the Contracting Officer, a reasonable number of officers, employees and personnel designated by the Government, or representatives of other contractors and their subcontractors shall have admission to the facility and access to the vessel at all reasonable times to perform and fulfill their respective obligations to the Government on a noninterference basis. The contractor shall make reasonable arrangements to provide access for these personnel to office space, work areas, storage or shop areas, and other facilities and services reasonable and necessary to perform their duties. All such personnel shall comply with contractor rules and regulations governing personnel at its shipyard, including those regarding safety and security.

(b) The contractor further agrees to allow a reasonable number of officers, employees, and designated personnel of offerors on other contemplated work, the same privileges of admission to the contractor's facility and access to the vessel(s) on a noninterference basis, subject to contractor rules and regulations governing personnel in its shipyard, including those regarding safety and security.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–85 Documentation of requests for equitable adjustment.

As prescribed in 48 CFR 1371.116, insert the following clause:

DOCUMENTATION OF REQUESTS FOR EQUITABLE ADJUSTMENT (APR 2010)

(a) For the purpose of this clause, the term ''change'' includes not only a change made pursuant to a written order designated as a ''change order,'' but also any act or omission to act on the part of the Government where a request is made for equitable adjustment.

(b) Whenever the contractor requests or proposes an equitable adjustment to the contract price for a change or an act or omission on the part of the Government, the request shall include a breakdown of the price adjustment in such form and supported by such reasonable detail as the Contracting Officer may request. As a minimum, the contractor shall provide a breakdown of direct labor hours, labor dollars, overhead, material, subcontracts, contingencies and profit for each change and a justification for any extension of the delivery date.

(c) Whenever the contractor requests or proposes an equitable adjustment of $100,000 or greater gross (aggregate increases and/or decreases) for a change made pursuant to a written order designated as a ''change order,'' or whenever the contractor requests an equitable adjustment in any amount for any other act or omission to act on the part of the Government, the proposal supporting such request shall contain the following information for each individual item or element of the request:

(1) A description of the unperformed work required by the contract before the change which has been deleted by the change and the work deleted by the change that already has been completed in whole or in part. The description shall include a list of components, equipment, and other identifiable property involved. Also, the status of manufacture, procurement, or installation of such property shall be indicated. A separate description shall be furnished for design and production work. Items of raw material, purchased parts, components, and other identifiable hardware which are made excess by the change, and which are not to be retained by the contractor, are to be listed for later disposition;

(2) A description of the work necessary to undo work already completed which has been deleted by the change;

(3) A description of the work substituted or added by the change that was not required by the terms of the contract before the change. A list of components and equipment (not bulk material or items) involved should be included. A separate description shall be furnished for design work and production work;

(4) A description of any interference or inefficiency encountered in performing the change;

(5) A description of disruption attributable solely to the change, which shall include the following information:

(i) A specific description of each element of disruption which states how the work has been, or will be, disrupted;

(ii) The calendar time period when disruption occurred, or will occur, illustrated via critical path analysis;

(iii) The area(s) aboard ship where disruption occurred, or will occur;

(iv) The trade(s) disrupted, with a breakdown of man-hours for each trade;

(v) The scheduling of trades before, during, and after the period of disruption;

(vi) A description of measures taken to lessen the disruptive effect of the change.

(6) The delay in delivery attributable solely to the change;

(7) A description of other work attributed to the change;

(8) A narrative statement of the direct causal relationship between any alleged Government act or omission and the claimed result, cross-referenced to the detailed information required above; and

(9) A statement setting forth a comparative enumeration of the amounts ''budgeted'' for the cost elements, including the materials cost, labor hours, and indirect costs pertinent to the change estimated by the contractor in preparing its proposal(s) for this contract, and the amounts claimed to have been incurred, or projected to be incurred, corresponding to each such ''budgeted cost'' element.

(10) At the time of agreement upon the price of the equitable adjustment, the contractor shall submit a signed Certificate of Current Cost or Pricing Data.

(d) Pending execution of a bilateral agreement or the direction of the Contracting Officer pursuant to the Changes clause, the contractor shall proceed diligently with contract performance without regard to the effect of any such proposed change.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–86 Lay days.

As prescribed in 48 CFR 1371.117, insert the following clause:

LAY DAYS (APR 2010)

(a) A lay day is defined as an additional day on dry dock or marine railway caused by a Government-issued change. Reimbursement for lay days shall be paid at the rate stated in the Schedule.

(b) No amount for lay day time shall be paid until all contract line items (including optional items) that require drydocking of the vessel have been completed. Lay days for work ordered pursuant to the Additional Item Requirements Clause shall not be compensable unless all dry dock work included in the contract line items is complete.

(c) Days of hauling out and floating, whatever the hour, shall not be paid as lay day time, and days when no work is performed by the contractor shall not be paid as lay day time. Days in which work is performed that are considered normal ''non-work'' days (weekends or holidays) shall not be paid as lay day time if the ship would have otherwise been in dry dock.

(d) Payment of lay day time shall constitute complete compensation for all costs associated with lay days except for costs directly related to the changed work.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–87 Changes—ship repair.

As prescribed in 48 CFR 1371.118, insert the following clause:

CHANGES—SHIP REPAIR (APR 2010)

(a) The Contracting Officer may, at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract, in any one or more of the following:

(1) Drawings, designs, or specifications, when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications;

(2) Method of shipment or packing;

(3) Place of performance of the work;

(4) Time of commencement or completion of the work; and

(5) Other requirements within the general scope of the contract.

(b) If any such change causes an increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether changed or not changed by the order, the Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract accordingly.

(c) The contractor must submit any proposal for adjustment under this clause within 5 days from the date of receipt of the written order. At the Contracting Officer's discretion, the 5-day period may be shortened. 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 rendered obsolete or 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)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–88 Guarantees.

As prescribed in 48 CFR 1371.119, insert the following clause:

GUARANTEES (APR 2010)

(a) In the event any work performed or materials furnished by the contractor under this contract prove defective or deficient within ____ days from the date of redelivery of the vessel, the contractor, as directed by the Contracting Officer and at its own expense, shall correct and repair the deficiency to the satisfaction of the Contracting Officer.

(b) The Government shall be entitled to rely upon any guarantee secured by the contractor or any sub-contractor covering work done or materials furnished which exceeds the ____day period until its expiration.

(c) With respect to any individual work item identified and listed as incomplete at the redelivery of the vessel, the guarantee period shall run from the date of completion of such item.

(d) If and when practicable, the Government shall afford the contractor an opportunity to effect such corrections and repairs.

(1) If the Contracting Officer determines it is impracticable or is otherwise not advisable to return the vessel to the contractor, or the contractor fails to proceed promptly with any such repairs as directed by the Contracting Officer, the Contracting Officer may direct that the repairs be performed elsewhere, at the contractor's expense.

(2) Where corrections and repairs are to be made by other than the contractor due to nonreturn of the vessel to the contractor, the contractor's liability may be discharged by an equitable deduction in the price of the contract.

(e) The contractor's liability shall only extend for an additional ____ day guarantee period on those defects or deficiencies which it corrected. However, this clause does not limit the responsibility or relieve the liability of the contractor under the Liability and Insurance clause.

(f) At the Contracting Officer's option, defects and deficiencies may be left in their uncorrected condition. In that event, the contractor and the Contracting Officer shall agree on an equitable deduction in the contract price. Failure to agree upon an equitable reduction shall constitute a dispute under the Disputes clause of this contract.

(g) 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. If a defect or deficiency that exists at the time of redelivery of the vessel was not discovered by a reasonable inspection and is discovered after the expiration of the time frame stated in this clause, it is not subject to the time limitations stated in this clause.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–89 Temporary services.

As prescribed in 48 CFR 1371.120, insert the following clause:

TEMPORARY SERVICES (APR 2010)

(a) Temporary services are services incidental to the performance of work which are required in the schedule or specifications to be provided by the contractor. Temporary services may include the furnishing of water, electricity, telephone service, toilet facilities, garbage removal, office space, parking places or similar facilities.

(b) If performance time is extended due to Government-caused delay, the contractor may request an equitable adjustment for providing temporary services at the rate stated in the Schedule.

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

1352.271–90 Insurance requirements.

As prescribed in 48 CFR 1371.121, insert the following clause:

INSURANCE REQUIREMENTS (APR 2010)

(a) The contractor shall procure and thereafter maintain the following insurance:

(1) Ship contractor's legal liability insurance to insure the risks described in paragraph (b) of clause 1352.271–79. This insurance shall be for $1,000,000.00.

(2) Comprehensive general liability insurance and automobile insurance to insure the risks described in paragraph (c) of clause 1352.271–79. This insurance shall be for $1,000,000.00 on account of any one accident or occurrence with respect to each vessel, boat, and/or barge upon which work is performed. The contractor shall cause the Government to be named as an additional insured under any and all liability insurance policies.

(3) Full coverage in accordance with the State Worker's Compensation law; and

(4) Full coverage in accordance with the United States Longshoremen's and Harbor Worker's Act.

(b) As evidence that it has obtained the insurance specified in paragraph (a) of this clause, the contractor shall furnish the Contracting Officer with a certificate or certificates executed by an agent of the insurer authorized to execute such certificates. Such certificates shall be furnished prior to commencement of the work. Each certificate shall state that (name of insurer) has insured (name of contractor) awarded contract number _____ for repair/alteration of (name of vessel) in accordance with the Liability and Insurance clause and the Insurance Requirements clause contained herein. Each certificate shall set forth that each policy of insurance represented thereby will expire on (APR 2010) and that each such policy contains the following clause:

''It is agreed that in the event of cancellation or any material change in the policy adversely affecting the interest of the Government in this insurance, 30 days prior written notice will be given to the Contracting Officer.''

(End of clause)

[75 FR 10570, Mar. 8, 2010; 75 FR 14496, Mar. 26, 2010]

Subpart 1352.3—Provisions and Clauses Matrix

1352.301 Solicitation provisions and contract clauses (Matrix).

Provision or Clause	Prescribed In	P or C	IBR	UCF	ALL SOL	ALL CON	T&M LH	IND DEL	IND QTY	SVC	SUP	SAP	FP	CR	LA	SR	IT
1352.201-70 Contracting Officer's Authority	1301.602-170	C	Y	G	R	R											
1352.201-71 Ratification Release	1301.602-3	C	N	H		A											
1352.201-72 Contracting Officer's Representative (COR)	1301.670-70	C	N	G	A	A											
1352.208-70 Restrictions on Printing and Duplicating	1308.802-70	C	Y	H	A	A											
1352.209-70 Potential Organizational Conflict of Interest	1309.507-1(a)	P	N	L	A												
Alternate I	1309.507-1(b)	P	N	L	A												
1352.209-71 Limitation of Future Contracting	1309.507-2(a)(1)	C	Y	H	A	A											
Alternate I	1309.507-2(a)(2)	C	Y	H	A	A											
Alternate II	1309.507-2(a)(3)	C	Y	H	A	A											

Provision or Clause	Prescribed In	P or C	IBR	UCF	ALL SOL	ALL CON	T&M LH	IND DEL	IND QTY	SVC	SUP	SAP	FP	CR	LA	SR	IT
Alternate III	1309.507-2(a)(4)	C	Y	H	A	A											
Alternate IV	1309.507-2(a)(5)	C	Y	H	A	A											
Alternate V	1309.507-2(a)(6)	C	Y	H	A	A											
Alternate VI	1309.507-2(a)(7)	C	Y	H	A	A											
1352.209-72 Restrictions against Disclosure	1309.507-2(b)	C	Y	H						A							
1352.209-73 Compliance with the Laws	1309.507-2(c)	C	Y	H	R	R											
1352.209-74 Organizational Conflict of Interest	1309.507-2(d)	C	Y	H	R	R											
1352.209-75 Title 13 and Non-Disclosure Requirements	1309.507-2(e)	C	Y	H						A							
1352.213-70 Evaluation Utilizing Simplified Acquisition Procedures	1313.106-2-70	P	N	M								R					
1352.213-71 Instructions for Submitting Quotations Under the Simplified Acquisition Threshold - Non-Commercial	1313.302-1-70	P	N	L								A					

Provision or Clause	Prescribed In	P or C	IBR	UCF	ALL SOL	ALL CON	T&M LH	IND DEL	IND QTY	SVC	SUP	SAP	FP	CR	LA	SR	IT
1352.215-70 Proposal Preparation	1315.204-570(a)(1)	P	N	L	R												
1352.215-71 Instructions for Oral Presentations	1315.204-570(a)(2)	P	N	L	A												
1352.215-72 Inquiries	1315.204-570(a)(3)	P	N	L	O												
1352.215-73 Evaluation Quantities-Indefinite Quantity Contract	1315.204-570(b)(1)	P	Y	M	A				A								
1352.215-74 Best Value Evaluation	1315.204-570(b)(2)	P	N	M	A												
1352.215-75 Evaluation Criteria	1315.204-570(b)(2) 1315.204-570(b)(3)	P	N	M	A												
1352.215-76 Cost or Pricing Data	1315.204-570(b)(4)	P	Y	L	A												
1352.216-70 Estimated and Allowable Costs	1316.307 (a)	C	N	B										R			
1352.216-71 Level of Effort (Cost-Plus-Fixed-Fee, Term Contract)	1316.307 (b)	C	N	B										A			
1352.216-72 Determination of Award Fee	1316.405.2	C	N	B										A			

Provision or Clause	Prescribed In	P or C	IBR	UCF	ALL SOL	ALL CON	T&M LH	IND DEL	IND QTY	SVC	SUP	SAP	FP	CR	LA	SR	IT
1352.216-73 Distribution of Award Fee	1316.406	C	N	B										A			
1352.216-74 Task Orders	1316.501-2-70	C	Y	H				A									
1352.216-75 Minimum and Maximum Contract Amounts	1316.506(a)	C	N	B					R								
1352.216-76 Placement of Orders	1316.506(b)	C	N	G				R									
1352.216-77 Ceiling Price	1316.601-70 1316.602-70	C	N	B			R										
1352.219-70 Section 8(a) Direct Award	1319.811-3(a)	C	N	H	A	A											
1352.219-71 Notification to Delay Performance	1319.811-3(b)	C	Y	H	A	A											
1352.219-72 Notification of Competition Limited to Eligible 8(a) Concerns - Alternate III	1319.811-3(c)	C	N	H	A	A											
1352.227-70 Rights in Data, Assignment of Copyright	1327.404-4(a)	C	Y	H	A	A											
1352.228-70 Insurance Coverage	1328.310-70(a)	C	N	H	A	A											

Provision or Clause	Prescribed In	P or C	IBR	UCF	ALL SOL	ALL CON	T&M LH	IND DEL	IND QTY	SVC	SUP	SAP	FP	CR	LA	SR	IT
1352.228-71 Deductibles Under Required Insurance Coverage - Cost Reimbursement	1328.310-70(c)	C	Y	H										A			
1352.228-72 Deductibles Under Required Insurance Coverage - Fixed Price	1328.310-70(d)	C	Y	H									A				
1352.228-73 Loss of or Damage to Leased Aircraft	1328.310-70(e) 1328.310-70(f)	C	Y	H											A		
1352.228-74 Fair Market Value of Aircraft	1328.310-70(e) 1328.310-70(g)	C	N	H											A		
1352.228-75 Risk and Indemnities	1328.310-70(e) 1328.310-70(h)	C	Y	H											A		
1352.228-76 Approval of Group Insurance Plans	1328.310-70(i)	C	Y	H										R			
1352.231-70 Precontract Costs	1331.205-32	C	N	H										A			
1352.231-71 Duplication of Effort	1331.205-70	C	Y	H			A							A			
1352.233-70 Agency Protests	1333.103(a)	P	N	L	A												

Provision or Clause	Prescribed In	P or C	IBR	UCF	ALL SOL	ALL CON	T&M LH	IND DEL	IND QTY	SVC	SUP	SAP	FP	CR	LA	SR	IT
1352.233-71 GAO and Court of Federal Claims Protests	1333.104-70(a)	P	Y	L	A												
1352.235-70 Protection of Human Subjects	1335.006(a)	P	Y	L	A												
1352.235-71 Protection of Human Subjects - Exemption	1335.006(b)	C	N	H		A											
1352.235-72 Protection of Human Subjects - Institutional Approval	1335.006(c)	C	N	H		A											
1352.235-73 Research Involving Human Subjects - After Initial Contract Award	1335.006(d)	C	Y	H		A											
1352.237-70 Security Processing Requirements - High or Moderate Risk Contracts	1337.110-70(b)	C	Y	H						A							
1352.237-71 Security Processing Requirements - Low Risk Contracts	1337.110-70(c)	C	Y	H						A							
1352.237-72 Security Processing Requirements - National Security Contracts	1337.110-70(d)	C	Y	H						A							

Provision or Clause	Prescribed In	P or C	IBR	UCF	ALL SOL	ALL CON	T&M LH	IND DEL	IND QTY	SVC	SUP	SAP	FP	CR	LA	SR	IT
1352.237-73 Foreign National Visitor and Guest Access to Departmental Resources	1337.110-70(e)	C	Y	H						A							
1352.237-74 Progress Reports	1337.110-71(a)	C	N	G	A	A											
1352.237-75 Key Personnel	1337.110-71(b)	C	Y	H						A							
1352.239-70 Software License Addendum	1339.107	C	Y	H													A
1352.239-71 Electronic and Information Technology	1339.270(a)	P	Y	L	A												A
1352.239-72 Security Requirements for Information Technology Resources	1339.270(b)	C	Y	H						A							R
1352.242-70 Postaward Conference	1342.503-70	P	Y	L	A	A											
1352.245-70 Government Furnished Property	1345.107-70	C	N	G	A	A											
1352.246-70 Place of Acceptance	1346.503	C	Y	E	R	R											

Provision or Clause	Prescribed In	P or C	IBR	UCF	ALL SOL	ALL CON	T&M LH	IND DEL	IND QTY	SVC	SUP	SAP	FP	CR	LA	SR	IT
1352.270-70 Period of Performance	1370.101	C	N	F	A	A											
1352.270-71 Pre-Bid / Pre-Proposal Conference and Site Visit	1370.102	P	N	L	A												
1352.271-70 Inspection and Manner of Doing Work	1371.101	C	Y	H												R	
1352.271-71 Method of Payment and Invoicing Instructions for Ship Repair	1371.102	C	N	H												R	
1352.271-72 Additional Item Requirements (AIR) - Growth Work	1371.103	C	Y	H												R	
1352.271-73 Schedule of Work	1371.104	C	Y	H												R	
1352.271-74 Foreseeable Cost Factors Pertaining to Different Shipyard Locations	1371.105	P	N	H												R	
1352.271-75 Delivery and Shifting of the Vessel	1371.106	C	Y	H												A	
1352.271-76 Performance	1371.107	C	Y	H												R	

Provision or Clause	Prescribed In	P or C	IBR	UCF	ALL SOL	ALL CON	T&M LH	IND DEL	IND QTY	SVC	SUP	SAP	FP	CR	LA	SR	IT
1352.271-77 Delays	1371.108	C	Y	H												R	
1352.271-78 Minimization of Delay Due to Government Furnished Property	1371.109	C	Y	H												R	
1352.271-79 Liability and Insurance	1371.110	C	Y	H												R	
1352.271-80 Title	1371.111	C	Y	H												R	
1352.271-81 Discharge of Liens	1371.112	C	Y	H												R	
1352.271-82 Department of Labor Occupational Safety and Health Standards for Ship Repair	1371.113	P	Y	H												A	
1352.271-83 Government Review, Comment, Acceptance and Approval	1371.114	C	Y	H												R	
1352.271-84 Access to the Vessel	1371.115	C	Y	H												R	
1352.271-85 Documentation of Requests for Equitable Adjustment	1371.116	C	Y	H												R	

Provision or Clause	Prescribed In	P or C	IBR	UCF	ALL SOL	ALL CON	T&M LH	IND DEL	IND QTY	SVC	SUP	SAP	FP	CR	LA	SR	IT
1352.271-86 Lay Days	1371.117	C	Y	H												R	
1352.271-87 Changes - Ship Repair	1371.118	C	Y	H												R	
1352.271-88 Guarantees	1371.119	C	N	H												R	
1352.271-89 Temporary Services	1371.120	C	Y	H												R	
1352.271-90 Insurance Requirements	1371.121	C	N	H												R	

PART 1353—FORMS

Subpart 1353.1—General

Sec.
1353.100 Scope of subpart.
1353.107 Obtaining forms.

Subpart 1353.2—Prescription of Forms

1353.200 Scope of subpart.

Subpart 1353.3—Illustration of Forms

353.300 Scope of subpart.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1353.1—General

1353.100 Scope of subpart.

This subpart prescribes DOC forms that are supplemental to those provided in FAR Part 53.

1353.107 Obtaining forms.

The DOC forms may be obtained from any DOC contracting office.

Subpart 1353.2—Prescription of Forms

1353.200 Scope of subpart.

This subpart prescribes or references DOC forms for use in acquisitions. Consistent with FAR 53.200, this subpart is arranged by subject matter, in the same order as and keyed to the parts of the CAR in which the form usage requirements are addressed.

1353.219 Small business programs.

Use Form CD–570, *Small Business Set-Aside Review*, to fulfill and document the requirements under FAR 19.5 (*see* Appendix A: Forms).

Subpart 1353.3—Illustration of Forms

1353.300 Scope of subpart.

DOC Forms will not be illustrated in this CAR. Persons wishing to obtain copies of DOC forms prescribed in the CAR may do so in accordance with 1353.107.

SUBCHAPTER I—DEPARTMENT SUPPLEMENTAL REGULATIONS

PART 1370—UNIVERSAL SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 1370.1—Provisions and Clauses

Sec.
1370.101 Period of performance.
1370.102 Pre-bid/pre-proposal conference and site visit.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1370.1—Provisions and Clauses

1370.101 Period of performance.

Insert the clause 1352.270–70, *Period of Performance*, in all solicitations and contracts where a period of performance will be specified.

1370.102 Pre-bid/pre-proposal conference and site visit.

Insert provision 1352.270–71, *Pre-Bid/Pre-Proposal Conference and Site Visit*, in solicitations where a pre-proposal conference will be held. The provision is optional for construction and may be modified as necessary. The contracting officer shall include or delete the paragraph regarding site visits.

PART 1371—ACQUISITIONS INVOLVING SHIP CONSTRUCTION AND SHIP REPAIR

Subpart 1371.1—Provisions and Clauses

Sec.
1371.101 Inspection and manner of doing work.
1371.102 Method of payment and invoicing instructions for ship repair.
1371.103 Additional item requirements (AIR)—growth work.
1371.104 Schedule of work.
1371.105 Foreseeable cost factors pertaining to different shipyard locations.
1371.106 Delivery and shifting of the vessel.
1371.107 Performance.
1371.108 Delays.
1371.109 Minimization of delay due to government furnished property.
1371.110 Liability and insurance.
1371.111 Title.
1371.112 Discharge of liens.
1371.113 Department of Labor occupational safety and health standards for ship repair.
1371.114 Government review, comment, acceptance, and approval.
1371.115 Access to the vessel.
1371.116 Documentation of requests for equitable adjustment.
1371.117 Lay days.
1371.118 Changes—ship repair.
1371.119 Guarantees.
1371.120 Temporary services.
1371.121 Insurance requirements.

AUTHORITY: 41 U.S.C. 414; 48 CFR 1.301–1.304.

SOURCE: 75 FR 10570, Mar. 8, 2010, unless otherwise noted.

Subpart 1371.1—Provisions and Clauses

1371.101 Inspection and manner of doing work.

Insert clause 1352.271–70, *Inspection and Manner of Doing Work*, in all solicitations and contracts for ship construction and ship repair.

1371.102 Method of payment and invoicing instructions for ship repair.

Insert clause 1352.271–71, *Method of Payment and Invoicing Instructions for Ship Repair*, in all solicitations and contracts for ship repair.

1371.103 Additional item requirements (AIR)—growth work.

Insert clause 1352.271–72, *Additional Item Requirements (AIR)—Growth Work*, in all solicitations and contracts for ship repair.

1371.104 Schedule of work.

Insert clause 1352.271–73, *Schedule of Work*, in all solicitations and contracts for ship repair.

1371.105 Foreseeable cost factors pertaining to different shipyard locations.

Insert provision 1352.271–74, *Foreseeable Cost Factors Pertaining to Different Shipyard Locations*, in all solicitations for ship repair.

1371.106 Delivery and shifting of the vessel.

Insert clause 1352.271–75, *Delivery and Shifting of the Vessel*, in all solicitations and contracts for ship repair to be performed at the contractor's facility.

1371.107 Performance.

Insert clause 1352.271–76, *Performance*, in all solicitations and contracts for ship construction and ship repair.

1371.108 Delays.

Insert clause 1352.271–77, *Delays*, in all solicitations and contracts for ship repair.

1371.109 Minimization of delay due to Government furnished property.

Insert clause 1352.271–78, *Minimization of Delay Due to Government Furnished Property*, in all solicitations and contracts for ship construction and ship repair.

1371.110 Liability and insurance.

Insert clause 1352.271–79, *Liability and Insurance*, in all solicitations and contracts for ship repair.

1371.111 Title.

Insert clause 1352.271–80, *Title*, in all solicitations and contracts for ship repair.

1371.112 Discharge of liens.

Insert clause 1352.271–81, *Discharge of Liens*, in all solicitations and contracts for ship construction and ship repair.

1371.113 Department of Labor occupational safety and health standards for ship repair.

Insert clause 1352.271–82, *Department of Labor Occupational Safety and Health Standards for Ship Repair*, in all solicitations and contracts for ship repair.

1371.114 Government review, comment, acceptance, and approval.

Insert clause 1352.271–83, *Government Review, Comment, Acceptance and Approval*, in all solicitations and contracts for ship construction and ship repair.

1371.115 Access to the vessel.

Insert clause 1352.271–84, *Access to the Vessel*, in all solicitations and contracts for ship construction and ship repair.

1371.116 Documentation of requests for equitable adjustment.

Insert clause 1352.271–85, *Documentation of Requests for Equitable Adjustment*, in all solicitations and contracts for ship construction and ship repair.

1371.117 Lay days.

Insert clause 1352.271–86, *Lay Days*, in all solicitations and contracts for ship repair.

1371.118 Changes—ship repair.

Insert clause 1352.271–87, *Changes—Ship Repair*, in all solicitations and contracts for ship repair.

1371.119 Guarantees.

Insert clause 1352.271–88, *Guarantees*, in all solicitations and contracts for ship construction and ship repair.

1371.120 Temporary services.

Insert clause 1352.271–89, *Temporary Services*, in all solicitations and contracts for ship repair.

1371.121 Insurance requirements.

Insert clause 1352.271–90, *Insurance Requirements*, in all solicitations and contracts for ship construction and ship repair.

PARTS 1372–1399 [RESERVED]

CHAPTER 14—DEPARTMENT OF THE INTERIOR

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1480	Acquisitions under the Buy Indian Act	881
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SUBCHAPTER A—GENERAL

PART 1400 [RESERVED]

PART 1401—DEPARTMENT OF THE INTERIOR ACQUISITION REGULATION SYSTEM

Subpart 1401.1—Purpose, Authority, Issuance

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1401.105–3 Copies.

Subpart 1401.2—Administration

1401.201 Maintenance of the Federal Acquisition Regulation (FAR).
1401.201–1 The Civilian Agency Acquisition Council (CAAC).

Subpart 1401.3—Agency Acquisition Regulations

1401.301 Policy.
1401.301–70 Definitions.
1401.301–80 Policy.
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1401.370 Acquisition Managers' Partnership.

Subpart 1401.4—Deviations from the FAR and DIAR

1401.403 Individual deviations.
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Subpart 1401.6—Career Development, Contracting Authority, and Responsibilities

1401.601 General.
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1401.603 Selection, appointment and termination of appointment.
1401.603–1 General.
1401.603–2 Selection.
1401.603–3 Appointment.
1401.670 Contracting officers' representatives.
1401.670–1 Contract clause.

Subpart 1401.70—Acquisition Reviews

1401.7000 Scope of subpart.
1401.7001 Review and approval of contract actions.
1401.7001–1 Review and approval by Assistant Secretaries.
1401.7001–2 Legal review by the Office of the Solicitor.
1401.7001–3 Administrative review and approval by bureaus and offices.
1401.7001–4 Acquisition performance measurement systems.
1401.7001–5 Acquisition Management Reviews (AMRs).

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1401.1—Purpose, Authority, Issuance

1401.105–3 Copies.

Copies of the Department of the Interior Acquisition Regulation (DIAR) and Department-wide internal guidance may be obtained from the Office of Acquisition and Property Management, Office of the Secretary, U.S. Department of the Interior, 1849 C Street (MS 2607–MIB), NW., Washington, DC 20240. Additional information on DOI may be obtained on the Internet at *http://www.doi.gov/pam*.

Subpart 1401.2—Administration

1401.201 Maintenance of the Federal Acquisition Regulation (FAR).

1401.201–1 The Civilian Agency Acquisition Council (CAAC).

The Department of the Interior is represented on the CAAC by a member of the Office of Acquisition and Property Management (PAM).

Subpart 1401.3—Agency Acquisition Regulations

1401.301 Policy.

(a)(1) Subject to the authorities in paragraph (c) of this section, the Department issues acquisition regulations which implement or supplement the FAR under the DIAR System. The regulation, as part of the FAR system, is issued in accordance with the policy in FAR 1.301(a)(1).

(2) Subject to the authorities in paragraph (c) of this section, the Department also issues internal guidance and

instructions under the DIAR System in accordance with the policy in FAR 1.301(a)(2).

(b) Public participation in promulgating acquisition regulations, which are published in the FEDERAL REGISTER, shall follow the Department's rulemaking procedures prescribed in Part 318, Chapter 5 of the Departmental Manual (318 DM 5) and the procedures in FAR Subpart 1.5.

(c) Regulations and internal guidance under the DIAR System are issued pursuant to the authority of the Secretary of the Interior under 5 U.S.C. 301 and 40 U.S.C. 486(c). This authority has been delegated to the Assistant Secretary—Policy, Management and Budget under Part 209, Chapter 4.1A of the Departmental Manual (209 DM 4.1A).

1401.301–70 Definitions.

(a) ''Implement,'' as used in this subpart, means coverage that expands upon or specifically indicates the manner of compliance with related higher level coverage.

(b) ''Supplement,'' as used in this subpart, means material for which there is no counterpart in higher-level coverage.

1401.301–80 Policy.

Indian Affairs must use the negotiation authority of the Buy Indian Act, 25 U.S.C. 47 to give preference to Indians whenever using that authority is authorized and feasible. The Buy Indian Act requires that, so far as may be feasible, Indian labor must be employed, and purchases of the products of Indian industry may be made in open market at the discretion of the Secretary of the Interior. This requirement applies notwithstanding any other law and applies to all products of industry, including printing.

[78 FR 34271, June 7, 2013]

1401.303 Publication and codification.

(a)(1) Implementing and supplementing regulations issued under the DIAR System are codified under Chapter 14 in Title 48, Code of Federal Regulations and shall parallel the FAR in format, arrangement, and numbering system.

(2)(i) Department-wide regulations are assigned parts 1401 through 1479 under 48 CFR, Chapter 14.

(ii) Where material in the FAR requires no implementation, there will be no corresponding number in the DIAR. Thus, there are gaps in the DIAR sequence of numbers where the FAR, as written, is deemed adequate. Supplemental material shall be numbered as specified in FAR 1.303.

(3) Bureau-wide regulations are authorized for codification in Appendices to Chapter 14, as assigned by the Director, PAM, in accordance with 1401.304(a)(3).

(b) Regulations implementing the FAR or DIAR are numbered using Parts 1401 through 1479. Supplemental material is numbered using Parts 1480 through 1499. Numbers for implementing or supplementing regulations by bureaus/offices are preceded by a prefix to the number 14 (indicating Chapter 14–DIAR) for the organization indicated by lettered appendices as follows:

(1) Bureau of Indian Affairs—BIA

(2) Bureau of Reclamation—WBR

(3) National Business Center—NBC

(4) Bureau of Land Management—LLM

(5) U.S. Geological Survey—WGS

(6) Office of Surface Mining Reclamation & Enforcement—LSM

(7) Minerals Management Service—LMS

(8) National Park Service—FNP

(9) U.S. Fish and Wildlife Service—FWS

(c) *e.g.*, FAR 1.3 then DIAR 1401.3 [Department level] then in Appendix A, BIA 1401.3 [Bureau level].

1401.304 Agency control and compliance procedures.

(a)(1) The DIAR System is under the direct oversight and control of the Director, PAM, who is responsible for reviewing and preparing the issuance of all Department-wide and bureau-wide acquisition regulations published in the FEDERAL REGISTER to ensure compliance with FAR Part 1. Review procedures are contained in Part 401 of the Departmental Manual (401 DM) and paragraph (a)(3) of this section. One

copy of all material issued shall be furnished to the Director, PAM, at the time of issuance.

(2) The Director, PAM, is also responsible for reviewing and issuing unpublished Department-wide internal guidance under the DIAR System.

(3) A bureau wishing to issue bureau-wide regulations shall submit a request to the Director, PAM, for authority to proceed with the regulation. The request shall include a justification for the regulation and a proposed outline of the regulation and the significant contents of the coverage to be included. The Director, PAM, shall review the request to determine whether the regulation should be considered for inclusion in the DIAR or FAR. If a determination is made that the regulation is appropriate for inclusion in the DIAR or FAR, PAM will process the regulation accordingly. If a determination is made that the regulation is appropriate for inclusion in bureau-wide regulations only, the Director, PAM, shall assign an appendix to 48 CFR Chapter 14 and authorization shall be granted for the bureau to proceed with the regulation in accordance with the procedures referenced in 1401.301(b). Rulemaking notices shall be submitted to the Director, PAM, for processing of AS/PMB approval under 401 DM 1.4C(3), before the appropriate program Assistant Secretary signs them.

(4) HCAs are responsible for establishing and implementing formal procedures for oversight and control of all unpublished bureau-wide internal guidance issued to implement FAR or DIAR requirements. The Director, PAM, shall review and approve these procedures and they shall include:

(i) Provisions for centralized issuance of all guidance and instructions using a directives system;

(ii) Methods for periodic review and updating of all issuances;

(iii) Distribution processes which ensure timely receipt by all affected contracting offices; and

(iv) Provisions for maintaining compliance with FAR 1.304.

(b) The Director, PAM, is responsible for evaluating coverage under the DIAR System to determine applicability to other agencies and for recommending coverage to the FAR Secretariat for inclusion in the FAR.

1401.370 Acquisition Managers' Partnership.

(a) The Acquisition Managers' Partnership (AMP) is a forum for DOI's senior acquisition management community to work cooperatively and continuously to improve the management, efficiency and effectiveness of its procurement services in support of DOI's mission.

(b) The AMP consists of the BPCs and representatives from PAM and OSDBU.

(c) The AMP Charter provides that the Chairperson and Associate Chairperson are leadership roles that will rotate annually. The AMP Chairperson determines when the partnership will meet and develops meeting agendas. The Chairperson will distribute the meeting minutes to all members.

Subpart 1401.4—Deviations from the FAR and DIAR

1401.403 Individual deviations.

(a) The Director, PAM, is authorized to approve deviations of FAR provisions (see FAR 1.4) or DIAR provisions which affect only one contracting action.

(b) Requests for deviations under paragraph (a) of this section shall be submitted by the BPC and include justification for the deviation.

(c) A copy of the approved deviation shall be included in the contract file.

1401.404 Class deviations.

(a) The Director, PAM, is authorized to approve class deviations of FAR or DIAR provisions which affect more than one contracting action.

(b) Requests for deviations under paragraph (a) of this section shall be submitted by the HCA and include justification for the deviation and the number of contracting actions which will be affected.

(c) For a FAR class deviation the Director, PAM, shall consult with the CAAC, as required in FAR 1.404(a)(1), before authorizing the deviation.

(d) A copy of each approved class deviation shall be referenced in the contract file.

(e) Recommended revisions to the FAR and a copy of each approved class FAR deviation shall be transmitted to the FAR Secretariat by the Director, PAM, as required in FAR 1.404.

1401.405 Deviations pertaining to treaties and executive agreements.

(a) The Director, PAM, is responsible for transmitting to the FAR Secretariat the information required in FAR 1.405(d).

(b) For deviations not authorized by FAR 1.405(b) or (c), the Director, PAM, shall process the request for deviation through the FAR Secretariat.

(c) Deviations authorized or requested under paragraph (d) or (e) of this section shall be submitted by the HCA to the Director, PAM for further action.

Subpart 1401.6—Career Development, Contracting Authority, and Responsibilities

1401.601 General.

(a) The authority and responsibility vested in the Secretary to contract for authorized supplies and services is delegated to Assistant Secretaries.

(b) The contracting authority and responsibility delegated to Assistant Secretaries may be redelegated to heads of bureaus and offices under their supervision in accordance with 200 DM 3. Such redelegations are published in bureau chapters of the Part 200 series of the Departmental Manual.

(c) Bureau heads and assistant or associate heads thereof (known as HCAs as defined in 1402.1) may redelegate contracting authority only as prescribed in 1401.603.

1401.602 Contracting officers.

1401.602–1 Authority.

Information on the limits of CO's authority shall be maintained by the HCA as required in FAR 1.602–1.

1401.602–3 Ratification of unauthorized commitments.

(a) The HCA may redelegate ratification authority to the CCO as defined in Subpart 1402.1 and implemented in bureau procedures.

(b) Legal concurrence is required prior to ratification of unauthorized actions for amounts greater than the micropurchase threshold.

(c) Nonratifiable commitments shall be coordinated with the SOL.

1401.603 Selection, appointment and termination of appointment.

1401.603–1 General.

BPCs are authorized to select and appoint COs and terminate their appointment as prescribed in the Department's Certificate of Appointment (COA) Manual. Copies of the manual may be obtained at *http://www.doi.gov/pam/Acqworkfor.html*.

1401.603–2 Selection.

COs, regardless of series or organizational placement, must be certified at a level commensurate with their appointment level, as prescribed in the Department's Federal Acquisition Certification in Contracting (FAC–C) Program Manual. Director, PAM, is the approving authority for all new and reinstated FAC–C certifications. BPCs are authorized to approve renewal FAC–C certifications.

1401.603–3 Appointment.

Purchase card holders may be appointed in writing or in accordance with the bureau/office procedures within the constraints of DOI Integrated Charge Card Program Policy Manual located at *http://www.doi.gov/pam/chargecard*. Additional guidance is available in the GSA Smart Pay program at *http://www.gsa.gov/smartpay*.

1401.670 Contracting officers' representatives.

When a CO elects to appoint an individual to act as an authorized representative in the administration of a contract, the CO must notify the contractor of the COR appointment in writing, and provide the name and contact information of the COR.

[76 FR 50141, Aug. 12, 2011]

1401.670–1 Contract clause.

Insert the clause at 1452.201–70 in solicitations and contracts under which a COR will be appointed.

[76 FR 50141, Aug. 12, 2011]

Subpart 1401.70—Acquisition Reviews

1401.7000 Scope of subpart.

This subpart sets forth requirements for review and approval of contract actions and the conduct of acquisition management reviews.

1401.7001 Review and approval of contract actions.

1401.7001–1 Review and approval by Assistant Secretaries.

Contract actions shall be reviewed and approved by Assistant Secretaries as prescribed in 211–255 DM. Their approvals shall be obtained before requesting any other approvals prescribed in the DIAR.

1401.7001–2 Legal review by the Office of the Solicitor.

The Office of the Solicitor (SOL) will review for legal sufficiency selected types and portions of contract actions from Bureaus and offices as required by the FAR, DIAR, and Department-wide policy. COs may request SOL advice or guidance on acquisition-related matters at any time. Matters related to legal sufficiency reviews that cannot be resolved between the respective CO and SOL Attorney-Advisor must be submitted for resolution to the HCA and the Assistant Solicitor for Acquisitions and Intellectual Property, Washington, DC.

1401.7001–3 Administrative review and approval by bureaus and offices.

(a) Administrative review and approval requirements for contract actions shall be established by the HCA and issued as internal bureau procedures. At a minimum, the review and approval requirements must address a representative percentage of the overall contract actions within a bureau/office. The procedures shall include:

(1) Identifying the type and dollar amounts of the actions to be reviewed based on the volume and nature of the contracting office workload;

(2) Designating the stage(s) in the acquisition process when the review(s) shall be performed;

(3) Establishing review and approval levels based on the type and dollar amount of the action and the capabilities of the reviewing office;

(4) Specifying what information is required to review the action, which includes creating a review and approval form and mechanism for following up on the correction of deficiencies noted in the review; and

(5) Providing for periodic review of procedures and revision as required, to assure necessary controls are maintained.

1401.7001–4 Acquisition performance measurement systems.

(a) The acquisition performance measurement system is a three-pronged approach that includes self assessment, statistical data for validation and flexible quality reviews and assessment techniques. This system is required to:

(1) Evaluate the effectiveness and efficiency of bureau and office acquisition systems;

(2) Assess the adequacy of policies, procedures and regulations governing the acquisition process; and

(3) Identify and implement changes necessary to improve the systems.

(b) HCA's are responsible for ensuring contracting activity compliance with law and regulations through the review and oversight process.

1401.7001–5 Acquisition Management Reviews.

Acquisition Management Reviews (AMRs) are to be conducted using the Government Accountability Office's (GAO) ''Framework for Assessing the Acquisition Function at Federal Agencies'' available at *http://www.gao.gov/new.items/d05218g.pdf*.

PART 1402—DEFINITIONS OF WORDS AND TERMS

Subpart 1402.1—Definitions

Sec.

1402.101 Definitions.
1402.170 Acronyms.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1402.1—Definitions

1402.101 Definitions.

As used in this part:

Bureau procurement chief (BPC) is defined as the senior GS–1102 official in a bureau or office. His/her authority may be delegated, unless specified otherwise, to the CCO. If the BPC is also the CO for an action requiring approval of the BPC, then approval shall be at the HCA level.

Chief of the contracting office (CCO) is defined as the senior GS–1102 within a contracting office unless otherwise specified by bureau/office regulation. If the CCO is also the Contracting Officer (CO) for an action requiring approval of the CCO, then approval shall be at a level above the CCO in accordance with bureau procedures.

Contracting activity is defined as an office with delegated procurement authority. Within the Office of the Secretary (OS), the Office of Inspector General (OIG) is a contracting activity. The *National Business Center (NBC)* contracts for the OS.

Head of the agency (also called ''agency head'') is defined as the Secretary of the Interior and the Assistant Secretary—*Policy, Management and Budget (AS/PMB)*.

Head of the contracting activity (HCA) is defined as the assistant or associate administrative head of each bureau and office who has overall responsibility for managing contracting. In reference to the OS, the HCAs are the Assistant Inspector General for Management and Policy and the Director, NBC. The authority of the HCA may be redelegated to the BPC unless otherwise specified.

Senior procurement executive is defined as the Director, *Office of Acquisition and Property Management (PAM)*.

1402.170 Acronyms.

A&E Architect & Engineering
ACMIS Acquisition Career Management Information System
AMP Acquisition Manager's Partnership
AMR Acquisition Management Review
AS/PMB Assistant Secretary—Policy, Management and Budget
BPA Blanket Purchase Agreement
BPC Bureau Procurement Chief
CA Competition Advocate
CAAC Civilian Agency Acquisition Council
CAS Cost Accounting Standards
CASB Cost Accounting Standards Board
CBCA Civilian Board of Contract Appeals
CCO Chief of the Contracting Office
CERCLA Comprehensive Environmental Response, Compensation and Liability Act
CFR Code of Federal Regulations
CIO Chief Information Officer
CO Contracting Officer
COA Certificate of Appointment
COI Conflicts of Interest
COR Contracting Officer's Representative
COTR Contracting Officer's Technical Representative
DISP Defense Industrial Security Program
DM Departmental Manual
DOI Department of the Interior
DOL Department of Labor
EC Electronic Commerce
FAR Federal Acquisition Regulation
FBMS Financial Business Management System
FPDS—NG Federal Procurement Data System—Next Generation
GAO Government Accountability Office
GIDEP Government-Industry Data Exchange Program
GPE Government Point of Entry
GPO Government Printing Office
GSA General Services Administration
GSBCA General Services Board of Contract Appeals
HCA Head of the Contracting Activity
IT Information Technology
IPMD Interior Property Management Directives
MBDA Minority Business Development Agency
OCIO Office of Chief Information Officer
OIG/IG Office of Inspector General/Inspector General
OFPP Office of Federal Procurement Policy

OHA Office of Hearings and Appeals
OMB Office of Management and Budget
OS Office of the Secretary
OSDBU Office of Small and Disadvantaged Business Utilization
PAM Office of Acquisition and Property Management
PMO Property Management Officer
PNM Procurement Negotiation Memorandum
SAT Simplified Acquisition Threshold
SBA Small Business Administration
SBS Small Business Specialist
SOL Office of the Solicitor
TFM Treasury Financial Manual
U.S.C. United States Code
VECP Value Engineering Change Proposal

[75 FR 19829, Apr. 15, 2010, as amended at 76 FR 50141, Aug. 12, 2011]

PART 1403—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

Subpart 1403.1—Safeguards

Sec.
1403.101 Standards of conduct.
1403.101–3 Agency regulations.
1403.101–70 Technical evaluators and advisors.
1403.104 Procurement integrity.
1403.104–2 Applicability.
1403.104–4 Disclosure, protection and marking of contractor bid or proposal information and source selection information.
1403.104–7 Violations or possible violations.

Subpart 1403.2—Contractor Gratuities to Government Personnel

1403.203 Reporting suspected violations of the Gratuities clause.
1403.204 Treatment of violations.

Subpart 1403.3—Reports of Suspected Antitrust Violations

1403.303 Reporting suspected antitrust violations.

Subpart 1403.4—Contingent Fees

1403.405 Misrepresentations or violations of the Covenant Against Contingent Fees.

Subpart 1403.5—Other Improper Business Practices

1403.570 Restrictions on contractor advertising.
1403.570–1 Policy.
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Subpart 1403.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

1403.602 Exceptions.
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1403.704 Policy.
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Subpart 1403.8—Limitation on the Payment of Funds to Influence Federal Transactions

1403.804 Policy.
1403.806 Processing suspected violations.

Subpart 1403.10—Contractor Code of Business Ethics and Conduct

1403.1004 Contract clause.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1403.1—Safeguards

1403.101 Standards of conduct.

1403.101–3 Agency regulations.

(a) Policy. DOI regulations governing the conduct and responsibilities of regular and special employees are contained in 43 CFR part 20. Additional guidance is contained in the DOI publication ''Ethics Guide for Department of the Interior Employees.'' Copies of the Guide can be obtained from the Bureau/Office Ethics Office or on the Internet at *http://www.doi.gov/ethics/*. With regard to the provisions of 43 CFR part 20, officials who participate personally and substantially in DOI procurements (as defined in FAR 3.104–3), may not solicit or accept any gift, gratuity, favor, entertainment, loan or anything of monetary value from a competing contractor during the conduct of a procurement.

(b)(1) Officials may not accept or solicit from any competing contractor any services that involve the development of specifications, statements of work, evaluation criteria, or formal

cost estimates to be used in a procurement unless such services are formally contracted for pursuant to the FAR and DIAR, and until the organizational COI provisions in FAR Subpart 9.5 have been fully addressed. This does not preclude COs from issuing formal Requests for Comment (RFC) or draft RFPs.

(2) IT resources shall not be accepted, installed or utilized by the Department on a no cost, free of charge basis (this includes donated equipment but not public domain software), except as permitted by law.

1403.101–70 Technical evaluators and advisors.

(a) Technical evaluators and advisors, including members of proposal evaluation committees, must render impartial, technically sound, and objective assistance and advice.

(b) With the exception of contracting personnel, proposal evaluators and advisors are not required to file a Confidential Financial Disclosure Report (SF450) unless they occupy positions identified in 43 CFR 20.735.30(b). Therefore, when an individual is appointed as an evaluator or advisor, he/she must sign and return to the CO a Conflict of Interest Certificate in a format approved by the HCA. If a potential COI exists, the appointee must not be allowed to evaluate or advise on an offeror's proposal until the conflict has been resolved with the servicing Ethics Counselor.

(c) During the evaluation process, each evaluator and advisor is responsible for ensuring that there are no financial or employment interests that conflict or give the appearance of conflicting with his or her duty to evaluate proposals impartially and objectively. Examples of situations that may be prohibited or represent a potential COI include:

(1) Financial interest, including stocks and bonds, in a firm that submits, or is expected to submit, an offer in response to the solicitation;

(2) Outstanding financial commitments to any actual or potential offeror;

(3) Employment in any capacity, even if otherwise permissible, by any actual or potential offeror;

(4) Employment within the last 12 months by an actual or potential offeror;

(5) Any non-vested pension or re-employment rights, or interest in profit sharing or stock bonus plans arising out of past employment by an actual or potential offeror; or

(6) Employment of any member of the immediate family by an actual or potential offeror.

(d) Bureaus shall include a notice similar to the following in all correspondence notifying employees of appointments to serve as technical evaluators or advisors, formally called Technical Evaluation Panels (TEP) and/or Source Evaluation Boards (SEB):

> You shall not solicit or accept any gift, gratuity, favor, entertainment, loan, or anything of monetary value from a competing contractor involved in any action for which you participate personally and substantially under this delegation of authority. You are also reminded of other conduct prohibitions in FAR 3.104–3, including negotiating with competing contractors for future employment, disclosure of contractor bid or proposal information or source selection information, and post-Government employment restrictions.
>
> Such notice shall include an acknowledgement of receipt signed and returned by the employee.

1403.104 Procurement integrity.

1403.104–2 Applicability.

Construction contracts (or subcontracts in such cases where the tribal contractor has subcontracted the activity) awarded under the authority of the Indian Self-Determination and Education Assistance Act, Public Law 93–638, as amended, are subject to the provisions promulgated under that Act.

1403.104–4 Disclosure, protection, and marking of contractor bid or proposal information and source selection information.

(a) The following classes of persons may be authorized access to contractor bid or proposal information and source selection information to the extent necessary to accomplish their requisite duties and responsibilities with respect to a particular procurement:

(1) Individuals who generate contract requirements, including program and

technical experts involved in the development of statements of work, specifications or similar documents;

(2) Contracting personnel acting in support of the CO;

(3) Secretarial, clerical and administrative personnel of the contracting activity directly involved in the procurement;

(4) Supervisors in the CO's chain of command;

(5) Attorneys in the SOL;

(6) OIG contract auditors, and auditors of other agencies such as the Defense Contract Audit Agency (DCAA) and DHHS when requested to perform contract audits by the OIG;

(7) Engineers and other technical support personnel who provide support to the CO;

(8) Small Business Technical Advisors and BUDS;

(9) SBA personnel responsible for reviewing determinations related to set-aside acquisitions, determining the small business status of offerors, processing applications for Certificates of Competency, reviewing subcontracting plans, or awarding contracts under the 8(a) program;

(10) Personnel in DOL responsible for making eligibility determinations or for processing preaward EEO clearances;

(11) Personnel who review bid protests in the GAO and the CBCA;

(12) Personnel serving on technical evaluation boards or source selection evaluation boards;

(13) Contract clearance personnel;

(14) Departmental and bureau/office Competition Advocates;

(15) Personnel in the Congressional liaison offices;

(16) Agency ethics official and servicing Ethics Counselors;

(17) Members of Congress and members of their staff. (See also DIAR 1405.403.); and

(18) Anyone specifically authorized by the CO.

1403.104–7 Violations or possible violations.

(a)(1) The CO's determination that there is no impact on the procurement due to a possible violation of the Procurement Integrity Act and decision to proceed with contract award shall receive concurrence from an individual one level above the CO.

(2) In case of nonconcurrence with the CO's determination, the HCA shall provide a copy of the reported violation and recommended action to the OIG in accordance with Part 111 DM 3. The CO, in consultation with the SOL and the OIG, must justify the compelling circumstances for immediate award and obtain approval to proceed from the BPC without the power of redelegation. Copies of the determination to proceed with the award will be sent to the Director, PAM, for submission to the AS/PMB.

Subpart 1403.2—Contractor Gratuities to Government Personnel

1403.203 Reporting suspected violations of the Gratuities clause.

When suspected violations of the clause at FAR 52.203–3, Gratuities, become known to a Federal Government employee, the matter shall be reported, in writing, to the cognizant CO or the CO's supervisor, as appropriate. The report shall clearly state the alleged circumstances surrounding the incident or incidents in which the contractor offered or gave a gratuity to a Federal Government employee and intended to obtain a contract or favorable treatment under a contract because of the gratuity. The date(s), location(s) and name(s) of all parties involved in the incident shall be included in the report.

1403.204 Treatment of violations.

(a) The CO will provide the contractor with a formal notice that summarizes the events involving the suspected violation and affords the contractor the opportunity to take the action(s) listed under FAR 3.204(b). The notice shall contain a time limit for reply and shall be sent by certified mail return receipt requested. The CO will submit the report, additional documentary evidence and other pertinent information to the HCA for disposition with a recommended course of action. A copy of this submission must also be sent to the Deputy Assistant Inspector General for Investigations. In consultation with the SOL and the OIG, and

based on the results of any further discussion with the contractor, its counsel or witnesses, the HCA may make a recommendation to the Director, PAM, pursuant to FAR 3.204(c) and shall provide formal notice to the contractor of such recommendation.

(b) If the decision involves the termination of a contract (see FAR 3.204(c)(1)), the CO will be responsible for implementing the decision.

Subpart 1403.3—Reports of Suspected Antitrust Violations

1403.303 Reporting suspected antitrust violations.

(a) Reports on suspected violations of antitrust laws as required by FAR 3.303 shall be prepared by the CO, reviewed by the SOL, and submitted by the HCA directly to the Attorney General, Department of Justice. A copy of this submission must also be sent to the Deputy Assistant Inspector General for Investigations.

(b) Depending on the nature of the suspected violation or the disposition of the matter, the HCA may recommend debarment or suspension in accordance with FAR 9.406–2(a)(2) or 9.407–2(a)(2) and subpart 1409.4.

Subpart 1403.4—Contingent Fees

1403.405 Misrepresentation or violations of the Covenant Against Contingent Fees.

(a) In addition to notifying the CO, the matter must also be reported to the Deputy Assistant Inspector General for Investigations and the HCA.

(b) The HCA may recommend debarment and suspension in accordance with Subpart 1409.4.

(c) The CCO shall consult with the SOL and OIG prior to forwarding a report of suspected fraudulent or criminal violations to the Department of Justice for action.

Subpart 1403.5—Other Improper Business Practices

1403.570 Restrictions on contractor advertising.

1403.570–1 Policy.

Award of a contract does not signify endorsement of the supplies or services purchased, nor does it signify agreement with any views espoused by officials of the awardee. It is vital to the integrity of the procurement system to avoid even the appearance of an improper preference toward a particular vendor. Therefore, contractors shall not be permitted to publicize, or otherwise circulate, promotional materials that state or imply Governmental endorsement of a product, service or position which the contractor represents.

1403.570–2 Procedures.

If a contractor requests a determination as to the propriety of such promotional material, the response shall be coordinated with the cognizant Public Affairs Office and Ethics Officer.

1403.570–3 Contract clause.

CO's shall include the clause at 1452.203–70, Restriction on Endorsements, in all solicitations, contracts and agreements which are not executed in accordance with FAR Parts 12 or 13.

Subpart 1403.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

1403.602 Exceptions.

The HCA, without the power of redelegation, is authorized to except a contract from the policy in FAR 3.601. However, no exceptions may be granted where the proposed contractor is owned or controlled by a Government employee or one or more members of the employee's immediate family and the employee or any subordinate is serving as a procurement official on the proposed contract.

1403.603 Responsibilities of the contracting officer.

The CO shall prepare a written determination and findings for the signature

of the HCA when requesting authorization to allow a contract award to a Government employee or business concern or other organization owned or substantially owned or controlled by one or more Government employees.

Subpart 1403.7—Voiding and Rescinding Contracts

1403.704 Policy.

The HCA is authorized to declare void and rescind contracts in accordance with the procedures in FAR 3.705.

1403.705 Procedures.

(a) *Reporting*. The facts concerning any final conviction for any violation of 18 U.S.C. 201–224 involving or relating to any contract awarded by a bureau or office shall be set forth in a report and submitted by the HCA to the Civil Division of the Department of the Justice. The report shall also contain a recommendation to initiate a debarment action. If debarment is recommended, the procedures in 1409.406–3(a) shall be followed. Copies of the report shall be provided to Director, PAM, and the Deputy Assistant Inspector General for Investigations for informational purposes.

(b) *Notice of Proposed Action*. Based upon review of the report in paragraph (a) of this section and after consultation with the SOL and the OIG, as appropriate, the HCA shall give notice of the proposed action to the contractor in accordance with the requirements of FAR 3.704(c).

(c) *Final Agency Decision*. The HCA shall make the final decision on voiding and rescinding contracts in accordance with the requirements of FAR 3.705(e).

Subpart 1403.8—Limitation on the Payment of Funds to Influence Federal Transactions

1403.804 Policy.

The BPC shall receive copies of contractor disclosures and forward them to the Director, PAM, for submission to Congress.

1403.806 Processing suspected violations.

Suspected violations shall be referred to the HCA. The HCA, in consultation with the SOL and OIG, shall act in accordance with FAR 3.807.

Subpart 1403.10—Contractor Code of Business Ethics and Conduct

1403.1004 Contract clause.

(a) In all awards expected to exceed $3,000,000, including options, for which performance is expected to exceed 120 days, except purchases conducted in accordance with FAR Part 12 and contracts to be performed entirely outside the United States, replace ''$5,000,000'' with ''$3,000,000'' in paragraph (d) of FAR 52.203–14.

(b) Insert the following into paragraph (b)(3) of the same clause: ''Downloadable hotline posters as well as instructions for obtaining a hard copy poster are available at *http://www.doioig.gov/hotline*.''

PART 1404—ADMINISTRATIVE MATTERS

Subpart 1404.4—Safeguarding Classified Information within Industry

Sec.
1404.402 General.
1404.403 Responsibilities of contracting officers.

Subpart 1404.7—Contractor Records Retention

1404.702 Applicability.

Subpart 1404.8—Contract Files

1404.802 Contract files.
1404.804 Closeout of contract files.
1404.804–70 Release of claims.
1404.805 Disposal of contract files.

Subpart 1404.70—Deposit of Contract Publications

1404.7001 General.
1404.7002 Policy.
1404.7003 Exceptions.
1404.7004 Procedures.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1404.4—Safeguarding Classified Information Within Industry

1404.402 General.

(a) The DOI has entered into an agreement with the DOD to be covered by the National Industrial Security Program (NISP). The agreement is contained in 443 DM 1, Appendix 1.

(b) Classified acquisitions or contracts (see FAR 4.401) shall be subject to the instructions contained in the DOD publications listed in FAR 4.402(b).

1404.403 Responsibilities of contracting officers.

(a) For proposed solicitations that may require access to Departmental classified information, the CO shall consult with the Office of Managing Risk and Public Safety for guidance on NISP in accordance with 443 DM 1.

(b) For proposed contracts where the contractor provides service for the handling and transmission of registered or certified mail at activities that customarily receive and transmit classified information (see FAR 4.401), the contractor shall be cleared to the degree of SECRET. This clearance shall be obtained through the Office of Managing Risk and Public Safety in accordance with 442 DM 8.

(c) For proposed contracts where guard services are assigned to safeguard Department activities in possession of classified information (see FAR 4.401), review and approval shall be obtained from the Office of Managing Risk and Public Safety in accordance with 442 DM 8.

Subpart 1404.7—Contractor Records Retention

1404.702 Applicability.

In addition to the clauses listed at FAR 4.702, the policies and procedures at FAR 4.7 shall also apply to records generated under contracts containing the clause at 1452.215–70, Examination of Records by the Department of the Interior.

Subpart 1404.8—Contract Files

1404.802 Contract files.

In addition to the requirements in FAR 4.802, files shall also be maintained in accordance with the provisions of 380 DM 3.

1404.804 Closeout of contract files.

1404.804–70 Release of claims.

(a) The CO shall insert the clause at 1452.204–70, Release of Claims, in all construction, architect and engineering, and cost-reimbursement contracts that exceed the SAT. The Release of Claims clause may be inserted in other types of contracts when the CO determines that the release is necessary to protect the interests of the Government.

(b) Form DI–137, Release of Claims, shall be used to obtain a release of claims.

1404.805 Disposal of contract files.

Disposition of files shall be accomplished in accordance with 384 DM.

Subpart 1404.70—Deposit of Contract Publications

1404.7001 General.

The DOI Departmental Library is responsible for maintaining a complete collection of Departmental publications. As used in this Subpart, the term ''Departmental publication'' means any publication or report produced under a DOI contract or Interagency agreement.

1404.7002 Policy.

The CO shall direct the contractor, in the technical instructions, to acknowledge Federal sponsorship in the final report or publication by placing the following statement on the title page:

''This publication was funded by U.S. Department of the Interior, (Name of Bureau/Office), Washington, DC, under contract number_____.''

1404.7003 Exceptions.

The following types of publications are excluded from the requirements of this Subpart:

(a) Internal documents required for administrative or operational purposes that have no public interest, educational, scientific, or research value;

(b) Classified publications and material otherwise marked prohibiting unauthorized disclosure;

(c) Tentative drafts such as preliminary planning reports that will appear later in revised or final form;

(d) Journal and magazine articles; or

(e) Disclosure materials containing any description, specification, data, plan, or drawing of any unpatented invention upon which a patent application is likely to be filed, unless an opinion by the SOL, or his/her duly authorized designee, has been rendered which finds that the interests of the Government will not be prejudiced by disclosure of such materials.

1404.7004 Procedures.

(a) The CO shall direct the contractor, in the technical instructions, to provide two copies of each publication or report produced under a contract to: U.S. Department of the Interior, Departmental Library, 1849 C Street, NW., MS–2258, Main Interior Bldg., Washington, DC 20240.

(b) A transmittal letter shall accompany the copies and identify the sender and the publication(s). The bibliographic information required by 481 DM 1.3B(4) shall be also included with the submission of all translations.

SUBCHAPTER B—COMPETITION AND ACQUISITION PLANNING

PART 1405—PUBLICIZING CONTRACT ACTIONS

Subpart 1405.2—Synopses of Proposed Contract Actions

Sec.
1405.202 Exceptions.
1405.207 Preparation and transmittal of synopses.

Subpart 1405.3—Synopses of Contract Awards

1405.303 Announcement of contract awards.

Subpart 1405.4—Release of Information

1405.403 Requests from members of Congress.
1405.404 Release of long-range acquisition estimates.
1405.404–1 Release procedures.

Subpart 1405.5—Paid Advertisements

1405.502 Authority.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1405.2—Synopses of Proposed Contract Actions

1405.202 Exceptions.

The AS/PMB is authorized to approve the written determination documenting the reasons why a synopsis is not appropriate or reasonable. The CO shall prepare the determination, submit it to the HCA and then to the Director, PAM, for AS/PMB approval.

1405.207 Preparation and transmittal of synopses.

In addition to the synopsis information generally required under FAR 5.207, as a best business practice, it is recommended each synopsis of a proposed contract action under other than full and open competition include the location where the offeror may obtain:

(a) A description of specific qualifications the Government requires of the product or service to meet the Government's minimum needs; and

(b) The factors the Government will use to evaluate the product or service information prospective contractors provide under the proposed contract action.

Subpart 1405.3—Synopses of Contract Awards

1405.303 Announcement of contract awards.

(a) The CO shall report the following information to the cognizant bureau congressional affairs officer for notification to Congress 24 hours prior to the award of a contract expecting to exceed $500,000:

(1) Proposed award date;

(2) Contractor name and address;

(3) Geographical location of contract performance;

(4) Description of the contracted work;

(5) Dollar amount of contract; and

(6) Contractor business size and whether the firm is minority-owned or is a disadvantaged business concern.

(b) With the concurrence of the Office of Congressional and Legislative Affairs, the HCA may waive the announcement of sensitive awards.

Subpart 1405.4—Release of Information

1405.403 Requests from Members of Congress.

For purposes of this subpart, the agency head is the HCA with the power of redelegation to the BPC.

1405.404 Release of long-range acquisition estimates.

1405.404–1 Release procedures.

(a) The authority to release acquisition requirements anticipated in the coming year is delegated to the OSDBU and the HCA with redelegation limited to the BPC. The Government cost estimate shall not be revealed. The expected dollar values shall be advertised as falling within dollar ranges rather than specific dollar amounts.

(b) Classified information shall only be released in accordance with the procedures in 442 DM.

Subpart 1405.5—Paid Advertisements

1405.502 Authority.

(a) The CO shall obtain written authorization of the HCA before placing an advertisement in a newspaper to advertise a contracting opportunity.

(b) Advertisements placed in media other than newspapers do not require advance authorization.

PART 1406—COMPETITION REQUIREMENTS

Subpart 1406.2—Full and Open Competition After Exclusion of Sources

Sec.
1406.202 Establishing or maintaining alternate sources.

Subpart 1406.3—Other Than Full and Open Competition

1406.302 Circumstances permitting other than full and open competition.
1406.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.
1406.302–7 Public interest.
1406.303 Justifications.
1406.303–70 Additional requirements.
1406.304 Approval of the justification.

Subpart 1406.5—Competition Advocates

1406.501 Requirement.
1406.502 Duties and responsibilities.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1406.2—Full and Open Competition After Exclusion of Sources

1406.202 Establishing or maintaining alternative sources.

HCAs are authorized to approve the determinations and findings (D&Fs) to establish or maintain an alternative source or sources for supplies or services.

Subpart 1406.3—Other Than Full and Open Competition

1406.302 Circumstances permitting other than full and open competition.

1406.302–1 Only one responsible source and no other supplies or services will satisfy agency requirements.

For contracts that will be awarded using this authority, the notices required by FAR 5.201 shall have been published and any bids, proposals, quotations, or capability statements must have been considered.

1406.302–7 Public interest.

The CO shall prepare the D&F and complete the justification to support use of public interest authority for other than full and open competition and submit it through the HCA to the Director, PAM, for further action.

1406.303 Justifications.

1406.303–70 Additional requirements.

(a) If other than full and open competition is recommended by the office initiating an acquisition requirement, the recommendation shall:

(1) Be in writing;

(2) Accompany the requisition;

(3) Contain the information required by FAR 6.303–2; and

(4) Request the CO to conduct a market survey by issuing a synopsis of the proposed contract action (see 1405.207). The initiating office shall evaluate and document all responses to the notice. The CO shall prepare the D&F that only one source can meet the Government's needs based on the evaluation results. The evaluation results shall be included in the justification as required by FAR 6.303–2(a)(8) if it is determined that only one source can meet the Government's needs.

(b) The procedure in paragraph (a) of this section is not required for proposed contract actions to be awarded under the authority in FAR 6.302–2 when the CO determines that preparation and approval of the justification

would unreasonably delay the acquisition. Under these circumstances, a justification may be prepared and approved after award in accordance with FAR 6.303–1(d).

1406.304 Approval of the justification.

A class justification shall be approved in accordance with bureau procedures. Copies of approved class justifications shall be promptly transmitted to PAM.

Subpart 1406.5—Competition Advocates

1406.501 Requirement.

(a) The competition advocate for DOI is located within PAM's staff. Applicable correspondence should be addressed to PAM, Attention: Competition Advocate.

(b) Competition Advocates for each bureau and office shall be as designated by the CAO–AS/PMB.

1406.502 Duties and responsibilities.

PAM is responsible for preparing and submitting the annual report required by FAR 6.502(b)(2). Bureau Competition Advocates shall furnish certain information, as may be required, to assist PAM in preparing the report.

PART 1407—ACQUISITION PLANNING

Subpart 1407.1—Acquisition Plans

Sec.
1407.102 Policy.

Subpart 1407.3—Contractor Versus Government Performance

1407.301 Policy.
1407.307 Appeals.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1407.1—Acquisition Plans

1407.102 Policy.

DOI has implemented its acquisition planning system in 404 DM. This system meets the criteria prescribed in FAR Subpart 7.1, 375 DM, OCIO Program Management, and 376 DM, Automated Data Processing. Each of these addresses strategic planning for OCIO and planning for acquisition of federal information processing resources.

Subpart 1407.3—Contractor Versus Government Performance

1407.301 Policy.

404 DM, Procurement Planning, addresses the requirements of OMB Circular A–76.

1407.307 Appeals.

Department appeal procedures required by OMB Circular A–76 are codified in 43 CFR part 4, subpart M.

PART 1408—REQUIRED SOURCES OF SUPPLIES AND SERVICES

Subpart 1408.1—Excess Personal Property

Sec.
1408.102 Policy.

Subpart 1408.8—Acquisition of Printing and Related Supplies

1408.802 Policy.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1408.1—Excess Personal Property

1408.102 Policy.

Inquiries on available excess or surplus personal property should be directed to the PMO or the designee in each Bureau or Office.

Subpart 1408.8—Acquisition of Printing and Related Supplies

1408.802 Policy.

(a) *Duplicating* is the mass reproduction of materials beyond the capabilities of typical office copiers. Volumes are of sufficient mass quantities up to 5,000 single-page and 25,000 production units in the aggregate of multiple pages. Such duplicating units shall require Departmental approval to be processed through the Department of

the Interior Publishing Council (DOIPC).

(b) *Copying* is distinguished from ''duplicating'' in that such work is administrative in nature, produced on office copying equipment and produced as necessary, in limited quantities. Volumes typically range from 1 to 500 single-pages to 2,500 production units in the aggregate of multiple pages. This volume standard is referred to as the ''500/2500'' rule. Reproduction work exceeding the ''500/2500'' rule is duplicating, and requires a waiver from the nearest servicing GPO office. Employees should consult with their bureau printing officer or the DOIPC representative to secure such a waiver.

(c) The DOIPC has been designated as the Department's liaison with the Joint Committee on Printing and GPO. Requirements for printing and related supplies shall be coordinated with the DOIPC or the designated bureau publications liaison officer in accordance with 314 DM 1.

PART 1409—CONTRACTOR QUALIFICATIONS

Subpart 1409.2—Qualifications Requirements

Sec.
1409.202 Policy.
1409.206 Acquisitions subject to qualifications requirements.
1409.206–1 General.

Subpart 1409.4—Debarment, Suspension and Ineligibility

1409.403 Definitions.
1409.404 Excluded Parties List System (EPLS).
1409.405 Effect of listing.
1409.405–1 Continuation of current contracts.
1409.406 Debarment.
1409.406–1 General.
1409.406–3 Procedures.
1409.407 Suspension.
1409.407–1 General.
1409.407–3 Procedures.

Subpart 1409.5—Organizational and Consultant Conflicts of Interest

1409.503 Waiver.
1409.506 Procedures.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1409.2—Qualifications Requirements

1409.202 Policy.

(a) The HCA is the official responsible for establishing the qualification requirement in FAR 9.202(a)(1). This authority is not redelegable.

(b) The HCA is the approval official referenced in FAR 9.202(e).

1409.206 Acquisitions subject to qualification requirements.

1409.206–1 General.

The HCA is the approval official referenced in FAR 9.206–1(b).

Subpart 1409.4—Debarment, Suspension, and Ineligibility

1409.403 Definitions.

As used in this subpart:

Case Representative refers to the individual who prepares and forwards the action referral memorandum to the Debarring and Suspending Official and provides additional assistance in the course of action resolution. Debarment and Suspension actions may be referred to the Debarring and Suspending Official for consideration from different sources, as appropriate. The HCA, or designee, may refer matters. The Office of Inspector General (OIG) may also refer actions.

Conviction, for the purposes of this subpart, means:

(a) 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,

(b) Any other resolution that is the functional equivalent of a judgment, 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.

Debarring Official refers to the Director, PAM. The Debarring Official is the official authorized to impose debarment or suspension. The Debarring Official also may settle a debarment or

suspension action at any time if it is in the best interest of the Government.

Suspending Official refers to the Director, PAM.

1409.404 Excluded Parties List System (EPLS).

(a) PAM is responsible for accomplishing the actions required in FAR 9.404(c).

(b) COs should access the EPLS online at *http://www.epls.gov*.

1409.405 Effect of listing.

When a CO finds that a compelling reason exists to conduct business with a contractor listed on the EPLS, the HCA shall submit the determination and findings to the Director, PAM, for approval.

1409.405–1 Continuation of current contracts.

The HCA, without authority to redelegate, is authorized to take the actions listed in FAR 9.405–1.

1409.406 Debarment.

1409.406–1 General.

The Director, PAM, is authorized to make the statement regarding debarment by another agency's debarring official under the conditions in FAR 9.406–1(c).

1409.406–3 Procedures.

(a) *Investigation and referral.* Whenever a cause for debarment, as listed in FAR 9.406–2. becomes known to a DOI employee, the matter shall be referred by the case representative to the Debarring Official, in consultation, as appropriate, with the HCA involved, the SOL, and OIG. The case representative will review the matter and, as warranted, prepare and submit to the Debarring Official for consideration an Action Referral Memorandum (ARM) with supporting documentation.

(b) *Notice of Proposed Debarment.* Based upon review of the ARM, as appropriate, the Debarring Official shall initiate proposed debarment by taking the actions listed in FAR 9.406–3(c) and advising the contractor of DOI's process for contesting the action.

(c) *Decision-making process.* (1) For debarment actions based upon a conviction, civil judgment, or in which there is no genuine dispute over material facts, consistent with FAR 9.406–3(d)(1), the Debarring Official shall make a decision on the basis of the information in the administrative record, including any contractor submissions. Where the proceeding includes an oral presentation of matters in opposition (PMIO) to the Debarring Official, the PMIO will be conducted in an informal business meeting format and tape recorded for the administrative record.

(2) For actions listed under FAR 9.406–3(b)(2), upon concluding from a contractor's information in response to the action notice that facts material to the existence of cause for debarment are genuinely in dispute, the Debarring Official may refer the disputed material facts to another official for fact-finding. The hearing shall be conducted in accordance with Debarment Program fact-finding procedures.

(i) The fact-finding proceeding will be transcribed. The fact-finding official will file the original copy of the transcript with the case record. The reporter's fees and other direct costs associated with the hearing shall be borne by the bureau or office initiating the debarment action, except in the case of actions initiated by the OIG. For actions initiated by the OIG, the costs will be borne by the bureau(s) and/or office(s) out of which the matter arose. A transcript of the proceedings shall be made available to the contractor as provided under FAR 9.406–3(b)(2)(ii).

(ii) Subject to the provisions of 43 CFR part 1, the contractor, and any specifically named affiliate, may be represented by counsel or any duly authorized representative. Witnesses may be called by either party. The proceedings shall be conducted expeditiously and in such a manner that each party will have a full opportunity to present all information considered pertinent to the proposed debarment. A transcript of the proceedings shall be made available to the contractor under the condition in FAR 9.406–3(b)(2)(ii).

(iii) The fact-finding official will prepare findings of fact, certify the entire hearing record and provide said findings and record to the Debarring Official. The fact-finding official shall not make any recommendations unless the

Debarring Official has expressly requested such recommendations in writing. Following receipt of the findings of fact, the Debarring Official shall complete debarment proceedings and issue a written debarment decision.

(d) *Administrative Agreements.* Matters may be resolved through administrative agreement at any stage of proceedings of a debarment action where a contractor agrees to appropriate terms. The specific effect of administrative agreements that incorporate terms regarding eligibility for DOI contracting will vary with the terms of the agreements. In general, such agreements resolve debarment concerns and thereby terminate any imposed or pending award ineligibility. In the event of an agreement, PAM will notify COs of the agreement and its terms.

(e) *Administrative Appeal.* Administrative review of the Debarring Official's decision under FAR 9.406–3(e) may be sought as follows:

(1) The contractor may within thirty (30) days of receipt of the decision, request the Debarring Official to reconsider the decision for clear material errors of fact or law which would change the outcome of the matter.

(2) The Debarring Official may exercise his/her discretion and stay the debarment pending reconsideration review. The Debarring Official will notify the contractor in writing of the decision on reconsideration.

(3) A review request under this section must be in writing, clearly state the specific findings believed to be in error and include the reasons or legal bases for the position.

1409.407 Suspension.

1409.407–1 General.

The Director, PAM, is authorized to make the determination in FAR 9.407–1(d).

1409.407–3 Procedures.

(a) *Investigation and referral.* Whenever a cause for suspension, as listed in FAR 9.407–2, becomes known to a DOI employee, the matter shall be referred by the case representative to the Suspending Official, in consultation, as appropriate, with the HCA involved, the SOL, and the OIG. The case representative will review the matter and, if warranted, prepare and submit to the Debarring Official for consideration an Action Referral Memorandum (ARM) with supporting documentation.

(b) *Notice of Suspension.* After review of the ARM, if appropriate, the Debarring Official shall initiate a suspension by taking the actions listed in FAR 9.407–3(c), and advising the contractor of the Department's process for contesting the action.

(c) *Decision making process.* (1) For suspension actions based upon an indictment or equivalent charging document, or where there is no genuine dispute over material facts, consistent with FAR 9.407–3(d), or in which additional proceedings to determine disputed material facts have been denied on the basis of DOJ advice, the Suspending Official shall make a decision on the basis of the information in the administrative record, including any submission by the contractor. Where the proceeding includes an oral PMIO to the Suspending Official, the PMIO will be conducted in an informal business meeting format and tape recorded for the administrative record.

(2) For actions listed under FAR 9.407–3(b)(2), when the Debarring Official concludes from information in a contractor's response to the proposed action notice that facts material to the existence of a cause for debarment are genuinely in dispute, the Suspending Official may refer the disputed material facts to another official for hearing and findings of fact.

(i) The hearing shall be conducted in accordance with Suspension Program fact-finding procedures.

(ii) The fact-finding proceeding will be transcribed. The reporter's fees and other direct costs associated with the hearing shall be borne by the bureau or office initiating the suspension referral, except in the case of actions initiated by the OIG. For actions initiated by the OIG, costs will be borne by Bureaus and/or offices out of which the matter arose. A transcript of the proceedings shall be made available to the contractor under the condition in FAR 9.407–3(b)(2)(ii).

(iii) Subject to the provisions of 43 CFR part 1, the contractor, and any specifically named affiliates, may be

represented by counsel or any duly authorized representative. Witnesses may be called by either party. The proceedings shall be conducted expeditiously and in such a manner that each party will have a full opportunity to present all information considered pertinent to the suspension.

(iv) The fact-finding official will prepare findings of fact, certify the entire hearing record and provide said findings and record to the Suspending Official. The fact-finding official shall not make any recommendations unless the Suspending Official has expressly requested such recommendations in writing. Following receipt of the findings of fact, the Suspending Official shall complete suspension proceedings and issue a written decision. Matters may be resolved through an administrative agreement at any stage of the proceedings.

(d) *Administrative Agreements.* Matters may be resolved through an administrative agreement at any stage of proceedings in resolution of a suspension action where a contractor agrees to appropriate terms. The specific effect of administrative agreements that incorporate terms regarding eligibility for DOI contracting will vary with the terms of the agreements. In general, such agreements resolve suspension concerns and thereby terminate award ineligibility. An administrative agreement resolving a suspension action may by its terms be an interim agreement. In the event of an agreement, PAM will notify COs of the agreement and its terms.

(e) *Administrative Appeal.* Administrative review of the Suspending Official's decision under FAR 9.407–3(d) may be sought as follows:

(1) The contractor may within thirty (30) days of receipt of the decision, ask the Suspending Official to reconsider the decision for clear material errors of fact or law which would change the outcome of the matter.

(2) The Suspending Official may in the exercise of discretion stay the debarment pending reconsideration review. The Suspending Official will notify the contractor in writing of the decision on reconsideration.

(3) A review request under this section must be submitted in writing; clearly state the specific findings believed to be in error, and include the reasons or legal bases for the position.

Subpart 1409.5—Organizational and Consultant Conflicts of Interest

1409.503 Waiver.

(a) The Director, PAM, is authorized to waive any general rule or procedure in FAR Subpart 9.5, when such action is in the Government's interest.

(b) Request for waivers shall be made by the HCA, through the appropriate SOL, to the Director, PAM. Each request shall include:

(1) An analysis of the facts involving the potential or actual conflict, including benefits and detriments to the Government and prospective contractor(s);

(2) A discussion of the factors which preclude avoiding, neutralizing or mitigating the conflict; and

(3) Identification of the provision(s) in FAR Subpart 9.5 to be waived.

1409.506 Procedures.

If the CO determines that contractor performance of the contemplated work is likely to create an organizational conflict of interest, then the contracting officer shall refer the documentation of the potential conflict and proposed resolution prepared in accordance with 7.105(b)(18) to the HCA for approval. Referrals to the HCA shall be initiated by the CO and reviewed by the SOL.

PARTS 1410–1412 [RESERVED]

SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

PART 1413—SIMPLIFIED ACQUISITION PROCEDURES

Subpart 1413.2—Micro-Purchase

Sec.
1413.201 General.
1413.202–70 Policy.

Subpart 1413.3—Simplified Acquisition Methods

1413.305 Imprest Fund.
1413.305–2 Agency responsibilities.
1413.305–4 Procedures.
1413.306 Standard Form 44, Purchase order—invoice—voucher.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1413.2—Micro-Purchase

1413.201 General.

The procedures set forth in the Federal Supply Schedule for Government-wide Commercial Credit Card Services, Treasury Financial Manual, TFM 4–4500, and ''U.S. Department of Interior Handbook for Utilization of Government Wide Commercial Credit Card'' issued by PAM contain guidance on using Government-wide purchase card services.

1413.202–70 Policy.

(a) The purchase card shall be used in preference to other methods of procurement for purchases up to $3,000. Other small purchase methods (BPAs, imprest funds, third-party drafts, SF–44 forms, and purchase orders) may be used in lieu of the Government purchase card when it is more cost-effective or practicable.

(b) The purchase card shall be issued primarily to personnel outside of procurement offices to purchase products and services up to the micro-purchase threshold ($2,000 for construction).

(c) The purchase card may be used in procurement offices for purchases up to the simplified acquisition threshold ($50,000 if not interim FACNET certified) not to exceed individual warrant limitations.

(d) Each contracting activity shall develop more specific procedures for use of purchase cards.

Subpart 1413.3—Simplified Acquisition Methods

1413.305 Imprest fund.

1413.305–2 Agency responsibilities.

Policy governing the use and administration of imprest funds within the Department are contained in 330 DM, in addition to the policies and regulations outlined in FAR 13.305–1. HCAs shall establish written procedures for designation, by name, of personnel authorized to approve requisitions and make purchases using imprest funds. The procedures shall include a periodic review of imprest fund transactions by acquisition personnel.

1413.305–4 Procedures.

The individual authorized to make purchases using imprest funds shall be responsible for compliance with the procedures and documentation requirements of FAR 13.305–4.

1413.306 Standard Form 44, Purchase order-invoice-voucher.

HCAs are responsible for establishing bureau procedures to control the use of the SF 44 and accounting for all purchases made using the form. Bureau procedures shall include instructions covering:

(a) Maintenance of a list of designated individuals authorized to make purchases using the form;

(b) Controls for issuing the form to authorized individuals; and

(c) Review of purchase transactions using the form to assure compliance with authorized procedures.

PART 1414—SEALED BIDDING

Subpart 1414.2—Solicitation of Bids

Sec.
1414.201 Preparation of invitations for bids.

1414.201–70 Alternate bids.

Subpart 1414.4—Opening of Bids and Award of Contract

1414.404 Rejection of bids.
1414.404–1 Cancellation of invitations after opening.
1414.407 Mistakes in bids.
1414.407–3 Other mistakes disclosed before award.
1414.407–4 Mistakes after award.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1414.2—Solicitation of Bids

1414.201 Preparation of invitation for bids.

1414.201–70 Alternate bids.

(a) Solicitations for supplies or services (other than construction) shall specify whether alternate bids are permitted, provide instructions for submitting alternate bids and clearly indicate how alternate bids will be evaluated.

(b) The clause set forth in 1452.236–71 may be used in non-construction contracts where additive and deductive alternate bids will be permitted.

Subpart 1414.4—Opening of Bids and Award of Contract

1414.404 Rejection of bids.

1414.404–1 Cancellation of invitations after opening.

The CCO is authorized to make the written determination to cancel the IFB before award but after bid opening.

1414.407 Mistakes in bids.

1414.407–3 Other mistakes disclosed before award.

(a) The HCA is authorized to make the administrative determinations under FAR 14.407–3, except as set forth in paragraph (b) of this section. This authority is not redelegable.

(b) The CCO has the authority outlined in FAR 14.407–3(c) to make the written determination permitting a bidder to withdraw a bid, after review by the SOL.

(c) The CO shall submit a report on suspected or alleged mistakes in bids together with the supporting data to the BPC, who will forward it to the HCA. The CO may also include a report on bids where evidence of the intended bid is clear and convincing but the bidder has not requested permission to correct the bid. Incomplete reports may result in a delay in obtaining a determination.

(d) The BPC is responsible for maintaining records of administrative determinations.

1414.407–4 Mistakes after award.

The CO is authorized to make the administrative determinations outlined in 14.407–4 after receiving concurrence from the SOL.

PART 1415—CONTRACTING BY NEGOTIATION

Subpart 1415.2—Solicitation and Receipt of Proposals and Information

Sec.
1415.201 Exchanges with industry before receipt of proposals.
1415.207 Handling proposals and information.
1415.207–70 Department of the Interior proposal and information handling procedures.
1415.207–71 Confidentiality of proposal evaluation.
1415.209 Solicitation provisions and contract clauses.
1415.209–70 Examination of records by the Department of the Interior.

Subpart 1415.3—Source Selection

1415.303 Responsibilities.
1415.305 Proposal evaluation.

Subpart 1415.4—Contract Pricing

1415.404 Proposal analysis.
1415.404–2 Information to support proposal analysis.
1415.404–4 Profit.
1415.406 Documentation.
1415.406–70 Department of the Interior price negotiation memorandum (PNM).

Subpart 1415.6—Unsolicited Proposals

1415.606 Agency procedures.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1415.2—Solicitation and Receipt of Proposals and Information

1415.201 Exchanges with industry before receipt of proposals.

(a) Use of a presolicitation conference shall be approved at one level above the CO.

(b) A CO may issue a solicitation for information or planning purposes without a written justification and without obtaining a higher level of approval.

1415.207 Handling proposals and information.

1415.207–70 Department of the Interior proposal and information handling procedures.

(a) *General.* This section establishes procedures that must be used in addition to those prescribed in FAR 15.207, for the use and disclosure of trade secret information and confidential commercial and financial information contained in solicited proposals.

(b) *Marking of solicited proposals.* A solicited proposal may contain trade secrets or confidential commercial or financial information which the offeror, or its subcontractors, prefers not to be disclosed to the public or used by the Government for any purpose other than evaluation of the proposal. To notify the Government of trade secrets and confidential commercial or financial information contained in a proposal, offerors must mark the cover page of the proposal and each affected page of the proposal with the legends specified in the solicitation provision at 1452.215–71, Use and Disclosure of Proposal Information—Department of the Interior. COs and other government personnel evaluating a proposal shall not refuse to consider the proposal because it contains information identified as trade secret information or confidential commercial or financial information.

(c) *Failure to mark.* The Government assumes no liability for the disclosure or use of information contained in a proposal if not marked in accordance with 1452.215–71. If a request under the Freedom of Information Act is made for information in a proposal not marked in accordance with 1452.215–71, the offeror concerned shall be notified promptly of the request and given an opportunity to provide its position to the Government. However, failure of an offeror to mark information contained in a proposal as trade secret information or confidential commercial and financial information will be treated by the Government as evidence that the information is not exempt from disclosure under the Freedom of Information Act, absent a showing that the failure to mark was due to unusual or extenuating circumstances, such as a showing that the offeror had intended to mark, but that markings were omitted from the offeror's proposal due to clerical error.

(d) *Solicitation provision.* The provision at 1452.215–71, Use and Disclosure of Proposal Information—Department of the Interior, shall be inserted in all requests for proposals and requests for quotations.

1415.207–71 Confidentiality of proposal evaluation.

(a) The safeguarding of evaluation data and information, including proposals, is essential in order to preserve the integrity of the proposal evaluation process. During the selection process, no member or advisor of any committee appointed to evaluate proposals shall discuss or disclose any information on the number, identity or content of proposals received to any other party (including supervisors) without the written approval of the CO. 18 U.S.C. 1905 prohibits the unauthorized disclosure of business, confidential or trade secret information unless authorized by law.

(b) At the initial meeting of the committee, the CO shall brief all members and advisors on the sensitivity of the evaluation process and the prohibition against unauthorized disclosure of information. At this meeting each member and advisor shall sign a Confidentiality Certificate. During the proposal evaluation process, all proposals, evaluation notes, scoring sheets, and other

materials shall be locked in file cabinets or drawers when not in use by committee members and advisors.

(c) The CO shall be the single point of contact regarding communications received from outside parties relating to the acquisition and the evaluation and selection process. Any committee member or advisor who receives a communication from any outside party shall, without discussion, immediately refer the party to the CO. The CO will then determine what further action shall be taken, if any, in responding to the communication. Requests for information made pursuant to the Freedom of Information Act shall be referred to the CO for reply. Proposal evaluation committee members and advisors shall not contact any offeror whose proposal is under evaluation. All communications with offerors shall be handled by the CO.

(d) Bureaus and offices may only release proposals outside the Government for evaluation or advice in accordance with the following requirements:

(1) Decisions to release proposals outside the Government for evaluation or advice shall be approved in writing by the HCA;

(2) Outside evaluators and advisors shall sign a Conflict of Interest Certificate and a Confidentiality Certificate in a format approved by the HCA;

(3) Any authorized restrictive legends placed on the proposal by the prospective contractor or subcontractor, or by the Government shall be applied to any reproduction or abstracted information made by the outside evaluator or advisor;

(4) Upon completing the evaluation, all copies of the proposal, as well as any abstracts thereof, shall be returned to the Government office which initially furnished them for evaluation; and

(5) All determinations to release the proposal outside the Government shall take into consideration requirements for avoiding individual conflicts of interest (see 1403.101) and organizational conflicts of interest (see 1409.5 and FAR Subpart 9.5), and the competitive relationship, if any, between the prospective contractor or subcontractor and the prospective outside evaluator.

(e) If outside individuals will be voting members of the evaluation committee or otherwise participate in other than an advisory capacity, then the committee must be constituted as a Federal Advisory Committee in accordance with the Federal Advisory Committee Act (PL 92–463) and 308 DM 2. Since the Secretary must appoint such committees in consultation with the Office of Management and Budget, there should be very few occasions when use of outside individuals as voting members is justified.

(f) Outside evaluators will usually serve as advisors to the proposal evaluation committee and as such, are consultants. Consultants may be appointed as special employees in accordance with 5 U.S.C. 3109 or contracted for in accordance with 1437.1.

(g) Additional restrictions on the disclosure of acquisition evaluation information are listed in FAR Subpart 5.4.

1415.209 Solicitation provisions and contract clauses.

1414.209–70 Examination of records by the Department of the Interior.

The CO shall insert the clause at 1452.215–70, Examination of Records by the Department of the Interior, in all contracts requiring the clause at FAR 52.215–2 Audit and Records, Negotiation, as prescribed in FAR 15.209(b).

Subpart 1415.3—Source Selection

1415.303 Responsibilities.

(a) The HCA shall determine when a formal source selection process will be used and shall establish implementing procedures.

(b) The formal source selection procedures shall include designating the CO as the individual responsible for the proper control and appropriate release of proprietary and source selection information after source selection.

1415.305 Proposal evaluation.

The CCO is authorized to make the determination to reject all proposals.

Subpart 1415.4—Contract Pricing

1415.404 Proposal analysis.

1415.404–2 Information to support proposal analysis.

The CO shall initiate an audit by sending a completed form DI–1902, Request for Audit, to the Assistant Inspector General for Auditing, OIG (see 1453.215–70).

(a) The CO shall allow at least 30 working days in assigning a realistic deadline for receipt of the audit report. In exceptional circumstances 20 working days may be allowed but the circumstances shall be documented in the contract file.

(b) Upon receipt of a DI–1902, the OIG will conduct the audit or arrange for its conduct by the cognizant audit agency in accordance with 360 DM 3.7.

(c) Upon receipt of the audit report, the CO and the price analyst (if assigned), shall discuss any questions regarding the report's contents with the cognizant auditor. If a question cannot be resolved or agreement cannot be reached on a recommendation in the report, the CO shall prepare a written statement for the contract file documenting the decision on the matter. A copy of the statement shall be promptly forwarded to the Assistant Inspector General for Auditing for information.

1415.404–4 Profit.

(a) DOI's policy is to use a structured approach for determining the profit or fee prenegotiation objective in acquisition actions that require cost analysis based on the profit analysis factors in FAR 15.404–4, as implemented and supplemented in this section.

(b) In addition to the factors listed in FAR 15.404–4(d), one additional factor, ''Other Costs,'' will be used in evaluating and determining a weighted profit or fee. For further guidance also refer to the Armed Services Pricing Manual (ASPM No. 1). The ''Other Costs'' factor shall include the contribution of all other direct costs including travel, direct support and hiring of consultants for contract performance.

[75 FR 19829, Apr. 15, 2010, as amended at 76 FR 50141, Aug. 12, 2011]

1415.406 Documentation.

1415.406–70 Department of the Interior price negotiation memorandum (PNM).

(a) *Policy*. In addition to the information required in FAR 15.406–3, the PNM prepared by the CO shall include the information in paragraph (c) of this section to the extent such information is applicable to the negotiation.

(b) *Applicability*. (1) The CO shall prepare a PNM documenting the negotiation of the initial contract award and any subsequent modifications affecting price, cost or fee, including revisions to the prices of contracts awarded through sealed bidding procedures. A PNM is not required for unilateral modifications such as exercising fixed price options or issuing change orders. The memorandum is required for concluding changes and settlements of claims and for issuing orders under Blanket Ordering Agreements, task orders and delivery orders that involve the negotiation of prices, estimated quantities or amounts.

(2) For simplified acquisitions conducted pursuant to FAR Part 13, the documentation requirements of 1413.106 and FAR 13.106 shall be followed.

(c) *Procedures*. When the CO prepares the memorandum prescribed in FAR 15.406–3, the following additional information shall be included to the extent it applies to the contract action. Information already contained in the contract file or in a previous PNM shall be referenced by location:

(1) A discussion of the reason(s) why sealed bidding is not appropriate as required by FAR 6.401 (or cross-reference the file location of the existing explanation);

(2) A memorandum identifying the type of contract used and why it was selected as required by FAR 16.103(d). The file location of any required determination and findings authorizing use of this type of contract (see Part 1416);

(3) A history of the contract action including: Whether the action was synopsized or the basis for exemption under FAR 5.202, and file location of the synopsis; consideration given to the use of set-asides and file location of

DI–1886 (see Subpart 1419.2); solicitation issuance date, closing date for receipt of proposals and extensions; (iv) sources solicited (reference file location); late proposal or proposal modification information required by FAR 15.208; and the file location of ''Justification for Other Than Full and Open Competition,'' if applicable.

(4) Evaluation of proposal(s), including: Evaluation factors used and weights (FAR 15.304); results of initial proposal evaluation (FAR 15.305); determination of competitive range (FAR 15.306); results of written or oral discussions conducted (FAR 15.306); discussion of final proposal revisions received (FAR 15.307) and results of final proposal evaluation; and basis for source selection. For formal source selection procedures (see 1415.303), information on the source selection plan, and the source selection decision including supporting documentation required by FAR 15.308.

(5) If cost or pricing data were not required, the cost or price analysis performed in accordance with FAR 15.404–1.

(6) If cost or pricing data were required, the cost analysis (FAR 15.404–1(c)) performed; and cost realism analysis (FAR 15.404–1(d)) and technical analysis (FAR 15.404–1(e)) performed, as applicable to the procurement.

(7) If an audit report was required (FAR 15.404–2), COs shall specifically describe actions taken in response to significant audit findings, including the monetary value and decisions made with regard to any of the audit's questioned costs; i.e., COs shall identify the value of the questioned costs, indicate whether they will allow or disallow them, and provide an explanation for their decisions. For purposes of this section, ''significant audit finding'' and ''questioned cost'' are defined as those findings and/or costs cited or questioned in an external audit because of their relationship to unallowable costs claimed, a failure to comply with regulations or the terms of the contract, mathematical errors, and/or the duplication of costs. Questions and/or disagreements between the CO, price analyst (if assigned) and cognizant auditor as to an audit report's interpretation or recommendations regarding ''significant audit finding'' and/or ''questioned costs'' shall be clarified or resolved and appropriately documented. If a disagreement cannot be resolved or agreement cannot be reached, the CO shall prepare a written statement in the PNM that discusses the issue(s) in question and supports a final decision on the matter.

(8) The basis for determining profit or fee as prescribed in FAR Subpart 15.404–4 and form DI–1920 (or file location).

(d) *Approval.* The PNM shall be signed and dated by the contract specialist or contract negotiator who conducted the negotiation and approved by the CO.

(e) *Distribution.* Whenever field pricing support has been obtained, copies of related PNMs shall be forwarded to the Assistant Inspector General for Auditing, OIG, not later than 15 days after the execution of the resulting contract, modification or close-out action.

Subpart 1415.6—Unsolicited Proposals

1415.606 Agency procedures.

The contact point for the receipt and coordination of unsolicited proposals is the contracting office, which will acknowledge and review the proposal contents and determine the proper activity within the bureau/office to evaluate and process the proposal. The policy or contracting office shall acknowledge unsolicited proposals and forward each one to the processing activity in an expeditious manner. Each bureau/office shall establish procedures for receipt, reproduction and disposition of unsolicited proposals consistent with the requirements of FAR 15.6.

PART 1416—TYPES OF CONTRACTS

Subpart 1416.2—Fixed-Price Contracts

Sec.

1416.203 Fixed-price contracts with economic price adjustment.
1416.203–4 Contract clauses.

Subpart 1416.4—Incentive Contracts

1416.405 Contract clauses.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1416.2—Fixed-Price Contracts

1416.203 Fixed-price contracts with economic price adjustment.

1416.203–4 Contract clauses.

An economic price adjustment clause based on actual cost of labor or material may be used after approval by the BPC, without the power of redelegation.

Subpart 1416.4—Incentive Contracts

1416.405 Contract clauses.

The BPC, without the power of redelegation, is authorized to approve an award fee clause to use in a solicitation when a cost-plus-award-fee contract is contemplated.

PART 1417—SPECIAL CONTRACTING METHODS

Subpart 1417.2—Options

Sec.
1417.203 Solicitations.
1417.206 Evaluation.

Subpart 1417.4—Leader Company Contracting

1417.402 Limitations.

Subpart 1417.6—Management and Operating Contracts

1417.602 Policy.
1417.605 Award, renewal and extension.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1417.2—Options

1417.203 Solicitations.

Option quantities in excess of the 50 percent limit may, in unusual circumstances, be approved by the CCO.

1417.206 Evaluation.

The determination in FAR 17.206(b) shall be approved by the CCO prior to soliciting offers.

Subpart 1417.4—Leader Company Contracting

1417.402 Limitations.

Use of leader company contracting for a product, subject to the limitations in FAR 17.402, shall require advance discussion with the Director, PAM, prior to approval by the HCA. This authority may not be redelegated. Documentation shall include the circumstances requiring such action.

Subpart 1417.6—Management and Operating Contracts

1417.602 Policy.

(a) The AS/PMB is authorized to approve the CO's determination to enter into, extend or renew any management and operating contract.

(b) The CO shall prepared requests for authorization to enter into, extend or renew any management and operating contract shall be prepared by the CO and submitted by the HCA through the Director, PAM for approval by the AS/PMB. The request shall be submitted prior to solicitation for the requirement and shall:

(1) Reference the statutory authority for the requirement;

(2) Discuss the relationship between the requirement and the limitations in FAR 17.603;

(3) Include a copy of the proposed contract schedule and evaluation factors for; and

(4) If a noncompetitive procurement is proposed, include a copy of the Justification for Other than Full and Open Competition.

(c) The HCA shall be responsible for conducting the reviews required by FAR 17.602(c) and taking required actions within the time limit prescribed.

(d) The CO shall request authorization under paragraph (a) of this section for solicitation of offers for cost comparison purposes under OMB Circular A–76 (see FAR 7.3) for:

(1) Operation, maintenance, or support of a Government-owned or controlled special production or testing facility; or

(2) Any other commercial or industrial service activity which, if performed by a contractor, would result in a management and operating contract as defined under FAR Subpart 17.6.

1417.605 Award, renewal and extension.

The CO shall review each management and operating contract prior to any extension or exercise of a renewal option. Any extension or renewal of a management and operating contract shall first be authorized as required in 1417.602.

PART 1418 [RESERVED]

SUBCHAPTER D—SOCIOECONOMIC PROGRAMS

PART 1419—SMALL BUSINESS PROGRAMS

Subpart 1419.1 [Reserved]

Subpart 1419.2 Policies

Sec.
1419.201 General policy.
1419.202 Specific policies.
1419.202–70 Acquisition screening and Small Business Specialist recommendations.

Subpart 1419.3—1419.4 [Reserved]

Subpart 1419.5—Set-Asides for Small Business

1419.503 Setting aside a class of acquisitions.
1419.503–70 Class set-aside for construction acquisitions.

Subpart 1419.6—Certificates of Competency and Determinations of Responsibility

1419.602 Procedures.
1419.602–1 Referral.

Subpart 1419.7 [Reserved]

Subpart 1419.8 Contracting with the Small Business Administration (The 8(a) Program)

1419.803 [Reserved]
1419.810 SBA appeals.

Subparts 1419.9—1419.10 [Reserved]

AUTHORITY: 40 U.S.C. 121(c); 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 84 FR 69344, Dec. 18, 2019, unless otherwise noted.

Subpart 1419.1 [Reserved]

Subpart 1419.2—Policies

1419.201 General policy.

The Director of the Office of Small Disadvantaged Business Utilization (OSDBU) is responsible for the following:

(a) Developing and maintaining policies, procedures, regulations, and guidelines for the effective administration of the Department's small business and disadvantaged business programs;

(b) The appointment of Small Business Specialists to ensure compliance with all applicable law, regulation, and policy; and

(c) The negotiation of annual small business and subcontracting goals with the Small Business Administration (SBA). The purpose of these goals is to increase participation of small business and disadvantaged small businesses in contract and subcontract opportunities.

1419.202 Specific policies.

1419.202–70 Acquisition screening and Small Business Specialist recommendations.

The Director of the OSDBU is responsible for issuing policy for use of the DI Form 1886 and determining the content of Form DI–1886 ''Acquisition Screening and Review Form.''

Subpart 1419.3—1419.4 [Reserved]

Subpart 1419.5—Set-Asides for Small Business

1419.503 Setting aside a class of acquisitions.

1419.503–70 Class set-aside for construction acquisitions.

(a) Acquisitions for construction (as defined in Federal Acquisition Regulation (FAR) 2.101) estimated to cost $2 million or less must be set-aside on a class basis for exclusive participation by small business or disadvantaged business concerns. This class set-aside does not apply when:

(1) The acquisition is procured using simplified acquisition procedures;

(2) A non-competitive acquisition has been approved under the procedures of FAR 6.3;

(3) Work is to be performed outside the U.S.; or

(4) The Bureau Procurement Chief determines that adequate competition is not likely to be obtained if the acquisition is restricted to small business concerns.

(b) [Reserved]

Subpart 1419.6—Certificates of Competency and Determinations of Responsibility

1419.602 Procedures.

1419.602–1 Referral.

The contracting officer must obtain approval from the Chief of the Contracting Office for all determinations documenting a responsive small business' lack of responsibility prior to submission to the appropriate SBA office. A copy of the determination must be sent to OSDBU within 5 working days of the approval date of the determination.

Subpart 1419.7—[Reserved]

Subpart 1419.8—Contracting with the Small Business Administration (The 8(a) Program)

1419.803 [Reserved]

1419.810 SBA appeals.

The Assistant Secretary of Policy Management and Budget, without the power of redelegation, is authorized to issue the decision on an SBA appeal of a Contracting Officer's Section 8(a) decision.

Subparts 1419.9—1419.10 [Reserved]

PARTS 1420–1421 [RESERVED]

PART 1422—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

Subpart 1422.1—Basic Labor Policies

Sec.

1422.101 Labor relations.
1422.101–1 General.
1422.101–3 Reporting labor disputes.
1422.101–4 Removal of items from contractors' facilities affected by work stoppages.
1422.103 Overtime.
1422.103–4 Approvals.

Subpart 1422.3—Contract Work Hours and Safety Standards Act

1422.302 Liquidated damages and overtime pay.

Subpart 1422.4—Labor Standards for Contracts Involving Construction

1422.404 Davis-Bacon Act wage determinations.
1422.404–6 Modifications of wage determinations.
1422.406–8 Investigations.
1422.406–9 Withholding from or suspension of contract payments.
1422.406–13 Semiannual enforcement reports.

Subpart 1422.6—Walsh-Healey Public Contracts Act

1422.604 Exemptions.
1422.604–2 Regulatory exemptions.

Subpart 1422.8—Equal Employment Opportunity

1422.803 Responsibilities.
1422.804 Affirmative action programs.
1422.804–2 Construction.
1422.805 Procedures.
1422.807 Exemptions.

Subpart 1422.10—Service Contract Act of 1965, As Amended

1422.1003 Applicability.
1422.1003–4 Administrative limitations, variations, tolerances and exemptions.

Subpart 1422.13—Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans

1422.1305 Waivers.

Subpart 1422.14—Employment of Workers with Disabilities

1422.1403 Waivers.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1422.1—Basic Labor Policies

1422.101 Labor relations.

1422.101–1 General.

The HCA may designate programs or requirements for which notice of labor disputes is necessary.

1422.101–3 Reporting labor disputes.

Labor disputes that may interfere with contract performance shall be reported to the SOL and the HCA.

1422.101–4 Removal of items from contractors' facilities affected by work stoppages.

Prior to initiating any action for removal of items from contractors' facilities, the CO shall obtain advice from SOL.

1422.103 Overtime.

1422.103–4 Approvals.

The CO shall obtain approval for the use of overtime from the CCO after consultation with the cognizant program office.

Subpart 1422.3—Contract Work Hours and Safety Standards Act

1422.302 Liquidated damages and overtime pay.

(a) HCAs are authorized to take the action in FAR 22.302(c)

(b) Funds withheld or collected for liquidated damages shall be disposed of in accordance with procedures under 1422.406–9.

Subpart 1422.4—Labor Standards for Contracts Involving Construction

1422.404 Davis-Bacon Act wage determinations.

1422.404–6 Modifications of wage determinations.

The HCA is authorized to request an extension for awards not made within 90 days after bid opening.

1422.406–8 Investigations.

(a) Labor standards investigations required by FAR 22.406–8 shall be the responsibility of the CO.

(b) The CO's report of violations shall be submitted to the HCA, who is authorized to take the actions prescribed in FAR 22.406–8(d).

(c) The HCA shall forward all referrals through the OIG to the Attorney General.

1422.406–9 Withholding from or suspension of contract payments.

HCAs shall establish procedures for collection and disposition of funds withheld under FAR 22.406–9, including liquidated damages.

1422.406–13 Semiannual enforcement reports.

PAM is responsible for submitting the report required by FAR 22.406–13 to DOL. In accordance with DOL memoranda, PAM requires bureaus to submit the required reports by April 15 and October 15 for the reporting periods of October 1 through March 31 and April 1 through September 30, respectively.

Subpart 1422.6—Walsh-Healey Public Contracts Act

1422.604 Exemptions.

1422.604–2 Regulatory exemptions.

The AS/PMB is authorized to request the Secretary of Labor to exempt contracts from the Walsh-Healey Public Contracts Act under FAR 22.604–2(b). A written finding justifying the exemption shall be prepared by the CO and submitted by the HCA to the Director, PAM for further action.

Subpart 1422.8—Equal Employment Opportunity

1422.803 Responsibilities.

The CO shall forward matters involving the applicability of EO 11246 to the HCA for resolution. This authority is granted to the HCA without the power of redelegation.

1422.804 Affirmative action programs.

1422.804–2 Construction.

Bureau contracting offices are responsible for maintaining (including updates and revisions) lists of geographic areas subject to affirmative action requirements.

1422.805 Procedures.

Copies of the poster ''Equal Employment Opportunity is the Law'' (National Stock No. 7690–00–926–8988) may be ordered from the GSA supply depot.

1422.807 Exemptions.

(a) The Director, PAM shall make the determination that a contract is essential to the national security and that the award of the contract without complying with one of the requirements of FAR 22.8 is necessary to national security.

(b) Requests for exemptions shall be submitted in writing by the CO, through the HCA, to the Director, PAM.

Subpart 1422.10—Service Contract Act of 1965, as Amended

1422.1003 Applicability.

1422.1003–4 Administrative limitations, variations, tolerances and exemptions.

The CO shall submit requests for determination regarding application of the Service Contract Act and exemptions directly to DOL, Administrator of the Wage and Hour Division.

Subpart 1422.13—Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans

1422.1305 Waivers.

(a) The Director, PAM is authorized to:

(1) Waive any or all terms of the clause at FAR 52.222–35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans, under the conditions prescribed in FAR 22.1305(a), and

(2) Waive any requirement in FAR Subpart 22.13 as prescribed in FAR 22.1305(b).

(b) Requests for waivers, under paragraph (a) of this section, shall be made in writing by the CO through the HCA to the Director, PAM for further action.

Subpart 1422.14—Employment of Workers with Disabilities

1422.1403 Waivers.

The Director, PAM is authorized to waive any or all of the terms of the clause at FAR 52.222–36, Affirmative Action for Workers with Disabilities, under the conditions prescribed in FAR 22.1403(a), and waive any requirement in FAR Subpart 22.14 as prescribed in FAR 22.1403(b). Requests for waivers shall be made in writing by the CO through the HCA to the Director, PAM.

PART 1423 [RESERVED]

PART 1424—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION

Subpart 1424.1—Protection of Individual Privacy

Sec.
1424.102 General.
1424.103 Procedures.
1424.104 Contract clauses.

Subpart 1424.2—Freedom of Information Act.

1424.203 Policy.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1424.1—Protection of Individual Privacy

1424.102 General.

Procedures for implementing the Privacy Act of 1974 and Departmental regulations under 43 CFR part 2, subpart D, are contained in 383 DM.

1424.103 Procedures.

When required by FAR 24.103(b)(2), the CO shall provide the contractor with a copy of the Department's Privacy Act regulations codified in 43 CFR part 2, subpart D.

1424.104 Contract clauses.

The clause at FAR 52.224–1, Privacy Act Notification, as prescribed in FAR 24.104(a), shall be supplemented in accordance with 1452.224–1.

Subpart 1424.2—Freedom of Information Act

1424.203 Policy.

(a) The Department's implementation of the Freedom of Information Act is codified in regulations under 43 CFR part 2, subparts A and B.

(b) It is the policy of the Department to alert prospective contractors which place restrictions on the disclosure and use of proposal data that certain data may be subject to disclosure under a Freedom of Information Act request. (*See* 1415.207 and 1452.215–71.)

PART 1425—FOREIGN ACQUISITION

Sec.

1425.003 Definitions.

Subpart 1425.1—Buy American Act—Supplies

1425.103 Exceptions.
1425.105 Determining reasonableness of cost.

Subpart 1425.2—Buy American Act—Construction Materials

1425.202 Exceptions.
1425.206 Noncompliance.

Subpart 1425.7—Prohibited Sources

1425.701 Restriction on acquisition of supplies or services from prohibited sources.

Subpart 1425.10—Additional Foreign Acquisition Regulations

1425.1001 Waiver of right to examination of records.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

1425.003 Definitions.

Impracticable, as used in this subpart, includes reasons other than cost, and availability.

Manufacture, as used in this subpart, means completion of an end product in the form required to meet specifications. It includes only direct incorporation of components into the end products to alter the original material and establish the identity/character of the end product, and excludes other supplies, materials, and requirements such as testing, manuals, related equipment, etc.

Subpart 1425.1—Buy American Act—Supplies

1425.103 Exceptions.

(a) The AS/PMB is authorized to make the determination that a foreign end item will be acquired for Government use because preference for a U.S. item would be inconsistent with the public interest. Such determinations shall be prepared by the CO and submitted by the HCA to the Director, PAM for further action.

(b) The Director, PAM is authorized to make the determination that an article, material or supply not included in the list under FAR 25.104 is not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities of satisfactory quality. Determinations shall be prepared by the CO and submitted by the BPC for approval.

(c) Contracting activities which have information justifying the removal of an item from the list under FAR 25.104 shall submit such information to the Director, PAM for further disposition.

1425.105 Determining reasonableness of cost.

(a) In unusual circumstances, the Director, PAM may authorize the use of evaluation differentials other than those prescribed in FAR 25.105 for a particular acquisition.

(b) Requests for use of other evaluation differentials shall be submitted by the HCA to the Director, PAM for further action.

Subpart 1425.2—Buy American Act—Construction Materials

1425.202 Exceptions.

(a)(1) The CO may determine the reasonableness of cost as determined by the formula in 1425.203–70.

(2) The Director, PAM has the authority to make the determination that use of U.S. construction material would be impracticable. Failure of the Director, PAM to issue a determination within 30 days after receipt of a

request will be deemed approval for use of the cited foreign material.

(3) For items not on the list at FAR 25.108(d), the CCO may make the non-availability determination if the items cost less than the SAT. The HCA may make the non-availability determination when the cost of the items exceeds the SAT.

(b) [Reserved]

1425.206 Noncompliance.

The CO will report, in writing, any use of non-excepted, foreign construction materials by contractors, subcontractors and suppliers through the HCA to the Director, PAM for debarment action in accordance with Subpart 1409.4.

Subpart 1425.7—Prohibited Sources

1425.701 Restriction on acquisition of supplies or services from prohibited sources.

The AS/PMB is authorized to request permission from the Office of Foreign Assets Control (OFAC) for DOI use of supplies and services from the sources described in FAR 25.701. Requests shall be prepared by the CO and submitted through the HCA to the Director, PAM.

Subpart 1425.10—Additional Foreign Acquisition Regulations

1425.1001 Waiver of right to examination of records.

The Director, PAM is authorized to make the determinations prescribed in FAR 25.1001(b). Determinations shall be prepared by the CO and submitted through the HCA to the Director, PAM.

PART 1426—OTHER SOCIOECONOMIC PROGRAMS

Subpart 1426.70 [Reserved]

Subpart 1426.71—Minority Business Reports

Sec.

1426.7100 Scope of subpart.
1426.7101 Definitions.
1426.7102 Minority Business Development Agency (MBDA–91) Plan and Reports.
1426.7102–1 Statutory basis.
1426.7102–2 Requirements.
1426.7103 The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (Superfund Minority Contractors Utilization Report).
1426.7103–1 Statutory basis.
1426.7103–2 Requirements.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1426.70 [Reserved]

Subpart 1426.71—Minority Business Reports

1426.7100 Scope of subpart.

This subpart sets forth reporting requirements established by Executive Order 12432 entitled ''Minority Business Enterprise Development'' and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), also known as ''Superfund.''

1426.7101 Definitions.

For purposes of this subpart the following definitions shall apply:

Contract means a contract or subcontract awarded pursuant to the FAR, as well as federal financial assistance, including a subcontract, cooperative agreement, grant, subagreement or subgrant.

Minority business enterprise means a business which is at least 51% owned by one or more minority individuals, or in the case of any publicly owned business, at least 51% of the voting stock is owned by one or more minority individuals. The daily business operations are likewise managed by the minority owner.

Minority individual means a U.S. citizen who has been subjected to racial or ethnic prejudice or cultural bias because of their identity as members of this group without regard to their individual qualities. Such groups include, but are not limited to: Black Americans; Hispanic Americans; Native Americans; Asian-Pacific Americans; and other groups whose members are U.S. citizens and are found to be disadvantaged by the Small Business Administration pursuant to Section 8(d) of the Small Business Act as amended (15 U.S.C. 637(d)), or the Secretary of Commerce.

(a) *Native Americans* are persons having origins in any of the original peoples of North America or the Hawaiian Islands; in particular, American Indians, Eskimos, Aleuts and Native Hawaiians.

(b) *Asian-Pacific Americans*—persons having origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan, Thailand, Malaysia, Indonesia, Singapore, Brunei, Republic of the Marshall Islands, or the Federated States of Micronesia.

1426.7102 Minority Business Development Agency (MBDA–91) Plan and Reports.

1426.7102–1 Statutory basis.

Executive Order 12432, dated July 14, 1983, established the requirement for the Department of Commerce (i.e., MBDA) to collect information on acquisition and financial assistance awards to minority businesses, as well as credit assistance to such firms.

1426.7102–2 Requirements.

(a) *MBDA–91 Plan.* The BPC is required to submit the Plan on form MBDA–91 to the OSDBU by no later than November 15 of each year. Section 1 of the form, ''Procurement Program Activities,'' will be completed by OSDBU. Sections 2 through 5 must be completed by bureaus and offices.

(b) *MBDA–91 Reports.* The BPC must submit reports to the OSDBU within 30 days following the end of a fiscal quarter. Reports are cumulative from October 1 of the reporting fiscal year, and monetary figures should be rounded to whole dollars in each section of the report.

(c) ''Negative report'' means when the Bureau had no reportable activity during the quarter. Submit such a report using the MBDA–91 report form.

1426.7103 The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (Superfund Minority Contractors Utilization Report).

1426.7103–1 Statutory basis.

Paragraph 105 of CERCLA requires the President of the United States to consider the availability of qualified minority business enterprises in awarding contracts under the Act and report annually to Congress on the extent of such awards, including the efforts made to encourage the participation of such firms in programs carried out under the act. The Environmental Protection Agency has delegated responsibility for preparing the report, which includes contracts for Superfund hazardous waste clean-up awarded by other agencies.

1426.7103–2 Requirements.

The contracting offices shall report designated projects funded with EPA monies, involving the actual award of contracts, subcontracts, financial assistance instruments, subagreements, etc. by DOI. Do not include Departmental projects covered by Superfund and funded solely with Departmental appropriations. The BPC must submit one of the following reports inclusive of all projects, as applicable, to the OSDBU by no later than November 8 of each year:

(a) EPA Forms 6005–3 and 6005–3A for applicable Superfund contract awards, including partial awards to minority businesses.

(b) EPA Form 6005–3A only, for applicable Superfund contract awards when no awards were made to minority firms, to report the efforts made to promote minority business participation in the designated projects.

(c) ''Negative Report'' when the reporting Bureau did not award contracts using Superfund monies.

SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS

PART 1427—PATENTS, DATA, AND COPYRIGHTS

Subpart 1427.2—Patents and Copyrights

Sec.
1427.201 Patent and copyright infringement liability.
1427.201–2 Contract clauses.
1427.202 Royalties.
1427.202–3 Adjustment of royalties.

Subpart 1427.3—Patent Rights Under Government Contracts

1427.303 Contract clauses.
1427.304 Procedures.
1427.304–1 General.
1427.304–4 Appeals.
1427.306 Licensing background patent rights to third parties.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1427.2—Patents and Copyrights

1427.201 Patent and copyright infringement liability.

1427.201–2 Contract clauses.

Approval to exempt specific United States patents from the patent indemnity clause shall be obtained from the CCO with legal review and concurrence.

1427.202 Royalties.

1427.202–3 Adjustment of royalties.

The CO shall report to the Assistant Solicitor for Acquisitions and Intellectual Property the results of any action taken in compliance with FAR 27.202–3.

Subpart 1427.3—Patent Rights Under Government Contracts.

1427.303 Contract clauses.

(a) The HCA is authorized to make the determination to sublicense foreign governments or international organizations, as prescribed in FAR 27.303(b)(3).

(b) If one of the exceptions in FAR 27.303(e)(1) is used, then insert clause 1452.227–70, Appeals of Use of Exceptions. The exception in FAR 27.303(e)(1)(ii) to use alternative provisions restricting or eliminating a contractor's right to retain title to any subject invention shall be made by the HCA, after consultation with the Assistant Solicitor for Acquisitions and Intellectual Property.

(c) Within 30 days after contract award the CO shall forward copies of determinations to use exceptions under FAR 27.303(e)(1) shall be forwarded to the Assistant Solicitor for Acquisitions and Intellectual Property for submission to the Secretary of Commerce and, if required, to the Chief Counsel for Advocacy of the Small Business Administration. The determinations shall include all supporting documentation.

1427.304 Procedures.

1427.304–1 General.

(a)(1) *Exceptions.* The Associate Solicitor for the General Law Division shall issue a decision on the appeal of a small business concern or nonprofit organization of the use of exceptions under FAR 27.303(e)(1).

(2) If the Associate Solicitor for the General Law Division determines that the appeal notice raises a genuine dispute over the material facts, a fact-finding hearing shall be conducted by OHA. The hearing shall be conducted at a location convenient to the parties concerned as determined by the Director, OHA, and on a date and time stated. The contractor may be represented by counsel or any duly authorized representative. Witnesses may be called by either party. The proceedings shall be conducted expeditiously and in such a manner that each party will have a full opportunity to present all information considered pertinent to the determination. A transcribed record of the proceedings shall be made and shall be made available at cost to the contractor upon request, unless the requirement for the transcribed record is waived by mutual agreement of the contractor and OHA.

(3) OHA shall prepare written findings of fact and transmit them to the

Associate Solicitor for the General Law Division.

(4) OHA may hear oral arguments after fact-finding provided that the contractor, its counsel or other duly authorized representative, is present in order to have the opportunity to make arguments and rebuttal. The Associate Solicitor for the General Law Division shall issue a decision.

(b) *Greater rights determinations.* Determinations on requests for greater rights in subject inventions by contractors shall be made by the HCA after consultation with the Assistant Solicitor for Acquisitions and Intellectual Property. Appeals of such determinations shall be made to the CBCA.

(c) *Exercise of march-in-rights.* After notification to the contractor of information warranting the exercise of march-in rights, the CO shall prepare a written notice to the contractor after consultation with the Assistant Solicitor for Acquisitions and Intellectual Property. The notice shall be prepared and signed by the Associate Solicitor for the General Law Division. Within the time constraints, if the Associate Solicitor for the General Law Division determines any information submitted by the contractor (assignee or exclusive licensee) after notice of march-in is received raises a genuine dispute over material facts, a fact-finding hearing shall be conducted by OHA. The Associate Solicitor for the General Law Division shall issue a final determination, after consideration of any further written or oral arguments from the parties. An unfavorable determination to a contractor (assignee or exclusive licensee) shall be subject to appeal.

(d) *Licenses and assignments under contracts with nonprofit organizations.* COs may approve contractor requests for assignment of rights or exclusive licenses after obtaining the advice of the Assistant Solicitor for Acquisitions and Intellectual Property. Solicitations containing FAR clause 52.227–11 shall state that contractors should forward such requests to the CO.

1427.304–4 Appeals.

(a) The CO is authorized to make any of the determinations listed after consultation with the Assistant Solicitor for Acquisitions and Intellectual Property.

(b) Determinations made under paragraph (a) of this section shall be considered final decisions under the Contract Disputes Act and may be appealed to the CBCA in accordance with the procedures in DIAR Subpart 1433.2.

1427.306 Licensing background patent rights to third parties.

Any proposed determination to be made to require third party licensing shall be submitted by the HCA through the Assistant Solicitor for Acquisitions and Intellectual Property for signature of the AS/PMB. The contractor may request a public hearing on the record prior to the above determination. In such cases, the proposed determination and the contractor's request for a hearing shall be referred to OHA. OHA shall conduct public hearings as set forth in 1427.304–1(a)(4) and shall forward its findings and recommendations to the AS/PMB for a final determination. The final determination shall inform the contractor of the right to judicial review within sixty (60) days of the AS/PMB determination.

PART 1428—BONDS AND INSURANCE

Subpart 1428.3—Insurance

Sec.

1428.301 Policy.
1428.306 Insurance under fixed-price contracts.
1428.306–70 Insurance for aircraft services contracts.
1428.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.
1428.311–1 Contract clause.
1428.311–2 Agency solicitation provisions and contract clauses.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1428.3—Insurance

1428.301 Policy.

It is the policy of DOI to insure its own risks only when such action is in the best interest of the Government. Circumstances where contractors are

required to carry insurance are listed under FAR 28.301 and 28.306. In these circumstances, the CO shall insert the clause at 1452.228–70, Liability Insurance— Department of the Interior, in solicitations and contracts.

1428.306 Insurance under fixed-price contracts.

1428.306–70 Insurance for aircraft services contracts.

(a) *Policy*. The CO shall insert minimum insurance requirements in aircraft services contracts in order to protect the Government and its contractors.

(b) *Applicability*. The clauses prescribed in section 1428.311–2 are applicable to all fixed-price contracts involving use of aircraft with either a contractor-furnished or a Government-furnished pilot except for one-time charters when Government exposure is minimal and time limitations are present.

1428.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

1428.311–1 Contract clause.

The CO shall modify the clause at FAR 52.228–7, Insurance—Liability to Third Persons, in accordance with 1452.228–7, and insert in solicitations and contracts as prescribed in FAR 28.311–1.

1428.311–2 Agency solicitation provisions and contract clauses.

The following DOI clauses shall be used as prescribed:

(a) The CO shall insert the clause at 1452.228–71, Aircraft and General Public Liability Insurance—Department of the Interior, in solicitations and contracts when a fixed-price contract for operation of aircraft is anticipated and where the Government is using a contractor-furnished pilot.

(b) The CO shall insert the clause at 1452.228–72, Liability for Loss or Damage—Department of the Interior, in solicitations and contracts when a fixed-price contract for use of aircraft is anticipated and where the Government does not have a property interest and is using a Government-furnished pilot.

(c) The CO shall insert the clause at 1452.228–73, Liability for Loss or Damage (Property Interest)—Department of the Interior, in solicitations and contracts when a fixed-price contract for use of aircraft is anticipated and where the Government has a property interest in the aircraft and is using a Government-furnished pilot (*e.g.*, a lease with purchase option).

PART 1429—TAXES

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1429.3—State and Local Taxes

1429.303 Application of State and local taxes to Government contractors and subcontractors.

Contractors to be treated as agents of the Government for the purposes set forth in FAR 29.303(a) shall require the written review and approval of the AS/PMB. The HCA shall submit requests for approval through SOL, to the Director, PAM, for further action.

PART 1430—COST ACCOUNTING STANDARDS ADMINISTRATION

Subpart 1430.2—CAS Program Requirements

Sec.
1430.201 Contract requirements.
1430.201–5 Waiver.
1430.202 Disclosure requirements.
1430.202–2 Impracticality of submission.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1430.2—CAS Program Requirements

1430.201 Contract requirements.

1430.201–5 Waiver.

The CO shall prepare requests to waive contractor compliance with CAS prescribed in FAR 30.201–5 and 48 CFR 9903.201–5(e) (FAR Appendix). The CO

shall submit the request for waiver to the Director, PAM, without the power of redelegation, for a determination. PAM must report any waivers granted on a fiscal year basis to the CASB in accordance with FAR 30.201–5(e).

1430.202 Disclosure requirements.

1430.202–2 Impracticality of submission.

The CO shall prepare any request to award a contract without the required contractor submission of the Form No. CASB–DS–1, Disclosure Statement, and submit it through the HCA, to the Director, PAM, and to the Secretary for approval. The Secretary, without the power of redelegation, must file a report to CASB within 30 days in accordance with 48 CFR 9903.202–2 (FAR Appendix).

PART 1431—CONTRACT COST PRINCIPLES AND PROCEDURES

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1431.1—Applicability

1431.101 Objectives.

Individual deviations concerning cost principles and procedures shall require the approval of the cognizant Assistant Secretary, with further redelegation authorized. Redelegation is limited to the BPC.

PART 1432—CONTRACT FINANCING

Subpart 1432.1—Non-Commercial Item Purchase Financing

Sec.

1432.102 Description of contract financing methods.

Subpart 1432.3—Loan Guarantees for Defense Production

1432.304 Procedures.
1432.304–2 Certificate of eligibility.

Subpart 1432.4—Advance Payments for Non-Commercial Items

1432.402 General.
1432.407 Interest.

Subpart 1432.5—Progress Payments Based on Costs

1432.501 General.
1432.501–2 Unusual progress payments.
1432.502–2 Contract finance office clearance.

Subpart 1432.6—Contract Debts

1432.602 Responsibilities.
1432.610 Compromising debts.

Subpart 1432.9—Prompt Payment

1432.903 Responsibilities.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1432.1—Non-Commercial Item Purchase Financing

1432.102 Description of contract financing methods.

Use of progress payments based on a percentage or stage of completion are authorized for construction contracts. Progress payments for other than construction, alteration, and repair contracts require the CO to write a determination that:

(a) Payments based on costs would be impracticable; and

(b) Adequate measures exist for determining quality standards and the percentage of work accomplished.

Subpart 1432.3—Loan Guarantees for Defense Production

1432.304 Procedures.

1432.304–2 Certificate of eligibility.

Guaranteed loan applications shall be authorized and transmitted to the Federal Reserve Board by the AS/PMB, in accordance with FAR 32.304–2(h).

Subpart 1432.4—Advance Payments for Non-Commercial Items

1432.402 General.

The HCA is authorized to approve determinations and findings, as well as contract terms, for advance payments. The CO shall submit a recommendation for approval or disapproval of the contractor's request to the HCA through the head of the bureau finance office.

1432.407 Interest.

The HCA may authorize advance payments without interest pursuant to FAR 32.407.

Subpart 1432.5—Progress Payments Based on Costs

1432.501 General.

1432.501–2 Unusual progress payments.

The CO shall obtain the advance approval of the HCA, or designee, before providing a progress payment rate higher than the customary rates as defined in FAR 32.501–1. Advance approval to provide progress payment rates higher than the customary rates shall not be delegated lower than the CCO.

1432.502–2 Contract finance office clearance.

The CO shall obtain approval of the bureau finance office prior to taking actions listed in FAR 32.502–2.

Subpart 1432.6—Contract Debts

1432.602 Responsibilities.

344 DM contains policy, standards, and guidelines for collection of debts within DOI. Each bureau and office is responsible for developing an internal debt collection system and prescribing internal procedures for collection of debts, including debts covered under FAR Subpart 32.6.

1432.610 Compromising debts.

The CO may recommend compromise of contractor actions pursuant to FAR 32.610, but shall consult 344 DM and SOL for further action.

Subpart 1432.9—Prompt Payment

1432.903 Responsibilities.

The CO may modify the timing of payment specified in paragraph (a)(1)(i) and (ii) of the clause FAR 52.232–26, Prompt Payment for Fixed-Price Architect-Engineer Contracts, and/or paragraph (a)(1)(i) and (ii) of the clause at FAR 52.232–27, Prompt Payment for Construction Contracts, as appropriate, to provide for a period shorter than 30 days (but not less than 7 days) for making contract financing payments based on geographical site location, workload, contractor ability to submit a proper request for payment, or other factors. When considering a modification to these FAR standard(s), the CO should alert the finance and program officials involved in the payment process to ensure that such shorter contract payment terms to be specified in the solicitation and resulting contract will be met. A CO determination justifying a shorter payment period must be documented in writing, and incorporated into the solicitation/contract file.

PART 1433—PROTESTS, DISPUTES, AND APPEALS

Subpart 1433.1—Protests

Sec.
1433.102 General.
1433.103 Protests to the agency.
1433.104 Protests to GAO.
1433.106 Solicitation provisions and contract clauses.

Subpart 1433.2—Disputes and Appeals

1433.203 Applicability.
1433.209 Suspected fraudulent claims.
1433.211 Contracting officer's decision.
1433.213 Obligation to continue performance.
1433.214 Alternative dispute resolution (ADR).
1433.215 Contract clauses.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1433.1—Protests

1433.102 General.

For protests filed with GAO, the SOL shall be responsible for handling all bid protest matters. Any communications to GAO shall be coordinated with the regional and/or field solicitor and the Assistant Solicitor, Acquisitions and Intellectual Property.

1433.103 Protests to the agency.

For protests filed with the agency, the CO shall coordinate with the regional and/or field solicitor and the Assistant Solicitor, Acquisitions and Intellectual Property, prior to making the protest decision and before suspending or terminating a contract award as a result of the protest. When a protest is denied by the CO, the decision issued shall advise the protester that the decision may be appealed to the GAO. All protest decisions must also contain a notice that appeals to GAO must include a copy of the CO's protest decision.

1433.104 Protests to GAO.

(a) *General procedure.* (1) A protester shall furnish a copy of its complete protest simultaneously to the CO and the Assistant Solicitor, Acquisitions and Intellectual Property. Upon being telephonically advised by the GAO of the receipt of a protest, the SOL shall inform the appropriate contracting activity which shall immediately notify the CO. For protests concerning Federal Information Processing (FIP) acquisitions, the SOL shall also inform the Director, Office of Information Resources Management (PIR), who, in turn, shall notify the appropriate bureau Information Resources Management contact and GSA official. The CO shall prepare the protest report as required by FAR 33.104(a)(3).

(2) The SOL will furnish promptly GAO's written notice of the protest to the cognizant contracting activity which, in turn, shall promptly transmit copies to the CO. The CO shall begin notification as prescribed in FAR 33.104(a)(2). The notification letters shall contain a specified period of time for submission of comments and include instructions that any comments submitted to the GAO should also be submitted simultaneously to the CO and the Assistant Solicitor, Acquisitions and Intellectual Property. Copies of the CO's notification letters shall be sent concurrently to the Assistant Solicitor, Acquisitions and Intellectual Property.

(3)(i) The contracting activity shall have no more than 15 working days from the date of telephonic notification by the SOL to deliver the protest report to the Assistant Solicitor, Acquisitions and Intellectual Property. For reports involving use of the 10 working day express option, the SOL shall establish the report delivery date after consultation with the contracting activity.

(ii) If required, the SOL shall make the request for an extension in the report due date.

(iii) In addition to the requirements of FAR 33.104(a)(3), the report shall be appropriately titled and dated; shall cite the GAO file number; and shall be signed by the CO. Reports shall be prepared with the assistance of the local attorney-advisor of the SOL. A statement shall be included giving an estimate of the length of time an award may be delayed without significant expense or difficulty in performance. If appropriate, the report shall contain a statement regarding any urgency for the acquisition and the extent to which a delay in award may result in significant performance difficulties or additional expense to the Government. The contracting activity shall submit the CO's report to the Assistant Solicitor, Acquisitions and Intellectual Property, who will then submit it to GAO and provide a copy to each interested party who responded to the notification pursuant to FAR 33.104(a)(2).

(b) *Protests before award.* (1) The finding to award, notwithstanding protest, shall be written by the CO, reviewed by the SOL, and approved by the HCA. A copy of the approved written finding shall be placed in the contract file.

(2) The SOL shall be responsible for notifying GAO of the finding to award notwithstanding protest.

(c) *Protests after award.* (1) The CO shall notify the SOL prior to suspending or terminating the awarded contract.

(2) The written finding to authorize continued contract performance, notwithstanding protest, shall be written by the CO, reviewed by the SOL, and approved by the HCA.

(3) The SOL shall be responsible for notifying GAO of the finding to continue contract performance not withstanding protest.

(d) *Notice to GAO.* The CO shall prepare the report required by FAR 33.104(g), and coordinate it with the Assistant Solicitor, Acquisitions and Intellectual Property, and the Director, PAM, prior to HCA signature (signature level not redelegable). For protests regarding FIP acquisitions, the CO shall also coordinate the report with the Director, PIR. After signature, the report shall be forwarded to the Assistant Solicitor for Acquisitions and Intellectual Property for transmission to GAO.

1433.106 Solicitation provisions and contract clauses.

The provision at FAR 52.233–2, Service of Protest, as prescribed in FAR 33.106, shall be modified in accordance with the instructions in DIAR 1452.233–2.

Subpart 1433.2—Disputes and Appeals

1433.203 Applicability.

(a) The CO shall prepare any determination that application of the Contract Disputes Act to contracts with a foreign or international organization would not be in the public interest and forward it to the HCA for review. The HCA shall be responsible for submitting the determination through the Director, PAM, to the AS/PMB for approval.

(b) The CBCA is authorized by the Contract Disputes Act or by the Secretary to consider and determine an appeal from a decision of a CO on a claim arising under or relating to a contract made by DOI.

1433.209 Suspected fraudulent claims.

The CO shall refer all matters relating to suspected fraudulent claims by a contractor or individual to the OIG for further action or investigation.

1433.211 Contracting officer's decision.

The CO's decision shall reference the Civilian Board of Contract Appeals, 6th Floor, 1800 M Street, NW., Washington, DC 20036, and its rules of procedure at *http://www.cbca.gsa.gov*.

1433.213 Obligation to continue performance.

If the CO considers financing continued contractor performance to be in the best interest of the Government, the CO shall prepare and forward a determination to the HCA for approval.

1433.214 Alternative dispute resolution (ADR).

DOI strongly encourages the use of ADR in the resolution of disputes in lieu of litigation or adjudication. Efforts shall be made to resolve disputes in an expeditious and financially responsible manner.

1433.215 Contract clauses.

The Disputes clause contained in FAR 52.233–1 shall be used with its Alternate I in all solicitations and contracts.

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 1434 [RESERVED]

PART 1435—RESEARCH AND DEVELOPMENT CONTRACTING

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

1435.010 Scientific and technical reports.

If a Research and Development (R&D) contract results involve classified or national security information, the CO shall follow the agency procedures prescribed in DIAR 1404.403 prior to making the results available. Copies of publications and reports are also required to be sent to the DOI Departmental Library, 1849 C Street, NW., MS–2258, Main Interior Building, Washington, DC 20240.

PART 1436—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

Subpart 1436.2—Special Aspects of Contracting for Construction

Sec.
1436.209 Construction contracts with architect-engineer firms.
1436.270 Preparation of solicitations and contracts for construction.
1436.270–1 Uniform contract format.
1436.270–2 Part I—The Schedule.
1436.270–3 Part II—Contract clauses.
1436.270–4 Part III—Documents, exhibits and other attachments.
1436.270–5 Part IV—Representations and instructions.

Subpart 1436.5—Contract Clauses

1436.570 Prohibition against use of lead-based paint.
1436.571 Additive and deductive items.

Subpart 1436.6—Architect-Engineer Services

1436.602 Selection of firms for architect-engineer contracts.
1436.602–1 Selection criteria.
1436.602–2 Evaluation boards.
1436.602–3 Evaluation board functions.
1436.602–4 Selection authority.
1436.602–5 Short selection processes for contracts not to exceed the simplified acquisition threshold.
1436.603 Collecting data on and appraising firms' qualifications.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1436.2—Special Aspects of Contracting for Construction

1436.209 Construction contracts with architect-engineer firms.

Approval to award a contract for construction to a firm or its subsidiaries that designed the project shall be made by the HCA only after discussion with Director, PAM, and with legal concurrence. The request for approval prepared by the CO shall include the reason(s) why award to the design firm is required; an analysis of the facts involving potential or actual organizational conflicts of interest, including benefits and detriments to the Government and the prospective contractor; and the measures which are to be taken to avoid, neutralize or mitigate conflicts of interest. A copy of the documentation shall be forwarded to PAM at the time of consultation.

1436.270 Preparation of solicitations and contracts for construction.

1436.270–1 Uniform contract format.

(a) COs shall prepare solicitations and contracts for construction using the uniform contract format outlined in Table 1436–1.

(b) If any section of the uniform contract format does not apply, the CO should so mark that section in the solicitation. Upon award, the CO shall not physically include Part IV in the resulting contract, but shall retain it in the contract file.

TABLE 1436–1—UNIFORM CONTRACT FORMAT

Section	Title
Part I—The Schedule	
A	Solicitation/contract form.
B	Bid schedule.
C	Specifications/Drawings.
D	Packaging and marking.
E	Inspection and acceptance.
F	Deliveries or performance.
G	Contract administration data.
H	Special contract requirements.
Part II—Contract Clauses	
I	Contract clauses.
Part III—List of Documents, Exhibits, and Other Attachments	
J	List of attachments.
Part IV—Representations and Instructions	
K	Representations, certifications, and other statements of offerors.
L	Instructions, conditions, and notices to offerors.
M	Evaluation factors for award.

[75 FR 19829, Apr. 15, 2010, as amended at 76 FR 50142, Aug. 12, 2011]

1436.270–2 Part I—The Schedule.

The CO shall prepare the Schedule as follows:

(a) *Section A, Solicitation/contract form.* Use SF 1442, Solicitation, Offer, and Award (Construction, Alteration or Repair), as prescribed in FAR 36.701(a).

(b) *Section B, Bid schedule.* Bid schedule.

(c) *Section C, Specifications/Drawings.* Include specifications and drawings (*See* FAR Part 11) or reference other location in the uniform contract format (*e.g.* Section J, attachment _____).

(d) *Section D, Packaging and Marking.* Not applicable.

(e) *Section E, Inspection and acceptance.* Include inspection, acceptance, quality assurance, and reliability requirements (*See* FAR Part 46).

(f) *Section F, Deliveries or performance.* Include Suspension of Work, Liquidated Damages, Commencement, Prosecution, and Completion of Work, Variation in Quantity clauses (*See* FAR Part 12).

(g) *Section G, Contract administration data.* Include Contracting Officer's Representative/Technical Representative identification, and any required administration information (*e.g.*, accounting and appropriation data).

(h) *Section H, Special contract requirements.* Include any special contract requirements which are not included in other sections of the uniform contract format.

1436.270–3 Part II—Contract clauses.

For Section I, Contract clause, include any clauses required by law or by the FAR (including subpart 36.5), the DIAR (including subpart 1436.5), and any additional bureau-wide or local clauses expected to be included in any resulting contract which are not included in other sections of the uniform contract format.

1436.270–4 Part III—Documents, exhibits and other attachments.

For Section J, List of documents, exhibits, and other attachments, include wage determinations (*See* FAR 22.404), SF–24—Bid Bond (*See* FAR 28.101), and other attachments by listing the title, date and number for each document.

1436.270–5 Part IV—Representations and instructions.

The CO shall prepare the representations and instructions as follows:

(a) *Section K, Representations, certifications, and other statements of offerors.* Include provisions requiring representations, certifications, or submission of other information by an offeror.

(b) *Section L, Instructions, conditions, and notices to offerors.* Include other provisions or instructions to offerors which are not included in other sections of the uniform contract (*e.g.*, FAR 52.214–19 if using sealed bidding).

(c) *Section M, Evaluation factors for award.* Identify all factors that will be considered in awarding the contract (*See*, for example, FAR 14.201–8 for sealed bidding; FAR 15.304 for competitive proposals).

Subpart 1436.5—Contract Clauses

1436.570 Prohibition against use of lead-based paint.

(a) *Definitions.* As used in this section, ''residential structure:'' means any house, apartment, or structure intended for human habitation including any institutional structure where persons reside such as an orphanage, boarding school dormitory, day care center, or extended care facility.

(b) The CO shall insert the clause at 1452.236–70, Prohibition Against Use of Lead-Based Paint, in solicitations and contracts when construction of residential structures or rehabilitation (including dismantling, demolition, or removal) of residential structures is contemplated.

1436.571 Additive and deductive items.

If it appears that funds available for a construction project may be insufficient for all the desired features, the CO may provide in the solicitation for a base bid item covering the work as specified and for one or more additive or deductive bid items which add or omit specified features of the work in a stated order of priority. Such solicitations shall include a provision substantially as set forth in 1452.236–71, and the low bidder and the bid items to be awarded shall be determined as provided in the provision.

Subpart 1436.6—Architect-Engineer Services

1436.602 Selection of firms for architect-engineer contracts.

1436.602–1 Selection criteria.

(a) The CO may include specific evaluation criteria to be used in the evaluation of potential contractors, in accordance with the requirements of FAR 36.602–1.

(b) HCAs are authorized to approve the use of design competition.

1436.602–2 Evaluation boards.

HCAs shall establish procedures for providing permanent or ad hoc architect-engineer evaluation boards. Bureau procedures shall provide for the appointment of private practitioners of architecture, engineering, or related professions when such action is determined by the HCA to be essential to meet the Government's minimum needs.

1436.602–3 Evaluation board functions.

The selection report shall be prepared for HCA approval, in accordance with bureau/office procedures.

1436.602–4 Selection authority.

The HCA is authorized to serve as the designated selection authority.

1436.602–5 Short selection processes for contracts not to exceed the simplified acquisition threshold.

At each occurrence, CO approval shall be obtained prior to the utilization of either of the short selection processes used for architect-engineer contracts not expected to exceed the simplified acquisition threshold.

1436.603 Collecting data on and appraising firms' qualifications.

HCAs who require architect-engineer services shall use their established procedures to collect data on and appraising firms' qualifications.

PART 1437—SERVICE CONTRACTING

Subpart 1437.1—Service Contracts—General

Sec.
1437.102 Policy.
1437.103 Contracting officer responsibility.
1437.170 Special service contract requirements.

Subpart 1437.70—Appraisal Services—(Real Property)

1437.7000 Scope of subpart.

1437.7001 Contractor qualification requirements.
1437.7002 Appraisal standards.

Subpart 1437.71—Information Collection Services

1437.7100 Scope of subpart.
1437.7101 General.
1437.7102 Clauses.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1437.1—Service Contracts—General

1437.102 Policy.

The HCA is responsible for establishing internal review and approval procedures for service contracts in accordance with OFPP Policy Letter 93–1, Management Oversight of Service Contracting. Special attention shall be directed to avoidance of contracting for inherently governmental functions, as well as contract administration in the area of incurred cost monitoring to complement work progress monitoring.

1437.103 Contracting officer responsibility.

(a) While recognizing that program officials are responsible for accurately describing the need to be filled or the problem to be solved through the service contract, COs shall:

(1) Award and administer contracts in a manner that will provide the customer with quality services on time and within budget;

(2) Ensure that requirements are clearly defined and appropriate performance standards are included in the contract;

(3) Utilize the checklist in paragraph (b) of this section, or bureau substitute, to ensure compliance with general policies and the specific guidance in OFPP Policy Letters 92–1, Inherently Governmental Functions, 91–2, Service Contracting, and 89–1, Conflicts of Interest Policies Applicable to Consultants;

(4) Work in close collaboration with the beneficiaries of the services being purchased to ensure that contractor performance meets contract requirements and performance standards;.

(b) Following is a checklist to aid analysis and review of requirements for service contracts.

(1) *General.* (i) Is the statement of work complete, with a clear-cut division of responsibility between the contracting parties?

(ii) Is it stated in terms the market can satisfy?

(iii) Does the statement of work encompass all commercially available services that can meet the actual functional need (eliminates any nonessential preferences that may thwart full and open competition)?

(iv) Is the statement of work performance-based to the maximum extent possible (i.e., is the acquisition structured around the purpose of the work to be performed, as opposed to either the manner by which the work is to be performed or a broad and imprecise statement of work? Does the statement of work follow OFPP Pamphlet IV, A Guide to Writing and Administering Performance Statements of Work for Service Contracts (Supplement 2 to OMB Circular A–76)?, as described in OFPP Pamphlet IV?)

(2) *Inherently governmental functions.* If the response to the first question below is affirmative, the contract requirement is for an inherently Governmental function that Government officials must perform. If the response to the second question below is affirmative, the contract may be for an inherently governmental function.

(i) Is the requirement for a function that is listed in Appendix A of OFPP Policy Letter 92–1?

(ii) If the function is not listed in Appendix A, do any of the factors in the totality of the circumstances analysis discussed in section 7(b) of the Policy Letter 92–1 indicate that the function may be inherently governmental?

(iii) Are Government employees currently performing the task to be contracted out? If so, has OMB Circular A–76 been consulted?

(3) *Cost effectiveness.* If the response to any of the following questions is negative, the agency may not have a valid requirement or not be obtaining the requirement in the most cost effective manner.

(i) Is the statement of work written so that it supports the need for a specific service?

(ii) Is the statement of work written so that it permits adequate evaluation of contractor versus in-house cost and performance?

(iii) Are the choices of contract type, quality assurance plan, competition strategy, or other related acquisition strategies and procedures in the acquisition plan appropriate to ensure good contractor performance to meet the user's needs?

(iv) If a cost reimbursement contract is contemplated, is the acquisition plan adequate to ensure that the contractor will have the incentive to control costs under the contract?

(v) Is the acquisition plan adequate to address the cost effectiveness of using contractor support (either long-term or short-term) versus in-house performance?

(vi) Is the cost estimate, or other supporting cost information, adequate to enable the contracting office to effectively determine whether costs are reasonable?

(vii) Is the statement of work adequate to describe the requirement in terms of what is to be performed as opposed to how the work is to be accomplished?

(viii) Is the acquisition plan adequate to ensure that there is proper consideration given to quality and best value?

(4) *Control.* If the response to any of the following questions is negative, there may be a control problem.

(i) Are there sufficient resources to evaluate contractor performance when the statement of work requires the contractor to provide advice, analysis and evaluation, opinions, alternatives, or recommendations that could significantly influence agency policy development or decision-making?

(ii) Does the quality assurance plan provide for adequate monitoring of contractor performance?

(iii) Is the statement of work written so that it specifies a contract deliverable or requires progress reporting on contractor performance?

(iv) Is agency expertise adequate to independently evaluate the contractor's approach, methodology, results, options, conclusions or recommendations?

(v) Is the requirement for a function or service absent from the list in Appendix B of OFPP Policy Letter 92–1? If it is similar to a function or service on that list, greater management scrutiny may be required.

(5) *Conflicts of Interest.* If the response to any of the following questions is affirmative, there may be a conflict of interest.

(i) Can the potential offeror perform under the contract in such a way as to devise solutions or make recommendations that would influence the award of future contracts to that contractor?

(ii) If the requirement is for support services (such as system engineering or technical direction), were any of the potential offerors involved in developing the system design specifications or in the production of the system?

(iii) Has a potential offeror participated in earlier work involving the same program or activity that is the subject of the present contract wherein the offeror had access to source selection or propriety information not available to other offerors competing for the contract?

(iv) Will the contractor be evaluating a competitor's work?

(v) Does the contract allow the contractor to accept its own products or activities on behalf of the Government?

(vi) Will the work under this contract put the contractor in a position to influence government decision-making, *e.g.*, developing regulations that will affect the contractor's current or future business?

(vii) Will the work under this contract effect the interests of the contractor's other clients?

(viii) Are any of the potential offerors, or their personnel who will perform the contract, former agency officials who—while employed by the agency—personally and substantially participated in the development of the requirement for, or the procurement of, these services within the past two years?

(6) *Competition.* If the response to any of the following questions is negative, completion may be unnecessarily limited.

(i) Is the statement of work defined so as to avoid overly restrictive specifications or performance standards?

(ii) Is the contract formulated in such a way as to avoid creating a continuous and dependent arrangement with the same contractor?

(iii) Is the use of an indefinite quantity or term contract arrangement appropriate to obtain the required services?

(iv) Will the requirement be obtained through the use of full and open competition?

1437.170 Special service contract requirements.

The following types of services shall be acquired as specified in the following Departmental regulations:

(a) Aircraft-related services and maintenance shall be acquired as prescribed in 353 DM;

(b) Audiovisual services, including motion pictures, slide shows and videotape recordings, shall be acquired as prescribed in 471 DM 1;

(c) Information-technology services shall be acquired as prescribed in 376 DM 4;

(d) Guard services for safeguarding classified information shall be acquired as prescribed in 442 DM 8;

(e) Printing services shall be acquired as prescribed in 314 DM 1;

(f) Contracts which require collection of identical information from ten or more members of the public shall be cleared as prescribed in 381 DM 12.

Subpart 1437.70—Appraisal Services (Real Property)

1437.7000 Scope of subpart.

This subpart prescribes policies and procedures for acquiring real property appraisal services.

1437.7001 Contractor qualification requirements.

(a) Prior to award of a contract for real property appraisal services when the services are required in support of court actions, the CO shall coordinate with the appropriate Solicitor's office and obtain written concurrence from the Assistant U.S. Attorney assigned to represent the Government in the matter that the source to be selected possesses the necessary qualifications for adequate contract performance. This requirement shall be treated as a special standard of responsibility (*See* FAR 9.104–2).

(b) The CO shall include the requirements of paragraph (a) of this section in all solicitations for real property appraisal services which may be subject to future court action.

1437.7002 Appraisal standards.

(a) All real property appraisals for condemnation purposes shall be consistent with requirements of the Interagency Land Acquisition Conference publication ''Uniform Appraisal Standards for Federal Land Acquisitions'' published by the Government Printing Office and available at *http://www.gpoaccess.gov*.

(b) The standards in paragraph (a) of this section shall be made a part of all solicitations and resulting contracts for real property appraisal services procured for condemnation purposes.

Subpart 1437.71—Information Collection Services

1437.7100 Scope of subpart.

This subpart prescribes policies and procedures for acquiring information collection services which are subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*)

1437.7101 General.

The Paperwork Reduction Act of 1980 requires that no federal agency shall conduct or sponsor the collection of information, upon identical items, from ten or more public respondents unless prior approval is obtained from OMB.

1437.7102 Clauses.

The CO shall insert the clause at 1452.237–70, Information Collection—Department of the Interior, in all solicitations and contracts which are subject to the Paperwork Reduction Act of 1980.

PARTS 1438–1441 [RESERVED]

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 1442—CONTRACT ADMINISTRATION AND AUDIT SERVICES

Subpart 1442.2—Contract Administration Services

Sec.
1442.202 Assignment of contract administration.

Subpart 1442.6—Corporate Administrative Contracting Officer

1442.602 Assignment and location.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1442.2—Contract Administration Services

1442.202 Assignment of contract administration.

(a) The decision to withhold normal individual contract administration functions is delegated to one level above the CO.

(b) The delegation of authority to issue orders under provisioning procedures in existing contracts and under basic ordering agreements for items and services identified in the schedule must be approved at one level above the CO.

Subpart 1442.6—Corporate Administrative Contracting Officer

1442.602 Assignment and location.

The BPC has the authority to approve the appointment of a Corporate Administrative Contracting Officer.

PART 1443—CONTRACT MODIFICATIONS

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1443.2—Change Orders

1443.205 Contract clauses.

BPCs may establish procedures, when appropriate, for authorizing the CO to vary the 30-day period for submission of requests for adjustment prescribed by FAR 43.205.

PART 1444 [RESERVED]

PART 1445—GOVERNMENT PROPERTY

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1445.3—Authorizing the Use and Rental of Government Property

1445.302 Contracts with foreign governments or international organizations.

The HCA, after coordinating with the cognizant PMO, shall establish procedures to recover use costs when foreign governments or international organizations request use of Government production and research property

PART 1446—QUALITY ASSURANCE

Subpart 1446.1—General

Sec.
1446.170 Government-Industry Data Exchange Program (GIDEP).

Subpart 1446.4—Government Contract Quality Assurance

1446.401 General.

Subpart 1446.5—Acceptance

1446.501 General.

Subpart 1446.6—Material Inspection and Receiving Reports

1446.670 Inspection, receiving and acceptance reports.
1446.671 Inspection, receiving and acceptance certification.

Subpart 1446.7—Warranties

1446.704 Authority for use of warranties.
1446.708 Warranties of data.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1446.1—General

1446.170 Government-Industry Data Exchange Program (GIDEP).

(a) COs shall encourage contractors and subcontractors to participate in the GIDEP, a cooperative program managed and funded by the U.S. Government to exchange engineering, failure experience, metrology, product information, and reliability-maintain ability data on products, components (including construction materials), manufacturing processes, environmental issues associated with those manufacturing processes, recycling and waste prevention.

(b) The GIDEP is managed for the U.S. Government by the Department of the Navy. GIDEP participants are not subject to any fees or assessments other than the costs associated with dissemination of information by other than electronic means.

(c) An application to participate in the GIDEP may be obtained at *http://www.gidep.org*. COs shall include information on GIDEP in solicitation documents and during discussions at preaward and postaward conferences.

Subpart 1446.4—Government Contract Quality Assurance

1446.401 General.

Inspection of supplies or services shall be documented as prescribed in DIAR Subpart 1446.6.

Subpart 1446.5—Acceptance

1446.501 General.

Acceptance of supplies or services shall be documented as prescribed in DIAR Subpart 1446.6.

Subpart 1446.6—Material Inspection and Receiving Reports

1446.670 Inspection, receiving and acceptance reports.

(a) Except for simplified acquisitions (*See* FAR 46.404) and unless otherwise prescribed by bureau procedures, the documentation in DIAR 1446.671 shall be inserted on each commercial shipping document or packing list, whether by manual or electronic means, for supplies or services and shall be signed by the authorized Government representative as required in FAR 46.401(f) and subpart 46.5.

(b) The documentation required in paragraph (a) of this section shall be made at the place or places specified in the contract for performance of Government quality assurance (*See* FAR 46.401(b)) as prescribed in FAR 46.402 or FAR 46.403, as appropriate and for acceptance in accordance with FAR 46.503.

(c) If the CO elects to use a contractor's certificate of conformance (*See* FAR 46.315) under the conditions prescribed in FAR 46.504, the certificate may be used as the basis of Government acceptance.

1446.671 Inspection, receiving and acceptance certification.

As prescribed in DIAR 1446.670, the following documentation shall be completed via manual or electronic means for each delivery of supplies or services in accordance with Bureau procedures:

INSPECTION, RECEIVING AND ACCEPTANCE CERTIFICATION

The listed items or services have been: _____ inspected, _____ received, and _____ accepted and they conform to the contract except as noted below or on attached documents.

_____ Signature and typed name of authorized Government representative.

Date _____

Subpart 1446.7—Warranties

1446.704 Authority for use of warranties.

The CCO is authorized to make the written determination to use a warranty in an acquisition.

1446.708 Warranties of data.

Warranties of data shall only be used after consultation with the SOL.

PART 1447 [RESERVED]

PART 1448—VALUE ENGINEERING

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1448.1—Policies and Procedures

1448.102 Policies.

The HCA shall establish procedures for processing and evaluating VECP's as prescribed in FAR Subpart 48.1 and 369 DM, Value Engineering.

PART 1449—TERMINATION OF CONTRACTS

Subpart 1449.1—General Principles

Sec.
1449.106 Fraud or other criminal conduct.
1449.107 Audit of prime contract settlement proposals and subcontract settlements.
1449.111 Review of proposed settlements.

Subpart 1449.4—Termination for Default

1449.402 Termination of fixed-price contracts for default.
1449.402–3 Procedure for default.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1449.1—General Principles

1449.106 Fraud or other criminal conduct.

When fraud or other criminal conduct is suspected, the CO will submit a report documenting the incident to the BPC for transmittal to the OIG. Informational copies will be forwarded to the HCA and the Director, PAM.

1449.107 Audit of prime contract settlement proposals and subcontract settlements.

Requests for audits pursuant to FAR 49.107 shall be sent to the Assistant Inspector General for Auditing, in accordance with the procedures in 360 DM 2.3.

1449.111 Review of proposed settlements.

All proposed settlement agreements shall be reviewed by the SOL and approved at one level above the CO. Settlement agreements of $250,000 or more shall be approved by the BPC.

Subpart 1449.4—Termination for Default

1449.402 Termination of fixed-price contracts for default.

1449.402–3 Procedure for default.

In addition to the requirements of FAR 49.402–3(g), the notice of termination shall contain instructions regarding the disposition of any Government property in the possession of the contractor, and, in the case of construction contracts, materials, appliances, and structures that may be on the construction site. The notice shall also contain a statement concerning the liability of the contractor or its surety for any liquidated damages (*See* FAR 49.402–7).

PART 1450—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

Subpart 1450.1—Extraordinary Contractual Actions

Sec.
1450.101 General.
1450.101–2 Policy.
1450.101–3 Records.
1450.102 Delegation of and limitations on exercise of authority.
1450.102–1 Delegation of authority.
1450.103 Contract adjustments.
1450.103–6 Disposition.
1450.104 Residual powers.

1450.104–2 General.
1450.104–3 Special procedures for unusually hazardous or nuclear risks.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1450.1—Extraordinary Contractual Actions

1450.101 General.

1450.101–2 Policy.

Requests for extraordinary contractual actions shall be submitted by the HCA to the Director, PAM, for further action.

1450.101–3 Records.

The records of actions taken under FAR Part 50 shall be maintained by the Director, PAM.

1450.102 Delegation of and limitations on exercise of authority.

1450.102–1 Delegation of authority.

The AS/PMB shall approve all actions under FAR Part 50, except for actions in excess of $55,000, actions which increase the contract price without consideration, and indemnification actions, which shall be approved by the Secretary.

1450.103 Contract adjustments.

1450.103–6 Disposition.

The CO shall submit the Memorandum of Decision including the contractor's request, contractor information in support of the request required by FAR 50.103–4, the results of the CO's investigation required by FAR 50.103–5, and the information required by FAR 50.103–6 to the SOL for review. If the SOL concurs with the Memorandum of Decision, the Memorandum of Decision will be submitted through the HCA to the Director, PAM, for further action.

1450.104 Residual powers.

1450.104–2 General.

Proposals for the exercise of residual powers shall be processed using the procedures referred to in FAR 50.104–2.

1450.104–3 Special procedures for unusually hazardous or nuclear risks.

The CO shall submit the proposed Memorandum of Decision including the contractor's request for indemnification and the information required from the CO, to the SOL for review and approval. If the SOL approves the proposed Memorandum of Decision, it shall be submitted through the HCA, to the Director, PAM, for approval or disapproval by the Secretary.

PART 1451—USES OF GOVERNMENT SOURCES BY CONTRACTORS

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

Subpart 1451.1—Contractor Use of Government Supply Sources

1451.102 Authorization to use Government supply sources.

If the CO decides to authorize a contractor to use Government supply sources under the conditions prescribed in FAR 51.102, a written request for a FEDSTRIP activity address code (*See* FPMR 101–26.203) shall be made through the acquisition office FEDSTRIP point of contact.

PART 1452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Sec.
1452.000 Scope of part.

Subpart 1452.2—Text of Provisions and Clauses

1452.200 Scope of subpart.
1452.201–70 Authorities and delegations.
1452.203–70 Restrictions on Endorsements.
1452.204–70 Release of Claims.
1452.215–70 Examination of Records by the Department of the Interior.
1452.215–71 Use and Disclosure of Proposal Information—Department of the Interior.
1452.224–1 Privacy Act Notification.
1452.226–70—1452.226–71 [Reserved]
1452.227–70 Appeals of Use or Exceptions.

1452.228–7 Insurance—Liability to Third Persons.
1452.228–70 Liability Insurance.
1452.228–71 Aircraft and General Public Liability Insurance.
1452.228–72 Liability for Loss or Damage—Department of the Interior.
1452.228–73 Liability for Loss or Damage (Property Interest).
1452.233–2 Service of Protest.
1452.236–70 Prohibition Against Use of Lead-based Paint.
1452.236–71 Additive or Deductive Items.
1452.237–70 Information Collection.
1452.237–71 Utilization of Woody Biomass.
1452.280–1 Notice of Indian small business economic enterprise set-aside.
1452.280–2 Notice of Indian economic enterprise set-aside.
1452.280–3 Indian Economic Enterprise subcontracting limitations.
1452.280–4 Indian economic enterprise representation.

AUTHORITY: Sec. 205(c), 63 Stat. 390, 40 U.S.C. 486(c); and 5 U.S.C. 301.

SOURCE: 75 FR 19829, Apr. 15, 2010, unless otherwise noted.

1452.000 Scope of part.

This part prescribes Department of the Interior provisions and clauses for use in acquisition.

Subpart 1452.2—Text of Provisions and Clauses

1452.200 Scope of subpart.

This subpart sets forth the texts of all DIAR provisions and clauses. Consistent with the numbering scheme prescribed in FAR 52.101 and the approach used in FAR Subpart 52.2, this subpart is arranged by subject matter, in the same order as, and keyed to, the parts of the DIAR in which provisions and clause requirements are addressed.

1452.201–70 Authorities and delegations.

As prescribed in section 1401.670–1, insert the following clause:

AUTHORITIES AND DELEGATIONS (SEP 2011)

(a) The Contracting Officer is the only individual authorized to enter into or terminate this contract, modify any term or condition of this contract, waive any requirement of this contract, or accept nonconforming work.

(b) The Contracting Officer will designate a Contracting Officer's Representative (COR) at time of award. The COR will be responsible for technical monitoring of the contractor's performance and deliveries. The COR will be appointed in writing, and a copy of the appointment will be furnished to the Contractor. Changes to this delegation will be made by written changes to the existing appointment or by issuance of a new appointment.

(c) The COR is not authorized to perform, formally or informally, any of the following actions:

(1) Promise, award, agree to award, or execute any contract, contract modification, or notice of intent that changes or may change this contract;

(2) Waive or agree to modification of the delivery schedule;

(3) Make any final decision on any contract matter subject to the Disputes Clause;

(4) Terminate, for any reason, the Contractor's right to proceed;

(5) Obligate in any way, the payment of money by the Government.

(d) The Contractor shall comply with the written or oral direction of the Contracting Officer or authorized representative(s) acting within the scope and authority of the appointment memorandum. The Contractor need not proceed with direction that it considers to have been issued without proper authority. The Contractor shall notify the Contracting Officer in writing, with as much detail as possible, when the COR has taken an action or has issued direction (written or oral) that the Contractor considers to exceed the COR's appointment, within 3 days of the occurrence. Unless otherwise provided in this contract, the Contractor assumes all costs, risks, liabilities, and consequences of performing any work it is directed to perform that falls within any of the categories defined in paragraph (c) prior to receipt of the Contracting Officer's response issued under paragraph (e) of this clause.

(e) The Contracting Officer shall respond in writing within 30 days to any notice made under paragraph (d) of this clause. A failure of the parties to agree upon the nature of a direction, or upon the contract action to be taken with respect thereto, shall be subject to the provisions of the Disputes clause of this contract.

(f) The Contractor shall provide copies of all correspondence to the Contracting Officer and the COR.

(g) Any action(s) taken by the Contractor, in response to any direction given by any person acting on behalf of the Government or any Government official other than the Contracting Officer or the COR acting within his or her appointment, shall be at the Contractor's risk.

(End of clause)

[76 FR 50142, Aug. 12, 2011]

1452.203–70 Restrictions on Endorsements.

As prescribed in 1403.570–3, insert the following clause:

RESTRICTION ON ENDORSEMENTS—DEPARTMENT OF THE INTERIOR (JUL 1996)

The Contractor shall not refer to contracts awarded by the Department of the Interior in commercial advertising, as defined in FAR 31.205–1, in a manner which states or implies that the product or service provided is approved or endorsed by the Government, or is considered by the Government to be superior to other products or services. This restriction is intended to avoid the appearance of preference by the Government toward any product or service. The Contractor may request the Contracting Officer to make a determination as to the propriety of promotional material.

(End of clause)

1452.204–70 Release of Claims.

As prescribed in 1404.804–70, insert the following clause:

RELEASE OF CLAIMS—DEPARTMENT OF THE INTERIOR (JUL 1996)

After completion of work and prior to final payment, the Contractor shall furnish the Contracting Officer with a release of claims against the United States relating to this contract. The Release of Claims form (DI–137) shall be used for this purpose. The form provides for exception of specified claims from operation of the release.

(End of clause)

1452.215–70 Examination of Records by the Department of the Interior.

As prescribed in 1415.209–70, insert the following clause:

EXAMINATION OF RECORDS BY THE DEPARTMENT OF THE INTERIOR (APR 1984)

For purposes of the Examination of Records by the Comptroller General clause of this contract (FAR 52.215–1), the Secretary of the Interior, the Inspector General, and their duly authorized representative(s) from the Department of the Interior shall have the same access and examination rights as the Comptroller General of the United States.

(End of clause)

1452.215–71 Use and Disclosure of Proposal Information—Department of the Interior.

As prescribed in 1415.207–70, insert the following provision:

USE AND DISCLOSURE OF PROPOSAL INFORMATION—DEPARTMENT OF THE INTERIOR (APR 1984)

(a) Definitions. For the purposes of this provision and the Freedom of Information Act (5 U.S.C. 552), the following terms shall have the meaning set forth below:

(1) ''Trade Secret'' means an unpatented, secret, commercially valuable plan, appliance, formula, or process, which is used for making, preparing, compounding, treating or processing articles or materials which are trade commodities.

(2) ''Confidential commercial or financial information'' means any business information (other than trade secrets) which is exempt from the mandatory disclosure requirement of the Freedom of Information Act, 5 U.S.C. 552. Exemptions from mandatory disclosure which may be applicable to business information contained in proposals include exemption (4), which covers ''commercial and financial information obtained from a person and privileged or confidential,'' and exemption (9), which covers ''geological and geophysical information, including maps, concerning wells.''

(b) If the offeror, or its subcontractor(s), believes that the proposal contains trade secrets or confidential commercial or financial information exempt from disclosure under the Freedom of Information Act, (5 U.S.C. 552), the cover page of each copy of the proposal shall be marked with the following legend:

''The information specifically identified on pages _____ of this proposal constitutes trade secrets or confidential commercial and financial information which the offeror believes to be exempt from disclosure under the Freedom of Information Act. The offeror requests that this information not be disclosed to the public, except as may be required by law. The offeror also requests that this information not be used in whole or part by the government for any purpose other than to evaluate the proposal, except that if a contract is awarded to the offeror as a result of or in connection with the submission of the proposal, the Government shall have the right to use the information to the extent provided in the contract.''

(c) The offeror shall also specifically identify trade secret information and confidential commercial and financial information on the pages of the proposal on which it appears and shall mark each such page with the following legend:

''This page contains trade secrets or confidential commercial and financial information which the offeror believes to be exempt from disclosure under the Freedom of Information Act and which is subject to the legend contained on the cover page of this proposal.''

(d) Information in a proposal identified by an offeror as trade secret information or confidential commercial and financial information shall be used by the Government only for the purpose of evaluating the proposal, except that (i) if a contract is awarded to the offeror as a result of or in connection with submission of the proposal, the Government shall have the right to use the information as provided in the contract, and (ii) if the same information is obtained from another source without restriction it may be used without restriction.

(e) If a request under the Freedom of Information Act seeks access to information in a proposal identified as trade secret information or confidential commercial and financial information, full consideration will be given to the offeror's view that the information constitutes trade secrets or confidential commercial or financial information. The offeror will also be promptly notified of the request and given an opportunity to provide additional evidence and argument in support of its position, unless administratively unfeasible to do so. If it is determined that information claimed by the offeror to be trade secret information or confidential commercial or financial information is not exempt from disclosure under the Freedom of Information Act, the offeror will be notified of this determination prior to disclosure of the information.

(f) The Government assumes no liability for the disclosure or use of information contained in a proposal if not marked in accordance with paragraphs (b) and (c) of this provision. If a request under the Freedom of Information Act is made for information in a proposal not marked in accordance with paragraphs (b) and (c) of this provision, the offeror concerned shall be promptly notified of the request and given an opportunity to provide its position to the Government. However, failure of an offeror to mark information contained in a proposal as trade secret information or confidential commercial or financial information will be treated by the Government as evidence that the information is not exempt from disclosure under the Freedom of Information Act, absent a showing that the failure to mark was due to unusual or extenuating circumstances, such as a showing that the offeror had intended to mark, but that markings were omitted from the offeror's proposal due to clerical error.

(End of provision)

1452.224–1 Privacy Act Notification.

(a) As prescribed in 1424.104, the clause at FAR 52.224–1, Privacy Act Notification, shall be modified before insertion into solicitations and contracts by—

(1) Changing the title of the clause to read ''Privacy Act Notification (JUL 1996) (Deviation)''; and

(2) Adding the following sentence to the end of the clause:

''Applicable Department of the Interior regulations concerning the Privacy Act are set forth in 43 CFR 2, subpart D. The CFR is available for public inspection at the Departmental Library, Main Interior Bldg., 1849 C St. NW, Washington DC, at each of the regional offices of bureaus of the Department and at many public libraries.''

(b) As prescribed in FAR 52.103(a) and 52.107(f), the clause at FAR 52.252–6, Authorized Deviation in Clauses, shall be inserted into solicitations and contracts containing the clause in paragraph (a) of this section.

1452.226–70—1452.226–71 [Reserved]

1452.227–70 Appeals of Use or Exceptions.

As prescribed in 1427.303(d)(1), insert the following clause:

APPEALS OF USE OF EXCEPTIONS (JUL 1996)

If the Contractor appeals the Contracting Officer determination to use one of the exceptions described in FAR 27.303(d)(1), such appeal shall be made by written notice specifically identifying the basis for the appeal within 30 working days from the receipt of the determination. Such appeal shall be mailed to the Associate Solicitor for General Law, U.S. Department of the Interior, Washington, DC 20240, who is designated as the appeals official.

(End of clause)

1452.228–7 Insurance—Liability to Third Persons.

(a) As prescribed in 1428.311–1, the clause at FAR 52.228–7, Insurance—Liability to Third Persons, shall be modified before insertion into solicitations and contracts by:

(1) changing the title of the clause to read: ''INSURANCE—Liability to Third Persons (APR 1984) (Deviations)''; and

(2) changing the first sentence in subparagraph (c)(2) of the clause to read:

''For certain liabilities (and expenses incidental to such liabilities) to third persons not compensated by insurance or otherwise but subject to the 'Limitation of Cost' or 'Limitation of Funds' clause of this contract.''

(b) As prescribed in FAR 52.103(a) and 52.107(f), the clause at FAR 52.252–6, Authorized Deviations in Clauses, shall be inserted into solicitations and contracts containing the clause in paragraph (a) of this section.

[75 FR 19829, Apr. 15, 2010, as amended at 76 FR 50142, Aug. 12, 2011]

1452.228–70 Liability Insurance.

As prescribed in 1428.301, insert the following clause:

LIABILITY INSURANCE—DEPARTMENT OF THE INTERIOR (JUL 1996)

(a) The Contractor shall procure and maintain during the term of this contract and any extension thereof liability insurance in form satisfactory to the Contracting Officer by an insurance company which is acceptable to the Contracting Officer. The named insured parties under the policy shall be the Contractor and the United States of America. The amounts of the insurance shall be not less than as follows:

$_____each person*
$_____each occurrence*
$_____property damage*

(b) Each policy shall have a certificate evidencing the insurance coverage. The insurance company shall provide an endorsement to notify the Contracting Officer 30 days prior to the effective date of cancellation or termination of the policy or certificate; or modification of the policy or certificate which may adversely affect the interest of the Government in such insurance. The certificate shall identify the contract number, the name and address of the Contracting Officer, as well as the insured, the policy number and a brief description of contract services to be performed. The contractor shall furnish the Contracting Officer with a copy of an acceptable insurance certificate prior to beginning the work.

*These amounts to be set by the Contracting Officer.

(End of clause)

1452.228–71 Aircraft and General Public Liability Insurance.

As prescribed in 1428.306–70(c)(1), insert the following clause:

AIRCRAFT AND GENERAL PUBLIC LIABILITY INSURANCE DEPARTMENT OF THE INTERIOR (MAR 1989)

(a) The Contractor, at the Contractor's expense, agrees to maintain, during the continuance of this contract, aircraft liability and general public liability insurance with limits of liability for:

(1) Bodily injury to or death of aircraft passengers of not less than $75,000 for any one passenger and a limit for each occurrence in any one aircraft of at least an amount equal to the sum produced by multiplying $75,000 by 75 percent of the total number of passenger seats installed in the aircraft;

(2) Bodily injury to or death of persons (excluding passengers) of not less than $75,000 for any one person in any one occurrence and $300,000 for occurrence; and

(3) Property damage of not less than $100,000 for each occurrence; or

(4) a single limit of liability for each occurrence equal to or greater than the combined required minimums set forth in paragraphs (a)(1) through (3) of this clause.

(b) The Contractor also agrees to maintain worker's compensation and other legally required insurance with respect to the Contractor's own employees and agents.

(End of clause)

1452.228–72 Liability for Loss or Damage—Department of the Interior.

As prescribed in 1428.306–70(c)(2), insert the following clause:

LIABILITY FOR LOSS OR DAMAGE—DEPARTMENT OF THE INTERIOR (APR 1984)

(a) The Contractor shall indemnify and hold the Government harmless from any and all loss or damage to the aircraft furnished under this contract except as provided in paragraph (d) of this clause. For the purpose of fulfilling its obligation under this clause, the Contractor shall procure and maintain during the term of this contract, and any extensions thereof, full insurance acceptable to the Contracting Officer. The Contractor's insurance coverage shall apply to pilots furnished by the Government who operate the aircraft. The contractor may request a list of Government pilots by name and qualification who are potential pilots.

(b) Prior to the commencement of work hereunder, the Contractor shall furnish to the Contracting Officer a copy of the insurance policy or policies or a certificate of insurance issued by the underwriter(s) showing that the coverage required by this clause has been obtained.

(c) Each policy or certificate evidencing the insurance shall contain an endorsement which provides that the insurance company

will notify the Contracting Officer 30 days prior to the effective date of any cancellation or termination of any policy or certificate or any modification of a policy or certificate which adversely affects the interests of the Government in such insurance. The notice shall be sent by registered mail and shall identify this contract, the name and address of the contracting office, the policy, and the insured.

(d) If the aircraft is damaged or destroyed while in the custody and control of the Government, the Government will reimburse the Contractor for the deductible stipulated in the insurance coverage (if any) as follows:

(1) In-Motion Accidents—Up to 5 percent of the current insured value of the aircraft stated in the policy, or $10,000, whichever is less.

(2) Not In-Motion Accidents—Up to $250 per accident. Such reimbursement shall not be made, however, for loss or damage to the aircraft resulting from:

(i) Normal wear and tear,

(ii) Negligence or fault in maintenance of the aircraft by the Contractor, or

(iii) A defect in construction of the aircraft or a component thereof.

(e) If damage to the aircraft is established to be the fault of the Government, rental payments to the Contractor during the repair period will be made as set forth elsewhere in this contract. The Government may, at its option, make necessary repairs or return the aircraft to the Contractor for repair. In the event the aircraft is lost, destroyed, or damaged so extensively as to be beyond repair, no rental payment will be made to the Contractor thereafter.

(f) Any failure to agree as to the responsibility of the Government or the Contractor under this clause shall, after a final finding and determination by the Contracting Officer, be considered a dispute within the meaning of the ''Disputes'' clause of this contract.

(End of clause)

1452.228–73 Liability for Loss or Damage (Property Interest).

As prescribed in 1428.311–2(c), insert the following clause:

LIABILITY FOR LOSS OR DAMAGE (PROPERTY INTEREST)—DEPARTMENT OF THE INTERIOR (APR 1984)

(a) The Government assumes all risk and liability for damage to or loss of the aircraft for the term of this contract, while the aircraft is in the Government's possession, except for;

(1) Normal wear and tear to the aircraft, or

(2) Loss which occurs as a result of negligence or fault in maintenance of the aircraft by the Contractor, or

(3) Loss resulting from a latent defect in the construction of the aircraft or a component thereof.

(b) In the event of damage to the aircraft, the Government may, at its option, make the necessary repairs with its own facilities, or by contract, or pay the Contractor the reasonable cost of repair of the aircraft. if damage to the aircraft is established to be the fault of the Government, rental payments to the Contractor during the repair period will be made as set forth elsewhere in this contract.

(c) In the event the aircraft is lost, destroyed, or damaged so extensively as to be beyond repair, no rental payment will be made to the Contractor thereafter, but the Government will pay to the Contractor a sum equal to the fair market value of the aircraft just prior to such loss, destruction, or extensive damage, less the salvage value of the aircraft.

(d) The Contractor certifies that the contract price does not include any cost attributable to insurance or to any reserve fund it has established to protect its interests in or use of the aircraft, regardless of whether or not the insurance coverage applies for the period during which the Government has possession of the aircraft. If, in the event of loss or damage to the aircraft, the Contractor receives compensation for such loss or damage, in any form, from any source, the amount of such compensation shall be credited to the Government in determining the amount of the Government's liability under this clause; except that this shall not apply to proceeds of insurance received solely as an advance of insurance pending determination of Government liability, or for an increment of value of the aircraft beyond the value for which the Government is responsible.

(e) In the event of loss or damage, the Government shall be subrogated to all rights of recovery by the Contractor against third parties for such loss or damage and such rights shall be immediately assigned to the Government. Except as the Contracting Officer may permit in writing, the Contractor shall neither release nor discharge any third party from liability for such loss or damage nor otherwise compromise or adversely affect the Government's subrogation or other rights hereunder. The Contractor shall cooperate with the Government in any suit or action undertaken by the Government against any such third party.

(f) Any failure to agree as to the responsibility of the Government or the Contractor under this clause shall, after a final finding and determination by the Contracting Officer, be considered a dispute within the meaning of the ''Disputes'' clause of this contract.

(End of clause)

1452.233–2 Service of Protest.

As prescribed in 1433.106, the provision at FAR 52.233–2, Service of Protest, shall be modified before insertion into solicitations and contracts by changing the title of the provision to read: ''Service of Protest Department of the Interior (JUL 1996) (Deviation)''; and adding the following sentence to the end of the provision:

''(c) A copy of the protest served on the Contracting Officer shall be simultaneously furnished by the protester to the Department of the Interior Assistant Solicitor, Acquisitions and Intellectual Property, 1849 C Street, NW., Room 6511, Washington, DC 20240.''

1452.236–70 Prohibition Against Use of Lead-based Paint.

As prescribed in 1436.570(b), insert the following clause:

PROHIBITION AGAINST USE OF LEAD-BASED PAINT—DEPARTMENT OF THE INTERIOR (JUL 1996)

Paint containing more than .06 percent by weight of lead in paint, or the equivalent measure of lead in the dried film of paint already applied, shall not be used in the construction or rehabilitation of residential structures under this contract or any resulting subcontracts.

(End of clause)

1452.236–71 Additive or Deductive Items.

As prescribed in 1436.571, insert the following provision:

ADDITIVE OR DEDUCTIVE ITEMS—DEPARTMENT OF THE INTERIOR (JUL 1996)

So that the Government may obtain the most desirable features of work within the limit of its funds available at time of bid evaluation, award may be made to the bidder having the lowest total of the base bid and a combination of additive and deductive items. All bids shall be evaluated on the basis of the same additive and deductive bid items using the order of priority of the items listed in the schedule.

(End of provision)

1452.237–70 Information Collection.

As prescribed in 1437.7102, insert the following clause:

INFORMATION COLLECTION—DEPARTMENT OF THE INTERIOR (JUL 1996)

If performance of this contract requires the contractor to collect information on identical items from ten or more public respondents, no action shall be taken or funds expended in the solicitation or collection of such information until the contractor has received from the Contracting Officer written notification that approval has been obtained from the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1980. The Contractor agrees to provide all information requested by the Contracting Officer which is necessary to obtain approval from OMB.

(End of clause)

1452.237–71 Utilization of Woody Biomass.

As prescribed in 1437.7202, insert the following clause:

UTILIZATION OF WOODY BIOMASS (MAY 2005)

(a) The contractor may remove and utilize woody biomass, if:

(1) Project work is progressing as scheduled; and

(2) Removal is completed before contract expiration.

(b) To execute this option, the contractor must submit a written request to the Government.

(c) Following receipt of the written request, and if appropriate, the Government and the contractor will negotiate and execute a separate timber/vegetative sales contract. Payment under the timber/vegetative sales contract must be at a price equal to or greater than the appraised value of the woody biomass. The contractor must make any appropriate payment specified in the related timber/vegetative sales contract before removal may be authorized.

(d) If required by law, regulation or Bureau policy, the Government will prepare a timber/vegetative sales notice and/or prospectus, including volume estimates, appraised value and any appropriate special provisions.

(e) The contractor must treat any woody biomass not removed in accordance with the specifications in the service contract.

(f) The sales contract and service contract are severable; default or termination under either contract does not remove the contractor from payment or performance obligations under the other contract.

(g) Definitions:

Timber/vegetative sales contract and/or notice means the agency-specific authorized contract instrument for the sale, barter, exchange, billing or other compensation for the payment, removal, and/or transportation of woody biomass material.

Woody biomass means the trees and woody plants, including limbs, tops, needles, leaves, and other woody parts, grown in a forest, woodland, or rangeland environment, that are the by-products of management, restoration and/or hazardous fuel reduction treatment.

1452.280–1 Notice of Indian Small Business Economic Enterprise set-aside.

As prescribed in 1480.503(e)(1), and in lieu of the requirements of FAR 19.508, insert the following provision in each written solicitation of offers to provide supplies, general services, A–E services, or construction. If the solicitation is oral, information substantially identical to that contained in the provision must be given to potential offerors.

NOTICE OF INDIAN SMALL BUSINESS ECONOMIC ENTERPRISE SET-ASIDE (FEB 2021)

Under the Buy Indian Act, 25 U.S.C. 47, offers are solicited only from Indian Economic Enterprises (Subpart 1480.8) that are also small business concerns. Any acquisition resulting from this solicitation will be from such a concern. Offers received from enterprises that are not both Indian Economic Enterprises and small business concerns will not be considered and will be rejected.

(End of provision)

[87 FR 20764, Apr. 8, 2022]

1452.280–2 Notice of Indian Economic Enterprise set-aside.

As prescribed in 1480.503(e)(2), insert the following clause in solicitations and contracts involving Indian Economic Enterprise set-asides. If the solicitation is oral, information substantially identical to that contained in the provision must be given to potential offerors.

NOTICE OF INDIAN ECONOMIC ENTERPRISE SET-ASIDE (FEB 2021)

(a) Definitions as used in this clause.

Alaska Native Claims Settlement Act (ANCSA) means Public Law 92–203 (December 18, 1971), 85 Stat. 688, codified at 43 U.S.C. 1601–1629h.

Indian means a person who is an enrolled member of a Federally Recognized Indian Tribe.

Indian Economic Enterprise means any business activity owned by one or more Indians or Federally Recognized Indian Tribes, provided that:

(i) The combined Indian or Federally Recognized Indian Tribe ownership of the enterprise shall constitute not less than 51 percent;

(ii) The Indians or Federally Recognized Indian Tribes shall, together, receive at least 51 percent of the earnings from the contract; and

(iii) The management and daily business operations of an Indian Economic Enterprise must be controlled by one or more individuals who are Indians. To ensure actual control over the enterprise, the individuals must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business. Management of Tribally owned Indian Economic Enterprises may be provided by:

(A) Committees, teams, or Boards of Directors which are controlled by one or more members of Tribe, or;

(B) Non-Tribal members if the enterprise can demonstrate that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to Committees, teams, or Boards of Directors. Common management decisions, include strategic planning, budget approval, and the employment and compensation of officers. A written management development plan must also exist which shows how Tribal members will develop managerial skills sufficient to manage the enterprise or similar enterprises in the future.

The enterprise must meet the requirements of (i) through (iii) throughout the following time periods:

(1) At the time an offer is made in response to a written solicitation;

(2) At the time of contract award; and,

(3) During the full term of the contract.

Federally Recognized Indian Tribe means an Indian Tribe, band, nation, or other Federally recognized group or community on the List of Federally Recognized Tribes. This definition includes any Alaska Native regional or village corporation under the Alaska Native Claims Settlement Act (ANCSA).

List of Federally Recognized Tribes means an entity appearing on the United States Department of the Interior's List of federally recognized Indian Tribes published annually in the FEDERAL REGISTER pursuant to Section 104 of Public Law 103–454, codified at 25 U.S.C. 5131.

Representation means the positive statement by an enterprise of its eligibility for preferential consideration and participation for acquisitions conducted under the Buy Indian Act, 25 U.S.C. 47, in accordance with the procedures in Subpart 1480.8.

(b) General.

(1) Under the Buy Indian Act, offers are solicited only from Indian Economic Enterprises.

(2) The Contracting Officer (CO) will reject all offers received from ineligible enterprises.

(3) Any award resulting from this solicitation will be made to an Indian Economic Enterprise, as defined in paragraph (a) of this clause.

(c) Required Submissions. In response to this solicitation, an offeror must also provide the following:

(1) A description of the required percentage of the work/costs to be provided by the offeror over the contract term as required by section 1452.280–3, Subcontracting Limitations clause; and

(2) Qualifications of the key personnel (if any) that will be assigned to the contract.

(d) Required Assurance. The offeror must provide written assurance to the CO that the offeror is and will remain in compliance with the requirements of this clause. It must do this before the CO awards the Buy Indian contract and upon successful and timely completion of the contract, but before the CO accepts the work or product.

(e) Non-responsiveness. Failure to provide the information required by paragraphs (c) and (d) of this clause may cause the CO to find an offer non-responsive and reject it.

(f) Eligibility.

(1) Participation in the Mentor-Protégé Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (25 U.S.C. 47 note) does not render an Indian Economic Enterprise ineligible for contracts awarded under the Buy Indian Act.

(2) If a contractor no longer meets the definition of an Indian Economic Enterprise after award, the contractor must notify the CO immediately and in writing. The notification must include full disclosure of circumstances causing the contractor to lose eligibility status and a description of any actions that the contractor will take to regain eligibility. If the contract is unable to regain eligibility, then the contractor must revise its the representations and certifications in the System for Award Management. Failure to give the CO immediate written notification means that:

(i) The economic enterprise may be declared ineligible as an IEE for future contract awards under this part; and

(ii) The CO may consider termination for default if it is in the best interest of the government.

(End of clause)

[87 FR 20764, Apr. 8, 2022]

1452.280–3 Indian Economic Enterprise subcontracting limitations.

A contractor shall not subcontract more than the subcontract limitations specified under FAR 52.219–14 to other than responsible Indian Economic Enterprises when receiving an award under the Buy Indian Act. For this purpose, work to be performed does not include the provision of materials, supplies, or equipment. As prescribed in 1480.503(e)(3), insert the following clause in each written solicitation or contract to provide supplies, general services, A–E services, or construction:

INDIAN ECONOMIC ENTERPRISE SUBCONTRACTING LIMITATIONS (FEB 2021)

(a) Definitions as used in this clause.

(1) *Concern* means any business 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, materials and/or labor, etc. It includes but is not limited to an individual, partnership, corporation, joint venture, association, or cooperative. For the purpose of making affiliation findings (see FAR 19.101), it includes any business entity, whether or not it is organized for profit or located in the United States or its outlying areas.

(2) *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 for performance of the contract, contract modification, or subcontract.

(3) *Subcontractor* means a concern to which a contractor subcontracts any work under the contract. It includes subcontractors at any tier who perform work on the contract.

(b) Required Percentages of work by the concern. The contractor must comply with FAR 52.219–14 Limitations on Subcontracting clause in allocating what percentage of work to subcontract. The contractor shall not subcontract work exceeding the subcontract limitations in FAR 52.219–14 to a concern other than a responsible Indian Economic Enterprise.

(c) Any work that an IEE subcontractor does not perform with its own employees shall be considered subcontracted work for the purpose of calculating percentages of subcontract work in accordance with FAR 52.219–14 Limitations on Subcontracting.

(d) Cooperation. The contractor must:

(1) Carry out the requirements of this clause to the fullest extent; and

(2) Cooperate in any study or survey that the CO, Indian Affairs, or its agents may conduct to verify the contractor's compliance with this clause.

(e) Incorporation in Subcontracts. The contractor must incorporate the substance of this clause, including this paragraph (e), in

all subcontracts for supplies, general services, A–E services, and construction awarded under this contract.

[87 FR 20764, Apr. 8, 2022]

1452.280–4 Indian Economic Enterprise representation.

As prescribed in 1480.503(e)(4), insert the following provision in each written solicitation for supplies, services, A–E, or construction:

INDIAN ECONOMIC ENTERPRISE REPRESENTATION (FEB 2021)

(a) The offeror represents as part of its offer that it [ ] does [ ] does not meet the definition of Indian Economic Enterprise (IEE) as defined in DIAR 1480.201 and that it intends to meet the definition of an IEE throughout the performance of the contract. The offeror must notify the contracting officer immediately in writing if there is any ownership change affecting compliance with this representation.

(b) Any false or misleading information submitted by an enterprise when submitting an offer in consideration for an award set aside under the Buy Indian Act is a violation of the law punishable under 18 U.S.C. 1001. False claims submitted as part of contract performance are subject to the penalties enumerated in 31 U.S.C. 3729 to 3731 and 18 U.S.C. 287.

(End of provision)

[87 FR 20764, Apr. 8, 2022]

SUBCHAPTER H—Buy Indian Act

PART 1480—ACQUISITIONS UNDER THE BUY INDIAN ACT

Subpart 1480.1—General

1480.101 Scope of part.
1480.102 Buy Indian Act acquisition regulations.

Subpart 1480.2—Definitions

1480.201 Definitions.

Subpart 1480.3—Applicability

1480.301 Scope of part.
1480.302 Restrictions on the use of the Buy Indian Act.

Subpart 1480.4—Policy

1480.401 Requirement to give preference to Indian Economic Enterprises.
1480.402 Delegations and responsibility.
1480.403 Deviations.

Subpart 1480.5—Procedures

1480.501 General.
1480.502 [Reserved]
1480.503 Procedures for acquisitions under the Buy Indian Act.
1480.504 Other circumstances for use of other than full and open competition.
1480.505 Debarment and suspension.

Subpart 1480.6—Contract Requirements

1480.601 Subcontracting limitations.
1480.602 Performance and payment bonds.

Subpart 1480.7—[Reserved]

Subpart 1480.8—Representation by an Indian Economic Enterprise Offeror

1480.801 General.
1480.802 Representation provision.
1480.803 Representation process.

Subpart 1480.9—Challenges to Representation

1480.901 General.
1480.902 Receipt of challenge.
1480.903 Award in the face of challenge.
1480.904 Challenge not timely.

AUTHORITY: 25 U.S.C. 47, as amended, 41 U.S.C. 253(c)(5), and 5 U.S.C. 301.

SOURCE: 87 FR 20766, Apr. 8, 2022, unless otherwise noted.

Subpart 1480.1—General

1480.101 Scope of part.

This part implements policies and procedures for the procurement of supplies, general services, architect and engineering (A&E) services, or construction while giving preference to Indian Economic Enterprises under authority of the Buy Indian Act (25 U.S.C. 47).

1480.102 Buy Indian Act acquisition regulations.

(a) This part supplements Federal Acquisition Regulation (FAR) and Department of the Interior Acquisition Regulation (DIAR) requirements in this chapter to meet the needs of the Department of Interior in implementing the Buy Indian Act.

(b) This part is under the direct oversight and control of the Chief Financial Officer, within the Office of the Assistant Secretary—Indian Affairs, Department of the Interior (CFO). The CFO is responsible for issuing and implementing this part.

(c) Acquisitions conducted under this part are subject to all applicable requirements of the FAR and DIAR, as well as internal policies, procedures, or instructions issued by Indian Affairs. After the FAR, this part would take precedence over any inconsistent Indian Affairs policies, procedures, or instructions.

Subpart 1480.2—Definitions

1480.201 Definitions.

Alaska Native Claims Settlement Act (ANCSA) means Public Law 92–203 (December 18, 1971), 85 Stat. 688, codified at 43 U.S.C. 1601–1629h.

Buy Indian Act means section 23 of the Act of June 25, 1910, codified at 25 U.S.C. 47.

Contracting Officer (CO) means a person with the authority to enter into, administer, or terminate contracts and make related determinations and findings on behalf of the U.S. Government.

Deviation means an exception to the requirement to use the Buy Indian Act

in fulfilling an acquisition requirement subject to the Buy Indian Act.

Fair market price means a price based on reasonable costs under normal competitive conditions and not on lowest possible cost, as determined in accordance with FAR 15.404–1(b).

Federally Recognized Indian Tribe means an Indian Tribe, band, nation, or other Federally recognized group or community on the List of Federally Recognized Tribes. This definition includes any Alaska Native regional or village corporation under the Alaska Native Claims Settlement Act (ANSCA).

Governing Body means the recognized entity empowered to exercise governmental authority over a Federally Recognized Indian Tribe.

Indian means a person who is an enrolled member of a Federally Recognized Indian Tribe.

Indian Affairs (IA) means all bureaus and offices under the Assistant Secretary—Indian Affairs.

Indian Economic Enterprise (IEE) means any business activity owned by one or more Indians or Federally Recognized Indian Tribes provided that:

(1) The combined Indian or Federally Recognized Indian Tribe ownership of the enterprise constitutes not less than 51 percent;

(2) The Indians or Federally Recognized Indian Tribes must, together, receive at least 51 percent of the earnings from the contract; and

(3) The management and daily business operations of an enterprise must be controlled by one or more individuals who are Indians. The Indian individual(s) must possess requisite management or technical capabilities directly related to the primary industry in which the enterprise conducts business. Management may be provided by:

(i) Committees, teams, or Boards of Directors which are controlled by one or more members of Tribe, or;

(ii) Non-Tribal members if the enterprise can demonstrate that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how Tribal members will develop managerial skills sufficient to manage the enterprise or similar enterprises in the future.

Indian Small Business Economic Enterprise (ISBEE) means an IEE that is also a small business concern established in accordance with the criteria and size standards of 13 CFR part 121.

Interested Party means an IEE that is an actual or prospective offeror whose direct economic interest would be affected by the proposed or actual award of a particular contract set-aside pursuant the Buy Indian Act.

List of Federally Recognized Tribes means an entity appearing on the United States Department of the Interior's List of federally recognized Indian Tribes published annually in the FEDERAL REGISTER pursuant to Section 104 of Public Law 103–454, codified at 25 U.S.C. 5131.

Subpart 1480.3—Applicability

1480.301 Scope of part.

Except as provided in 1480.302, this part applies to all acquisitions, including simplified acquisitions, made by IA and by any other bureau or office of the Department of the Interior conducting acquisitions on behalf of IA or otherwise delegated the authority to conduct acquisitions under the Buy Indian Act.

1480.302 Restrictions on the use of the Buy Indian Act.

IA must not use the authority of the Buy Indian Act and the procedures contained in this part to award intergovernmental contracts to Tribal organizations to plan, operate, or administer authorized IA programs (or parts thereof) that are within the scope and intent of the Indian Self-Determination and Education Assistance Act (ISDEAA) (Pub. L. 93–638). IA must use the Buy Indian Act solely to award procurement contracts to IEEs. Contracts subject to ISDEAA must follow 25 CFR part 900.

Subpart 1480.4—Policy

1480.401 Requirement to give preference to Indian Economic Enterprises.

(a) IA must use the negotiation authority of the Buy Indian Act to give preference to Indians or Federally Recognized Tribes whenever the use of that authority is practicable. The Buy Indian Act provides that so far as may be practicable, Indian labor shall be employed, and purchases of the products (including, but not limited to printing, notwithstanding any other law) of Indian industry may be made in open market at the discretion of the Secretary of the Interior. Thus, IA may use the Buy Indian Act to give preference to IEEs through set-asides when acquiring supplies, general services, A&E services, or construction to meet IA needs and requirements. All other FAR and DIAR requirements that do not conflict with this part, such as requirements applicable to the acquisition of A&E and construction services, remain applicable.

(b) The Buy Indian Act does not apply when a supply requirement can be met by existing inventories of the requiring agency or excess from other agencies.

(c) The CO will give priority to ISBEEs for all purchases, regardless of dollar value. COs when prioritizing ISBEEs may consider either:

(1) A set-aside for ISBEEs; or

(2) A sole source award to an ISBEE, as authorized under the FAR.

(d) If the CO determines after market research that there is no reasonable expectation of obtaining offers that will be competitive in terms of market price, quality, and delivery, the CO may consider either:

(1) A set-aside for IEEs; or

(2) A sole source award to an IEE, as authorized under the FAR.

(e) If the CO determines after market research that there is no reasonable expectation of obtaining offers that will be competitive in terms of market price, quality, and delivery from ISBEEs or IEEs, then the CO must follow the Deviation process under 1480.403.

(f) When only one offer is received from a responsible IEE in response to an acquisition set-aside or direct negotiation under paragraph (c)(1) or (d)(1) of this section:

(1) If the offer is not at a reasonable and fair market price, then the CO may negotiate with that enterprise for a reasonable and fair market price.

(2) If the offer is at a reasonable and fair market price, then the CO must:

(i) Make an award to that enterprise;

(ii) Document the reason only one offer was considered; and

(iii) Initiate action to increase competition in future solicitations.

(g) If the offers received from one or more responsible IEEs in response to an acquisition set-aside under paragraph (c)(1) or (d)(1) of this section are not reasonable or otherwise unacceptable, then the CO must follow the deviation process under 1480.403. The CO must document in the deviation determination the reasons why the IEE offeror(s) were not reasonable or otherwise unacceptable.

(1) If a deviation determination is approved, the CO must cancel the set-aside solicitation and inform all offerors in writing.

(2) When the solicitation of the same requirement is posted, the CO must inform all previous offerors in writing of the solicitation number.

1480.402 Delegations and responsibility.

(a) The Secretary has delegated authority under the Buy Indian Act to the Assistant Secretary—Indian Affairs. IA exercises this authority in support of its mission and program activities and as a means of fostering Indian employment and economic development.

(b) The Secretary may delegate authority under the Buy Indian Act to a bureau or office within the Department of the Interior other than IA.

(c) The Chief Financial Officer of The Office of the Assistant Secretary—Indian Affairs is responsible for ensuring that all IA acquisitions under the Buy Indian Act comply with the requirements of this part.

1480.403 Deviations.

There are certain instances where the application of the Buy Indian Act

to an acquisition may not be appropriate. In these instances, the Contracting Officer must detail the reasons in writing and make a deviation determination.

(a) Sole source acquisitions awarded to an ISBEE or IEE under 1480.401(c)(2) or (d)(2) do not require a deviation determination and comply with the requirements of the Buy Indian Act.

(b) Some acquisitions by their very nature would make such a written determination unnecessary. The following acquisitions do not require a written deviation from the requirements of the Buy Indian Act:

(1) Any sole source acquisition justified and approved in accordance with FAR 6.3 and DIAR 1406.3 constitutes an authorized deviation from the requirements of the Buy Indian Act.

(2) Any order or call placed against an indefinite delivery vehicle that already has an approved deviation from the requirements of the Buy Indian Act.

(c) Deviation determinations are required for all other acquisitions where the Buy Indian Act is applicable and must be approved as follows:

TABLE 1 TO PARAGRAPH (c)

For a proposed contract action	The following official may authorize a deviation
Up to $25,000	CO.
Exceeding $25,000 but not exceeding $700,000.	One level above the CO or Chief of the Contracting Office (CCO) (or the IA Competition Advocate, absent a CCO).
Exceeding $700,000 but not exceeding $13.5 million.	IA Competition Advocate.
Exceeding $13.5 million but not exceeding $57 million.	The Head of the Contracting Activity or a designee who is a civilian serving in a position in a grade above GS–15 under the General Schedule or in a comparable or higher position under another schedule.
Exceeding $57 million	Department of the Interior Senior Procurement Executive.

(d) Deviations may be authorized prior to issuing the solicitation when the CO makes the following determinations and takes the following actions:

(1) The CO determines after market research that there is no reasonable expectation of obtaining offers that will be competitive in terms of market price, quality, and delivery from two or more responsible ISBEE, IEEs, or direct negotiation with an IEE that is a certified 8a business.

(2) The deviation determination is authorized by the official listed at 1480.403(c) for the applicable contract action.

(e) If a deviation determination has been approved, the CO must follow the FAR and DIAR unless specified otherwise.

(f) Acquisitions made under an authorized deviation from the requirements of the Buy Indian Act must be made in conformance with the order of precedence required by FAR 8.002.

Subpart 1480.5—Procedures

1480.501 General.

All acquisitions made in accordance with this part, including simplified or commercial item acquisitions, must conform to all applicable requirements of the FAR and DIAR.

1480.502 [Reserved]

1480.503 Procedures for acquisitions under the Buy Indian Act.

(a) Commercial items or simplified acquisitions under this section must conform to the competition and price reasonableness documentation requirements of FAR 12.209 for commercial item acquisitions and FAR 13.106 for simplified acquisitions.

(b) When acquiring construction services, solicit proposals and evaluate potential contractors in accordance with FAR part 36 and DIAR subpart 1436.2.

(c) When acquiring A&E services, solicit proposals and evaluate potential contractors in accordance with FAR part 36 and DIAR subpart 1436.6.

(d) This paragraph (d) applies to solicitations that are not restricted to participation of IEEs.

(1) If an interested IEE is identified after a solicitation has been issued, but before the date established for receipt of offers, the contracting office must provide a copy of the solicitation to this enterprise. In this case, the CO:

(i) Will not give preference under the Buy Indian Act to the IEE; and

(ii) May extend the date for receipt of offers when practical.

(2) If more than one IEE is identified subsequent to the solicitation, but prior to the date established for receipt of offers, the CO may cancel the solicitation and re-compete it as an IEE set-aside.

(e) This paragraph (e) lists the clauses and provisions that must be inserted.

(1) Insert the clause at 1452.280–1, Notice of Indian Small Business Economic Enterprise set-aside, in accordance with 1480.401(c).

(2) Insert the clause at 1452.280–2, Notice of Indian Economic Enterprise set-aside, in accordance with 1480.401(d).

(3) Insert the clause at 1452.280–3, Indian Economic Enterprise subcontracting limitations, in accordance with 1480.601(b).

(4) Insert the clause at 1452.280–4, Indian Economic Enterprise representation, in accordance with 1480.801(a).

1480.504 Other circumstances for use of other than full and open competition.

(a) Other circumstances may exist where the use of an IEE set-aside in accordance with 1480.401(a) and FAR 6.302–5 is not feasible. In such situations, the requirements of FAR subparts 6.3 and 13.5 and DIAR subpart 1406.3 apply in justifying the use of the appropriate authority for other than full and open competition.

(b) Except as provided in FAR 5.202, all proposed acquisition actions must first be publicized in accordance with the requirements of FAR 5.2 and DIAR 1405.2.

(c) Justifications for use of other than full and open competition in accordance with this section must be approved in accordance with DIAR part 1406. These approvals are required for a proposed contract or for an out of scope modification to an existing contract.

1480.505 Debarment and suspension.

A misrepresentation by an offeror of its status as an IEE, failure to notify the CO of any change in IEE status that would make the contractor ineligible as an IEE, or any violation of the regulations in this part by an offeror or an awardee may be cause for debarment or suspension in accordance with FAR 9.406 and 9.407 and DIAR 1409.406 and 1409.407. IA must refer recommendations for debarment or suspension to the Director, Office of Acquisition and Property Management, Department of the Interior, in accordance with DIAR 1409.406 and 1409.407, through the Head of the Contracting Activity.

Subpart 1480.6—Contract Requirements

1480.601 Subcontracting limitations.

(a) In contracts awarded under the Buy Indian Act and this part, the CO must insert the clause FAR 52.219–14, Limitations on Subcontracting.

(b) The CO must also insert the clause at 1452.280–3, Indian Economic Enterprise subcontracting limitations, in all awards to ISBEEs and IEEs pursuant this part.

1480.602 Performance and payment bonds.

Solicitations requiring performance and payment bonds must conform to FAR part 28 and may authorize use of any of the types of security acceptable in accordance with FAR subpart 28.2 or 25 U.S.C. 1497a. In accordance with FAR 28.102 and 25 U.S.C. 47a, the CO may accept alternative forms of security in lieu of performance and payment bonds if a determination is made that such forms of security provide the Government with adequate security for performance and payment.

Subpart 1480.7—[Reserved]

Subpart 1480.8—Representation by an Indian Economic Enterprise Offeror

1480.801 General.

(a) The CO must insert the provision at 1452.280–4, Indian Economic Enterprise representation, in all solicitations regardless of dollar value solicited under 1480.401(c) or (d) and in accordance with this part.

(b) To be considered for an award under 1480.401(c) or (d), an offeror must certify that it meets the definition of ''Indian Economic Enterprise'' (as defined in 1480.201) in response to a specific solicitation set-aside in accordance with the Buy Indian Act and this part; and

(c) The enterprise must meet the definition of ''Indian Economic Enterprise'' throughout the following time periods:

(1) At the time an offer is made in response to a solicitation;

(2) At the time of contract award; and

(3) During the full term of the contract.

(d) If, after award, a contractor no longer meets the eligibility requirements as it has certified and as set forth in this section, then the contractor must provide the CO with written notification within 3 days of its failure to comply with the eligibility requirements. The notification must include:

(1) Full disclosure of circumstances causing the contractor to lose eligibility status; and

(2) A description of actions, if any, that must be taken to regain eligibility.

(e) Failure to provide written notification required by paragraph (d) of this section means that:

(1) The economic enterprise may be declared ineligible as an IEE for future contract awards under this part; and

(2) The CO may consider termination for default if it is determined to be in the best interest of the Government.

(f) A CO will review the representation if an interested party challenges the IEE representation or if the CO has any other reason to question the representation. The CO may ask the offeror for more information to substantiate the representation. Challenges of and questions concerning a specific representation must be referred to the CO or CCO in accordance with subpart 1480.9.

(g) Participation in the Mentor-Protégé Program established under section 831 of the National Defense Authorization Act for Fiscal Year 1991 (25 U.S.C. 47 note) does not render an IEE ineligible for contracts awarded under the Buy Indian Act.

1480.802 Representation provision.

(a) Contracting offices must provide copies of the IEE representation to any interested parties upon written request.

(b) The submission of a Solicitation Mailing List Application by an enterprise does not remove the requirement for it to provide representation as an IEE, as required by this part, if it wishes to be considered as an offeror for a specific solicitation. COs may determine the validity of the contents of the applicant's representation.

(c) Any false or misleading information submitted by an enterprise when submitting an offer in consideration for an award set aside under the Buy Indian Act is a violation of the law punishable under 18 U.S.C. 1001. False claims submitted as part of contract performance are subject to the penalties enumerated in 31 U.S.C. 3729 to 3731 and 18 U.S.C. 287.

(d) The CO will review and refer to the appropriate officials all IEE misrepresentation by an offeror or failure to provide written notification of a change in IEE eligibility.

1480.803 Representation process.

(a) Only IEEs may participate in acquisitions set aside in accordance with the Buy Indian Act and this part. These procedures support responsible IEEs and prevent circumvention or abuse of the Buy Indian Act.

(b) Eligibility is based on information furnished by the enterprise to a CO in the IEE representation at DIAR 1452.280–4 in response to a specific solicitation under the Buy Indian Act.

(c) The CO may ask the appropriate Regional Solicitor to review the enterprise's representation.

(d) The CO may also request the Office of the Inspector General (on Form DI–1902 as part of a normal pre-award audit) to assist in determining the eligibility of the low responsive and responsible offerors on Buy Indian Act awards.

(e) The IEE representation does not relieve the CO of the obligation for determining contractor responsibility, as required by FAR subpart 9.1.

Subpart 1480.9—Challenges to Representation

1480.901 General.

(a) The CO can accept an offeror's written representation of being an IEE (as defined in 1480.201) only when it is submitted with an offer in response to a solicitation under the Buy Indian Act. Another interested party may challenge the representation of an offeror or contractor by filing a written challenge to the applicable CO in accordance with the procedures in 1480.902.

(b) After receipt of offers, the CO may question the representation of any offeror in a specific offer by filing a formal objection with the CCO.

1480.902 Receipt of challenge.

(a) An interested party must file any challenges against an offeror's representation with the cognizant CO.

(b) The challenge must be in writing and must contain the basis for the challenge with accurate, complete, specific, and detailed evidence. The evidence must support the allegation that the offeror fails to meet the definition of ''Indian Economic Enterprise'' or ''Indian Small Business Economic Enterprise'' as defined in 1480.201 or is otherwise ineligible. The CO will dismiss any challenge that is deemed frivolous or that does not meet the conditions in this section.

(c) To be considered timely, a challenge must be received by the CO no later than 10 days after the basis of challenge is known or should have been known, whichever is earlier.

(1) A challenge may be made orally if it is confirmed in writing within the 10-day period after the basis of challenge is known or should have been known, whichever is earlier.

(2) A written challenge may be delivered by hand, telefax, telegram, email, or letter postmarked within the 10-day period after the basis of challenge is known or should have been known, whichever is earlier.

(3) A CO's challenge to a certification is always considered timely, whether filed before or after award.

(d) Upon receiving a timely challenge, the CO must:

(1) Notify the challenger of the date it was received, and that the representation of the enterprise being challenged is under consideration; and

(2) Furnish to the offeror (whose representation is being challenged) a request to provide detailed information on its eligibility by certified mail, return receipt requested or electronic mail.

(e) Within 3 days after receiving a copy of the challenge and the CO's request for detailed information, the challenged offeror must file, as specified at paragraph (d)(2) of this section, with the CO a complete statement answering the allegations in the challenge and furnish evidence to support its position on representation. If the offeror does not submit the required material within the 3 days, or another period of time granted by the CO, the CO may assume that the offeror does not intend to dispute the challenge and must not award to the challenged offeror.

(f) Within 10 days after receiving a challenge, the challenged offeror's response, and any other pertinent information, the CO must determine the representation status of the challenged offeror and notify the challenger and the challenged offeror of the decision by certified mail, return receipt requested, or by other expeditious means including by hand, email, telefax, or telegraph if actual delivery can be shown, and make known to all parties the option to appeal the determination to the Director, Office of Acquisition and Property Management, Department of the Interior (PAM).

(g) If the representation accompanying an offer is challenged and subsequently upheld by the Director of PAM, the written notification of this action must state the reason(s).

1480.903 Award in the face of challenge.

(a) Award of a contract in the face of challenge may be made on the basis of the CO's written determination that the challenged offeror's representation is valid.

(1) This determination of validity is final unless it is appealed to the Director of PAM and the CO is notified of the appeal before making award.

(2) If an award was made before the CO received notice of appeal, the award is presumed to be valid.

(b) After receiving a challenge involving an offeror being considered for award, the CO must not award the contract until the CO has determined the validity of the representation. Award may be made in the face of a timely challenge when the CO determines in writing that an award must be made to protect the public interest, is urgently required, or a prompt award will otherwise be advantageous to the Government.

(c) If a timely challenge on representation is filed with the CO and received before award in response to a specific offer and solicitation, the CO must notify eligible offerors within one day that the solicitation will not be awarded due to a pending challenge. The CO also may ask eligible offerors to extend the period for acceptance of their proposals.

(d) If a challenge on representation is filed with the CO and received after award in response to a specific offer and solicitation, the CO need not suspend contract performance or terminate the awarded contract unless the CO believes that an award may be invalidated and a delay would prejudice the Government's interest. However, if contract performance is to be suspended or terminated, a mutual no cost agreement will be sought.

1480.904 Challenge not timely.

If a CO receives an untimely filed challenge of a representation, the CO must notify the challenger that the challenge cannot be considered on the instant acquisition but will be considered in any future actions. However, the CO may question at any time, before or after award, the representation of an IEE.

PARTS 1481–1499 [RESERVED]

FINDING AIDS

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For changes to this volume of the CFR prior to this listing, consult the annual edition of the monthly List of CFR Sections Affected (LSA). The LSA is available at *www.govinfo.gov*. For changes to this volume of the CFR prior to 2001, see the ''List of CFR Sections Affected, 1949–1963, 1964–1972, 1973–1985, and 1986–2000'' published in 11 separate volumes. The ''List of CFR Sections Affected 1986–2000'' is available at *www.govinfo.gov*.

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