

## **PART 42**

### **CONTRACT ADMINISTRATION**

#### **42.000 Scope of part.**

This part prescribes general policies and procedures for performing contract administration functions and related audit services.

#### **SUBPART 42.1—INTERAGENCY CONTRACT ADMINISTRATION AND AUDIT SERVICES**

#### **42.100 Scope of subpart.**

This subpart prescribes policies and procedures for obtaining and providing interagency contract administration and audit services in order to (a) provide specialized assistance through field offices located at or near contractors' establishments, (b) avoid or eliminate overlapping and duplication of Government effort, and (c) provide more consistent treatment of contractors.

#### **42.101 Policy.**

(a) Agencies requiring field contract administration or audit services are encouraged to use cross-servicing arrangements with existing contract administration and contract audit components to preclude duplicate demands being made upon contractors (see 42.102(a) for the directories of cognizant offices). The customer agency and the servicing agency shall enter into a formal cross-servicing arrangement when the volume of work or other circumstances warrants a formal understanding.

(b) Multiple reviews, inspections, and examinations of a contractor or subcontractor by several agencies involving the same practices, operations, or functions shall be eliminated to the maximum practicable extent through the use of cross-servicing arrangements.

(c) OMB Circular No. A-73, Audit of Federal Operations and Programs, states executive branch policy on audit cross-servicing arrangements. As further provided in OFPP Policy Letter 78-4, Field Contract Support Cross-Servicing Program, (1) agencies shall use cross-servicing arrangements for the audit of costs incurred under contracts of two or more agencies being performed at the same business entity, and (2) the responsible auditor or contracting officer shall coordinate with concerned agencies the establishment of indirect cost rates at such entities and shall convey the finally established

rates to those agencies for application to their contracts to the extent allocable and allowable (see Subpart 42.7).

(d) Subject to the fiscal regulations of the agencies concerned, agencies (1) may be reimbursed in accordance with the Economy Act of 1932 (31 U.S.C. 1535) for services rendered under formal or informal cross-servicing arrangements, (2) normally should refrain from seeking reimbursement for cross-servicing accomplished incidental to their own needs or Governmentwide responsibilities, and (3) may use the hourly rate established under the cross-servicing arrangement between the Department of Defense and the National Aeronautics and Space Administration to facilitate reimbursement arrangements.

(e) Agencies are not expected to enter into cross-servicing arrangements that would unduly burden agency resources or otherwise obstruct an agency in fulfilling its responsibilities.

#### **42.102 Procedures.**

(a) In locating available field contract administration or audit services, contracting offices shall consult the Department of Defense Directory of Contract Administration Services Components or the Directory of Federal Contract Audit Offices. Questions regarding contract administration offices may be referred to the Defense Logistics Agency, Attn: DLA-AO, Cameron Station, Alexandria, Virginia, 22304-6100. Questions regarding audit offices may be referred to the Defense Contract Audit Agency, Attn: OTD, Cameron Station, Alexandria, Virginia, 22304-6178. Agencies having a field contract administration or audit cross-servicing capability shall arrange for identification of this capability (including changes as they occur) in the appropriate directory by contacting one of these offices.

(b) Services may be obtained by direct request to the cognizant contract administration or audit component indicated in the applicable directory or as specified in a formal cross-servicing arrangement (see 42.101(a)).

(c) Except for requests submitted under formal cross-servicing arrangements, requests for services from Government agencies may be declined on a case-by-case basis if resources are inadequate to accomplish delegated tasks, provided the decision is made by an official above the level of the contract administration office, or as otherwise provided in agency regulations.

(d) Contract administration and audit services will be performed using the procedures of the servicing agency unless formal agreements between agencies provide otherwise.

## 42.200

(e) Both the requesting and servicing activities are responsible for prudent use of the services provided under either formal or informal interagency cross-servicing arrangements. When it is appropriate, servicing activities shall counsel requesting agencies or contracting offices concerning the desirability and practicality of relaxing or waiving controls and surveillance that may not be necessary to ensure satisfactory contract performance.

### SUBPART 42.2—ASSIGNMENT OF CONTRACT ADMINISTRATION

#### 42.200 Scope of subpart.

This subpart prescribes policies and procedures for (a) assigning, retaining, or reassigning contract administration responsibility, (b) withholding normal functions or delegating additional functions when assigning contracts for administration, and (c) requesting and performing supporting contract administration. Subpart 42.3 lists both the normal contract administration functions and those requiring specific authorization by the contracting office.

#### 42.201 Definition.

“Supporting contract administration” means performance of specific contract administration functions by another contract administration office (CAO) as required by (a) the CAO to which a contract is assigned for administration or (b) the contracting office retaining a contract for administration.

#### 42.202 Assignment of contract administration.

(a) *Authority.* Except as provided in paragraph (b) below, assignment of a contract to a CAO for administration automatically carries with it the authority to perform all of the normal functions listed in 42.302(a) to the extent that those functions apply to the contract. The CAO has authority to perform the functions requiring specific authorizations, listed in 42.302(b), only to the extent specified by the contracting office. No other function shall be performed by the CAO unless delegated as provided under 42.202(c).

(b) *Withholding normal functions.* In assigning a contract for administration by a CAO, the contracting office may withhold individual functions among those listed in 42.302(a) if—

(1) Their retention by the contracting office is required by (i) the contracting agency’s agency-level acquisition regulations or (ii) a formal interagency cross-servicing arrangement (see 42.101(a) and 42.102(b)); or

(2) It is clear, after consultation with the CAO when appropriate, that they can best be performed by the contracting office and the decision to withhold them is approved above the contracting officer’s level.

(c) *Delegating additional functions.* For individual contracts or groups of contracts, the contracting office may

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delegate to the CAO functions not listed in 42.302; *provided, that—*

(1) Prior coordination with the CAO ensures the availability of required resources;

(2) In the case of authority to issue orders under provisioning procedures in existing contracts and under basic ordering agreements for items and services identified in the schedule, the head of the contracting activity or designee approves the delegation; and

(3) The delegation does not require the CAO to undertake new or follow-on acquisitions.

(d) *Transmittal and documentation.* When assigning a contract for administration by a CAO, the contracting officer shall—

(1) Enter on the contract the name and address of the CAO designated to administer it;

(2) Provide any special instructions, including any specific authorization to perform functions listed in 42.302(b), in an accompanying letter to the CAO;

(3) Include, along with the contract furnished to the CAO, copies of all contracting agency regulations or directives that are (i) incorporated into the contract by reference or (ii) otherwise necessary to administer the contract, unless copies have been previously provided; and

(4) Advise the contractor (and other activities as appropriate) of any functions withheld or additional functions delegated in the special instructions under subparagraph (2) above.

(e) *Contract administration office responsibilities.* For each contract assigned for administration, the CAO shall—

(1) Perform the functions listed in 42.302(a) to the extent that they apply to the contract, except for any functions specifically withheld under paragraph (b) above;

(2) Perform the functions listed in 42.302(b) to the extent that they apply and are specifically authorized by the contracting office;

(3) Serve as a focal point for inquiries and keep the contracting office and other interested activities advised concerning all pertinent matters related to administration of the contract;

(4) Request supporting contract administration under 42.204 when it is required; and

(5) Reassign contract administration under 42.206(a) if reassignment is required.

#### 42.203 Retention of contract administration.

(a) Contracting offices shall retain for administration any contract (1) not requiring the performance of contract administration functions (see 42.302) at or near contractor facilities, or (2) for which retention by the contracting office is prescribed by agency acquisition regulations. However, 30.601(a) and (b) require that retained contracts to which Cost Accounting Standards (CAS) apply be assigned for

CAS administration only. Instructions for marking and distributing these contracts are provided in 4.201(c).

(b) Contracting offices or CAO's may request supporting contract administration under 42.204 for contracts for which they have contract administration responsibility. However, if a substantial proportion of the normal contract administration functions listed in 42.302(a) are to be requested, an official above the contracting officer's level shall review the validity of retaining administration while requesting extensive supporting contract administration.

#### **42.204 Supporting contract administration.**

(a) A CAO assigned a contract for administration under 42.202 or a contracting office retaining administration under 42.203 may request supporting contract administration from the CAO cognizant of the contractor location where performance of specific contract administration functions is required. The request shall (1) be in writing, (2) clearly state the specific functions to be performed, and (3) be accompanied by a copy of pertinent contractual and other necessary documents.

(b) The prime contractor is responsible for managing its subcontracts. The CAO's concern with subcontracts is normally limited to evaluating the prime contractor's management of them (see Part 44). Therefore, supporting contract administration shall not be used for subcontracts unless (1) the Government would otherwise incur undue cost, (2) successful completion of the prime contract is threatened, or (3) it is authorized under paragraph (c) of this section or elsewhere in this regulation.

(c) For major system acquisitions (see Part 34), the contracting officer may designate certain high-risk or critical subsystems or components for special surveillance (see 44.205) in addition to requesting supporting contract administration. This surveillance shall be conducted in a manner fully consistent with the policy of calling upon the cognizant CAO to perform contract administration functions at a contractor's facility (see Subpart 42.1).

#### **42.205 Designation of the paying office.**

If the information is available, the contracting officer shall enter on the contract the name and address of the office designated under agency procedures to make payments on the contract. Unless agency acquisition regulations otherwise provide, the assignment of contract administration to a CAO does not affect the designation of the paying office.

#### **42.206 Reassignment of contract administration.**

(a) The administrative contracting officer at the CAO of initial assignment shall reassign a contract for administration when the need for reassignment results from (1) an incorrect initial assignment, (2) organizational transfer of the cognizant CAO, (3) establishment or disestablishment of a CAO, or (4) a change in a CAO's geographical responsibility.

(b) The contracting officer at the contracting office shall reassign a contract for administration when reasons other than those in paragraph (a) of this section make reassignment appropriate.

(c) To reassign a contract, the responsible contracting officer shall use a unilateral contract modification. The CAO of initial assignment shall transfer the contract file and necessary supporting documents to the successor CAO.

(d) When warranted by a change in circumstances and approved at a higher level, a contracting officer may recall a contract or function previously assigned for administration.

### **SUBPART 42.3—CONTRACT ADMINISTRATION OFFICE FUNCTIONS**

#### **42.301 General.**

When a contract is assigned for administration under Subpart 42.2, the contract administration office (CAO) shall perform contract administration functions in accordance with this regulation, the contract terms, and, unless otherwise agreed upon in formal cross-servicing arrangements (see 42.101(a)), the applicable regulations of the servicing agency.

#### **42.302 Contract administration functions.**

(a) The following are the normal contract administration functions to be performed by the cognizant CAO, to the extent they apply, as prescribed in 42.202:

- (1) Review the contractor's compensation structure.
- (2) Review the contractor's insurance plans.
- (3) Conduct post-award orientation conferences.
- (4) Review and evaluate contractors' proposals under Subpart 15.8 and, when negotiation will be accomplished by the contracting officer, furnish comments and recommendations to that officer.
- (5) Negotiate forward pricing rate agreements (see 15.809).
- (6) Negotiate advance agreements applicable to treatment of costs under contracts currently assigned for administration (see 31.109).
- (7) Determine the allowability of costs suspended or disapproved as required (see Subpart 42.8), direct the suspension or disapproval of costs when there is reason to believe they should be suspended or disapproved, and approve final vouchers.
- (8) Issue Notices of Intent to Disallow or not Recognize Costs (see Subpart 42.8).
- (9) Establish final indirect cost rates and billing rates for those contractors meeting the criteria for contracting officer determination in Subpart 42.7.
- (10) Attempt to resolve issues in controversy, using ADR procedures when appropriate (see Subpart 33.2); prepare findings of fact and issue decisions under the Disputes clause on matters in which the administrative contracting officer (ACO) has the authority to take definitive action.

(11) In connection with Cost Accounting Standards (see Part 30 and 48 CFR Chapter 99 (FAR Appendix B))—

(i) Determine the adequacy of the contractor's disclosure statements;

(ii) Determine whether disclosure statements are in compliance with Cost Accounting Standards and Part 31;

(iii) Determine the contractor's compliance with Cost Accounting Standards and disclosure statements, if applicable; and

(iv) Negotiate price adjustments and execute supplemental agreements under the Cost Accounting Standards clauses at 52.230-2, 52.230-3, 52.230-5 and 52.230-6.

(12) Review and approve or disapprove the contractor's requests for payments under the progress payments or performance-based payments clauses.

(13) Make payments on assigned contracts when prescribed in agency acquisition regulations (see 42.205).

(14) Manage special bank accounts.

(15) Ensure timely notification by the contractor of any anticipated overrun or underrun of the estimated cost under cost-reimbursement contracts.

(16) Monitor the contractor's financial condition and advise the contracting officer when it jeopardizes contract performance.

(17) Analyze quarterly limitation on payments statements and recover overpayments from the contractor.

(18) Issue tax exemption certificates.

(19) Ensure processing and execution of duty-free entry certificates.

(20) For classified contracts, administer those portions of the applicable industrial security program designated as ACO responsibilities (see Subpart 4.4).

(21) Issue work requests under maintenance, overhaul, and modification contracts.

(22) Negotiate prices and execute supplemental agreements for spare parts and other items selected through provisioning procedures when prescribed by agency acquisition regulations.

(23) Negotiate and execute contractual documents for settlement of partial and complete contract terminations for convenience, except as otherwise prescribed by Part 49.

(24) Negotiate and execute contractual documents settling cancellation charges under multiyear contracts.

(25) Process and execute novation and change of name agreements under Subpart 42.12.

(26) Perform property administration (see Part 45).

(27) Approve contractor acquisition or fabrication of special test equipment under the clause at 52.245-18, Special Test Equipment.

(28) Perform necessary screening, redistribution, and disposal of contractor inventory.

(29) Issue contract modifications requiring the contractor to provide packing, crating, and handling services on excess Government property. When the ACO determines it to be in the Government's interests, the

services may be secured from a contractor other than the contractor in possession of the property.

(30) In facilities contracts—

(i) Evaluate the contractor's requests for facilities and for changes to existing facilities and provide appropriate recommendations to the contracting officer;

(ii) Ensure required screening of facility items before acquisition by the contractor;

(iii) Approve use of facilities on a noninterference basis in accordance with the clause at 52.245-9, Use and Charges;

(iv) Ensure payment by the contractor of any rental due; and

(v) Ensure reporting of items no longer needed for Government production.

(31) Perform production support, surveillance, and status reporting, including timely reporting of potential and actual slippages in contract delivery schedules.

(32) Perform pre-award surveys (see Subpart 9.1).

(33) Advise and assist contractors regarding their priorities and allocations responsibilities and assist contracting offices in processing requests for special assistance and for priority ratings for privately owned capital equipment.

(34) Monitor contractor industrial labor relations matters under the contract; apprise the contracting officer and, if designated by the agency, the cognizant labor relations advisor, of actual or potential labor disputes; and coordinate the removal of urgently required material from the strikebound contractor's plant upon instruction from, and authorization of, the contracting officer.

(35) Perform traffic management services, including issuance and control of Government bills of lading and other transportation documents.

(36) Review the adequacy of the contractor's traffic operations.

(37) Review and evaluate preservation, packaging, and packing.

(38) Ensure contractor compliance with contractual quality assurance requirements (see Part 46).

(39) Ensure contractor compliance with contractual safety requirements.

(40) Perform engineering surveillance to assess compliance with contractual terms for schedule, cost, and technical performance in the areas of design, development, and production.

(41) Evaluate for adequacy and perform surveillance of contractor engineering efforts and management systems that relate to design, development, production, engineering changes, subcontractors, tests, management of engineering resources, reliability and maintainability, data control systems, configuration management, and independent research and development.

(42) Review and evaluate for technical adequacy the contractor's logistics support, maintenance, and modification programs.

(43) Report to the contracting office any inadequacies noted in specifications.

(44) Perform engineering analyses of contractor cost proposals.

(45) Review and analyze contractor-proposed engineering and design studies and submit comments and recommendations to the contracting office, as required.

(46) Review engineering change proposals for proper classification, and when required, for need, technical adequacy of design, producibility, and impact on quality, reliability, schedule, and cost; submit comments to the contracting office.

(47) Assist in evaluating and make recommendations for acceptance or rejection of waivers and deviations.

(48) Evaluate and monitor the contractor's procedures for complying with procedures regarding restrictive markings on data.

(49) Monitor the contractor's value engineering program.

(50) Review, approve or disapprove, and maintain surveillance of the contractor's purchasing system (see Part 44).

(51) Consent to the placement of subcontracts.

(52) Review, evaluate, and approve plant or division-wide small, small disadvantaged and women-owned small business master subcontracting plans.

(53) Obtain the contractor's currently approved company- or division-wide plans for small, small disadvantaged and women-owned small business subcontracting for its commercial products, or, if there is no currently approved plan, assist the contracting officer in evaluating the plans for those products.

(54) Assist the contracting officer, upon request, in evaluating an offeror's proposed small, small disadvantaged and women-owned small business subcontracting plans, including documentation of compliance with similar plans under prior contracts.

(55) By periodic surveillance, ensure the contractor's compliance with small, small disadvantaged and women-owned small business subcontracting plans and any labor surplus area contractual requirements; maintain documentation of the contractor's performance under and compliance with these plans and requirements; and provide advice and assistance to the firms involved, as appropriate.

(56) Maintain surveillance of flight operations.

(57) Assign and perform supporting contract administration.

(58) Ensure timely submission of required reports.

(59) Issue administrative changes, correcting errors or omissions in typing, contractor address, facility or activity code, remittance address, computations which do not require additional contract funds, and other such changes (see 43.101).

(60) Cause release of shipments from contractor's plants according to the shipping instructions. When applicable, the order of assigned priority shall be followed; shipments within the same priority shall be determined by date of the instruction.

(61) Obtain contractor proposals for any contract price adjustments resulting from amended shipping instructions. ACO's shall review all amended shipping instructions on a periodic, consolidated basis to assure that adjustments are timely made. Except when the ACO has settlement authority, the ACO shall forward the proposal to the contracting officer for contract modification. The ACO shall not delay shipments pending completion and formalization of negotiations of revised shipping instructions.

(62) Negotiate and/or execute supplemental agreements, as required, making changes in packaging subcontractors or contract shipping points.

(63) Cancel unilateral purchase orders when notified of nonacceptance by the contractor. The ACO shall notify the contracting officer when the purchase order is canceled.

(64) Negotiate and execute one-time supplemental agreements providing for the extension of contract delivery schedules up to 90 days on contracts with an assigned Criticality Designator of C (see 42.1105). Notification that the contract delivery schedule is being extended shall be provided to the contracting office. Subsequent extensions on any individual contract shall be authorized only upon concurrence of the contracting office.

(65) Accomplish administrative closeout procedures (see 4.804-5).

(66) Determine that the contractor has a drug-free workplace program and drug-free awareness program (see Subpart 23.5).

(67) Support the program, product, and project offices regarding program reviews, program status, program performance and actual or anticipated program problems.

(68) Monitor the contractor's compliance with the requirements of environmental laws including the Resource Conservation and Recovery Act (RCRA) (42 U.S.C. 6901, et seq.) and other environmental requirements as specified in the contract (see Part 23). Responsibilities of the contracting officer shall include—

(i) Verification of contractor compliance with specifications requiring the use of environmentally preferable and energy-efficient materials and the use of materials or delivery of end items with the specified recovered material content. This shall occur as part of the quality assurance procedures set forth in Part 46.

(ii) As required in the contract, ensuring that the contractor complies with the reporting requirements relating to recovered material content utilized in contract performance.

(69) Administer commercial financing provisions and monitor contractor security to ensure its continued adequacy to cover outstanding payments, when on-site review is required.

(b) The CAO shall perform the following functions only when and to the extent specifically authorized by the contracting office:

(1) Negotiate or negotiate and execute supplemental agreements incorporating contractor proposals resulting from change orders issued under the Changes clause. Before completing negotiations, coordinate any delivery schedule change with the contracting office.

(2) Negotiate prices and execute priced exhibits for unpriced orders issued by the contracting officer under basic ordering agreements.

(3) Negotiate or negotiate and execute supplemental agreements changing contract delivery schedules.

(4) Negotiate or negotiate and execute supplemental agreements providing for the deobligation of unexpended dollar balances considered excess to known contract requirements.

(5) Issue amended shipping instructions and, when necessary, negotiate and execute supplemental agreements incorporating contractor proposals resulting from these instructions.

(6) Negotiate changes to interim billing prices.

(7) Negotiate and definitize adjustments to contract prices resulting from exercise of an economic price adjustment clause (see Subpart 16.2).

(8) Issue change orders and negotiate and execute resulting supplemental agreements under contracts for ship construction, conversion, and repair.

(9) Execute supplemental agreements on firm-fixed-price supply contracts to reduce required contract line item quantities and deobligate excess funds when notified by the contractor of an inconsequential delivery shortage, and it is determined that such action is in the best interests of the Government, notwithstanding the default provisions of the contract. Such action will be taken only upon the written request of the contractor and, in no event, shall the total downward contract price adjustment resulting from an inconsequential delivery shortage exceed \$250.00 or 5 percent of the contract price, whichever is less.

(10) Execute supplemental agreements to permit a change in place of inspection at origin specified in firm-fixed-price supply contracts awarded to nonmanufacturers, as deemed necessary to protect the Government's interests.

(11) Prepare evaluations of contractor performance in accordance with Subpart 42.15.

(c) Any additional contract administration functions not listed in 42.302(a) and (b), or not otherwise delegated, remain the responsibility of the contracting office.

#### **SUBPART 42.4—CORRESPONDENCE AND VISITS**

##### **42.401 Contract correspondence.**

(a) The contracting officer (or other contracting agency personnel) normally shall (1) forward correspondence relating to assigned contract administration functions through the cognizant contract administration office (CAO) to the contractor, and (2) provide a copy for the CAO's file. When urgency requires sending such correspondence directly to the contractor, a copy shall be sent concurrently to the CAO.

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(b) The CAO shall send the contracting office a copy of pertinent correspondence conducted between the CAO and the contractor.

##### **42.402 Visits to contractors' facilities.**

(a) Government personnel planning to visit a contractor's facility in connection with one or more Government contracts shall provide the cognizant CAO with the following information, sufficiently in advance to permit the CAO to make necessary arrangements. Such notification is for the purpose of eliminating duplicative reviews, requests, investigations, and audits relating to the contract administration functions in subpart 42.3 delegated to CAO's and shall, as a minimum, include the following (see also paragraph (b) of this section):

(1) Visitors' names, official positions, and security clearances.

(2) Date and duration of visit.

(3) Name and address of contractor and personnel to be contacted.

(4) Contract number, program involved, and purpose of visit.

(5) If desired, visitors to a contractor's plant may request that a representative of the CAO accompany them. In any event, the CAO has final authority to decide whether a representative shall accompany a visitor.

(b) If the visit will result in reviewing, auditing, or obtaining any information from the contractor relating to contract administration functions, the prospective visitor shall identify the information in sufficient detail so as to permit the CAO, after consultation with the contractor and the cognizant audit office, to determine whether such information, adequate to fulfill the requirement, has recently been reviewed by or is available within the Government. If so, the CAO will discourage the visit and refer the prospective visitor to the Government office where such information is located. Where the office is the CAO, such information will be immediately forwarded or otherwise made available to the requestor.

(c) Visitors shall fully inform the CAO of any agreements reached with the contractor or other results of the visit that may affect the CAO.

##### **42.403 Evaluation of contract administration offices.**

Onsite inspections or evaluations of the performance of the assigned functions of a contract administration office shall be accomplished only by or under the direction of the agency of which that office is a part.

#### **SUBPART 42.5—POSTAWARD ORIENTATION**

##### **42.500 Scope of subpart.**

This subpart prescribes policies and procedures for the postaward orientation of contractors and subcontractors through (a) a conference or (b) a letter or other form of written communication.

**42.501 General.**

(a) A postaward orientation aids both Government and contractor personnel to (1) achieve a clear and mutual understanding of all contract requirements, and (2) identify and resolve potential problems. However, it is not a substitute for the contractor's fully understanding the work requirements at the time offers are submitted, nor is it to be used to alter the final agreement arrived at in any negotiations leading to contract award.

(b) Postaward orientation is encouraged to assist small business, small disadvantaged and women-owned small business concerns (see Part 19).

(c) While cognizant Government or contractor personnel may request the contracting officer to arrange for orientation, it is up to the contracting officer to decide whether a postaward orientation in any form is necessary.

(d) Maximum benefits will be realized when orientation is conducted promptly after award.

**42.502 Selecting contracts for postaward orientation.**

When deciding whether postaward orientation is necessary and, if so, what form it shall take, the contracting officer shall consider, as a minimum, the—

(a) Nature and extent of the preaward survey and any other prior discussions with the contractor;

(b) Type, value, and complexity of the contract;

(c) Complexity and acquisition history of the product or service;

(d) Requirements for spare parts and related equipment;

(e) Urgency of the delivery schedule and relationship of the product or service to critical programs;

(f) Length of the planned production cycle;

(g) Extent of subcontracting;

(h) Contractor's performance history and experience with the product or service;

(i) Contractor's status, if any, as a small business, small disadvantaged or women-owned small business concern;

(j) Contractor's performance history with small, small disadvantaged and women-owned small business subcontracting programs;

(k) Safety precautions required for hazardous materials or operations; and

(l) Complex financing arrangements, such as progress payments, advance payments, or guaranteed loans.

**42.503 Postaward conferences.**

**42.503-1 Postaward conference arrangements.**

(a) The contracting officer who decides that a conference is needed is responsible for—

(1) Establishing the time and place of the conference;

(2) Preparing the agenda, when necessary;

(3) Notifying appropriate Government representatives (e.g., contracting/contract administration office) and the contractor;

(4) Designating or acting as the chairperson;

(5) Conducting a preliminary meeting of Government personnel; and

(6) Preparing a summary report of the conference.

(b) When the contracting office initiates a conference, the arrangements may be made by that office or, at its request, by the contract administration office.

**42.503-2 Postaward conference procedure.**

The chairperson of the conference shall conduct the meeting. Unless a contract change is contemplated, the chairperson shall emphasize that it is not the purpose of the meeting to change the contract. The contracting officer may make commitments or give directions within the scope of the contracting officer's authority and shall put in writing and sign any commitment or direction, whether or not it changes the contract. Any change to the contract that results from the postaward conference shall be made only by a contract modification (see 43.101) referencing the applicable terms of the contract. Participants without authority to bind the Government shall not take action that in any way alters the contract. The chairperson shall include in the summary report (see 42.503-3 below) all information and guidance provided to the contractor.

**42.503-3 Postaward conference report.**

The chairperson shall prepare and sign a report of the postaward conference. The report shall cover all items discussed, including areas requiring resolution, controversial matters, the names of the participants assigned responsibility for further actions, and the due dates for the actions. The chairperson shall furnish copies of the report to the contracting office, the contract administration office, the contractor, and others who require the information.

**42.504 Postaward letters.**

In some circumstances, a letter or other written form of communication to the contractor may be adequate postaward orientation (in lieu of a conference). The letter should identify the Government representative responsible for administering the contract and cite any unusual or significant contract requirements. The rules on changes to the contract in 42.503-2 also apply here.

**42.505 Postaward subcontractor conferences.**

(a) The prime contractor is generally responsible for conducting postaward conferences with subcontractors. However, the prime contractor may invite Government representatives to a conference with subcontractors, or the Government may request that the prime contractor initiate a conference with subcontractors. The prime contractor should ensure that representatives from involved contract administration offices are invited.

(b) Government representatives (1) must recognize the lack of privity of contract between the Government and subcontractors, (2) shall not take action that is inconsistent with or alters subcontracts, and (3) shall ensure that any changes in direction or commitment affecting the prime contract or contractor resulting from a subcontractor conference are made by written direction of the contracting officer to the prime contractor in the same manner as described in 42.503-2.



## 42.601

### SUBPART 42.6—CORPORATE ADMINISTRATIVE CONTRACTING OFFICER

#### 42.601 General.

Contractors with more than one operational location (e.g., division, plant, or subsidiary) often have corporate-wide policies, procedures, and activities requiring Government review and approval and affecting the work of more than one administrative contracting officer (ACO). In these circumstances, effective and consistent contract administration may require the assignment of a corporate administrative contracting officer (CACO) to deal with corporate management and to perform selected contract administration functions on a corporate-wide basis.

#### 42.602 Assignment and location.

(a) A CACO may be assigned only when (1) the contractor has at least two locations with resident ACO's or (2) the need for a CACO is approved by the agency head or designee (for this purpose, a nonresident ACO will be considered as resident if at least 75 percent of the ACO's effort is devoted to a single contractor). One of the resident ACO's may be designated to perform the CACO functions, or a full-time CACO may be assigned. In determining the location of the CACO, the responsible agency shall take into account such factors as the location(s) of the corporate records, corporate office, major plant, cognizant government auditor, and overall cost effectiveness.

(b) A decision to initiate or discontinue a CACO assignment should be based on such factors as (1) the benefits of coordination and liaison at the corporate level, (2) the volume of Government sales, (3) the degree of control exercised by the contractor's corporate office over Government-oriented lower-tier operating elements, and (4) the impact of corporate policies and procedures on those elements.

(c) Responsibility for assigning a CACO shall be determined as follows:

(1) When all locations of a corporate entity are under the contract administration cognizance of a single agency, that agency is responsible.

(2) When the locations are under the contract administration cognizance of more than one agency, the agencies concerned shall agree on the responsible agency (normally on the basis of the agency with the largest unliquidated dollar balance of affected contracts). In such cases, agencies may sometimes also consider geographic location.

(d) The directory of contract administration components referenced in 42.102(a) includes a listing of CACO's and the contractors for which they are assigned responsibility. When the directory indicates that the services of a CACO are available, the provisions of Subpart 42.1 apply to the CACO functions.

#### 42.603 Responsibilities.

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(a) The CACO shall perform, on a corporate-wide basis, the contract administration functions (see Subpart 42.3) as designated by the responsible agency. Typical CACO functions include (1) the determination of final indirect cost rates for cost-reimbursement contracts, (2) establishment of advance agreements or recommendations on corporate/ home office expense allocations, and (3) administration of Cost Accounting Standards (CAS) applicable to corporate-level and corporate-directed accounting practices.

(b) The CACO shall—

(1) Fully utilize the cognizant contract audit agency financial and advisory accounting services, including (i) advice regarding the acceptability of corporate-wide policies and (ii) advisory audit reports;

(2) Keep cognizant ACO's and auditors informed of important matters under consideration and determinations made; and

(3) Solicit their advice and participation as appropriate.

### SUBPART 42.7—INDIRECT COST RATES

#### 42.700 Scope of subpart.

This subpart prescribes policies and procedures for establishing (a) billing rates and (b) final indirect cost rates.

#### 42.701 Definitions.

“Billing rate” means an indirect cost rate (a) established temporarily for interim reimbursement of incurred indirect costs and (b) adjusted as necessary pending establishment of final indirect cost rates.

“Business unit” (see 31.001).

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

“Indirect cost” (see 31.001 and 31.203).

“Indirect cost rate” means the percentage or dollar factor that expresses the ratio of indirect expense incurred in a given period to direct labor cost, manufacturing cost, or another appropriate base for the same period.

#### 42.702 Purpose.

(a) Establishing final indirect cost rates under this subpart provides—

(1) Uniformity of approach with a contractor when more than one contract or agency is involved;

(2) Economy of administration; and



(3) Timely settlement under cost-reimbursement contracts.

(b) Establishing billing rates provides a method for interim reimbursement of indirect costs at estimated rates subject to adjustment during contract performance and at the time the final indirect cost rates are established.

**42.703 General.**

**42.703-1 Policy.**

(a) A single agency (see 42.705-1(a)) shall be responsible for establishing indirect cost rates for each business unit. These rates shall be binding on all agencies and their contracting offices, unless otherwise specifically prohibited by statute.

(b) Billing rates and final indirect cost rates shall be used in reimbursing indirect costs under cost-reimbursement contracts and in determining progress payments under fixed-price contracts.

(c) Contracting officers shall—

(1) Unless the quick-closeout procedure in 42.708 is used, use final indirect cost rates of a business unit for a given period, which shall be binding for all the cost-reimbursement contracts of the business unit for that period, subject to any specific limitation in a contract or advance agreement (when contracts of more than one agency are involved, see 42.101(c)); and

(2) To ensure compliance with 10 U.S.C. 2324(a) and 41 U.S.C. 256(a), use established final indirect cost rates in negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established.

**42.703-2 Certificate of indirect costs.**

(a) *General.* In accordance with 10 U.S.C. 2324(h) and 41 U.S.C. 256(h), a proposal shall not be accepted and no agreement shall be made to establish billing rates or final indirect cost rates unless the costs have been certified by the contractor.

(b) *Waiver of certification.* (1) The agency head, or designee, may waive the certification requirement when—

(i) It is determined to be in the interest of the United States; and

(ii) The reasons for the determination are put in writing and made available to the public.

(2) A waiver may be appropriate for a contract with—

(i) A foreign government or international organization, such as a subsidiary body of the North Atlantic Treaty Organization;

(ii) A state or local government subject to OMB Circular A-87;

(iii) An educational institution subject to OMB Circular A-21; and

(iv) A nonprofit organization subject to OMB Circular A-122.

(c) *Failure to certify.* (1) If the contractor has not certified its proposal for billing rates or indirect cost rates and a waiver is not appropriate, the contracting officer shall unilaterally establish the rates if they are necessary for continuation of the contract.

(2) Rates established unilaterally should be—

(i) Based on audited historical data or other available data as long as unallowable costs are excluded; and

(ii) Set low enough to ensure that potentially unallowable costs will not be reimbursed.

(d) *False certification.* The contracting officer should consult with legal counsel to determine appropriate action when a contractor certificate of indirect costs is thought to be false.

(e) *Penalties for unallowable costs.* 10 U.S.C. 2324(a) through (d) and 41 U.S.C. 256(a) through (d) prescribe penalties for submission of unallowable costs in final indirect cost rate proposals (see 42.709 for penalties and contracting officer responsibilities).

(f) *Contract clause.* (1) Except as provided in paragraph (f)(2) of this subsection, the clause at 52.242-4, Certification of Indirect Costs, shall be incorporated into all solicitations and contracts which provide for—

(i) Interim reimbursement of indirect costs;

(ii) Establishment of final indirect cost rates; or

(iii) Contract financing that includes interim payment of indirect costs, e.g., progress payments based on cost (Subpart 32.5) or progress payments based on percentage or stage of completion.

(2) The Department of Energy may provide an alternate clause in its agency supplement for its Management and Operating contracts.

**42.704 Billing rates.**

(a) The contracting officer or auditor responsible under 42.705 for determining the final indirect cost rate ordinarily shall also be responsible for determining the billing rate.

(b) The contracting officer or auditor shall establish a billing rate on the basis of information resulting from recent review, previous audits or experience, or similar reliable data or experience of other contracting activities. In establishing the billing rate, the contracting officer or auditor should ensure that it is as close as possible to the final indirect cost rate anticipated for the contractor's fiscal period, as adjusted for any unallowable costs. When the contracting officer or auditor determines that the dollar value of contracts requiring use of a billing rate does not warrant submission of a detailed billing rate proposal, the billing rate may be established by making appropriate adjustments from the prior year's indirect cost experience to eliminate unallowable and nonrecurring costs and to reflect new or changed conditions.

(c) Once established, billing rates may be prospectively or retroactively revised by mutual agreement of the contracting officer or auditor and the contractor at either

party's request, to prevent substantial overpayment or underpayment.

(d) The elements of indirect cost and the base or bases used in computing billing rates shall not be construed as determinative of the indirect costs to be distributed or of the bases of distribution to be used in the final settlement.

**42.705 Final indirect cost rates.**

Final indirect cost rates shall be established on the basis of (a) contracting officer determination procedure (see 42.705-1) or (b) auditor determination procedure (see 42.705-2).

**42.705-1 Contracting officer determination procedure.**

(a) *Applicability and responsibility.* Contracting officer determination shall be used for the following, with the indicated cognizant contracting officer responsible for establishing the final indirect cost rates:

(1) Business units of a multidivisional corporation under the cognizance of a corporate administrative contracting officer (see Subpart 42.6), with that officer responsible for the determination, assisted, as required, by the administrative contracting officers, assigned to the individual business units. Negotiations may be conducted on a coordinated or centralized basis, depending upon the degree of centralization within the contractor's organization.

(2) Business units not under the cognizance of a corporate administrative contracting officer, but having a resident administrative contracting officer (see 42.602), with that officer responsible for the determination. For this purpose, a nonresident administrative contracting officer is considered as resident if at least 75 percent of the administrative contracting officer's time is devoted to a single contractor.

(3) Business units not included in subparagraph (1) or (2) above, but where the predominant interest (on the basis of unliquidated contract dollar amount) is in an agency whose procedures require contracting officer determination. In such cases, the responsible contracting officer will be as designated under that agency's procedures.

(4) Educational institutions (see 42.705-3 for responsibility and procedures).

(5) State and local governments (see 42.705-4).

(6) Nonprofit organizations other than educational and state and local governments (see 42.705-5).

(b) *Procedures.* (1) In accordance with the Allowable Cost and Payment clause at 52.216-7 or 52.216-13, the contractor shall submit to the contracting officer and, if required by agency procedures, to the cognizant auditor a final indirect cost rate proposal reflecting actual cost experience during the covered period, together with supporting cost or pricing data.

(2) The auditor shall submit to the contracting officer an advisory audit report (i) identifying any relevant

advance agreements or restrictive terms of specific contracts and (ii) including the information required by 15.805-5(e).

(3) The contracting officer shall head the Government negotiating team, which includes the cognizant auditor and technical or functional personnel as required. Contracting offices having significant dollar interest shall be invited to participate in the negotiation and in the preliminary discussion of critical issues. Individuals or offices that have provided a significant input to the Government position should be invited to attend.

(4) The Government negotiating team shall develop a negotiation position. Pursuant to 10 U.S.C. 2324(f) and 41 U.S.C. 256(f), the contracting officer shall—

(i) Not resolve any questioned costs until obtaining—

- (A) Adequate documentation on the costs; and
- (B) The contract auditor's opinion on the allowability of the costs.

(ii) Whenever possible, invite the contract auditor to serve as an advisor at any negotiation or meeting with the contractor on the determination of the contractor's final indirect cost rates.

(5) The cognizant contracting officer shall—

- (i) Conduct negotiations;
- (ii) Prepare a written indirect cost rate agreement conforming to the requirements of the contracts;
- (iii) Prepare, sign, and place in the contractor general file (see 4.801(c)(3)) a negotiation memorandum covering (A) the disposition of significant matters in the advisory audit report, (B) reconciliation of all costs questioned, with identification of items and amounts allowed or disallowed in the final settlement as well as the disposition of period costing or allocability issues, (C) reasons why any recommendations of the auditor or other Government advisors were not followed, and (D) identification of cost or pricing data submitted during the negotiations and relied upon in reaching a settlement; and
- (iv) Distribute resulting documents in accordance with 42.706.
- (v) Notify the contractor of the individual costs which were considered unallowable and the respective amounts of the disallowance.

**42.705-2 Auditor determination procedure.**

(a) *Applicability and responsibility.* (1) The cognizant Government auditor shall establish final indirect cost rates for business units not covered in 42.705-1(a).

(2) In addition, auditor determination may be used for business units that are covered in 42.705-1(a) when the contracting officer and auditor agree that the indirect costs can be settled with little difficulty and any of the following circumstances apply:

- (i) The business unit has primarily fixed-price

contracts, with only minor involvement in cost-reimbursement contracts.

(ii) The administrative cost of contracting officer determination would exceed the expected benefits.

(iii) The business unit does not have a history of disputes and there are few cost problems.

(iv) The contracting officer and auditor agree that special circumstances require auditor determination.

(b) *Procedures.* (1) The contractor shall submit to the cognizant contracting officer and auditor a final indirect cost rate proposal reflecting actual cost experience during the covered period, together with supporting cost or pricing data.

(2) The auditor shall—

(i) Audit the proposal and seek agreement on it with the contractor;

(ii) In coordination with the affected contracting officers, prepare an indirect cost rate agreement conforming to the requirements of the contracts;

(iii) Prepare an audit report including the information required by 15.805-5(e);

(iv) If agreement with the contractor is not reached, forward the audit report to the contracting officer designated by the agency with the pre-dominant interest (on the basis of unliquidated contract dollar amounts) or, where applicable, the contracting officer designated in 42.705- 2(a)(2) above, who will then resolve the disagreement; and

(v) Distribute resulting documents in accordance with 42.706.

**42.705-3 Educational institutions.**

(a) *General.* (1) Postdetermined final indirect cost rates shall be used in the settlement of indirect costs for all cost-reimbursement contracts with educational institutions, unless predetermined final indirect cost rates are authorized and used (see paragraph (b) below).

(2) OMB Circular No. A-88, Indirect Cost Rates, Audit, and Audit Followup at Educational Institutions, (i) assigns each educational institution to a single Government agency for the negotiation of indirect cost rates and (ii) provides that those rates shall be accepted by all Federal agencies. Cognizant Government agencies and educational institutions are listed in the Directory of Federal Contract Audit Offices (see 42.102(a)).

(3) The cognizant agency shall establish the billing rates and final indirect cost rates at the educational institution, consistent with the requirements of this subpart, Subpart 31.3, and the OMB Circular. The agency shall follow the procedures outlined in 42.705-1(b).

(4) If the cognizant agency is unable to reach agreement with an institution, the appeals system of the cognizant agency shall be followed for resolution of the dispute.

(b) *Predetermined final indirect cost rates.* (1) Under cost-reimbursement research and development contracts with

universities, colleges, or other educational institutions (41 U.S.C. 254a), payment for reimbursable indirect costs may be made on the basis of predetermined final indirect cost rates. The cognizant agency is not required to establish predetermined rates, but if they *are* established, their use must be extended to all the institution's Government contracts.

(2) In deciding whether the use of predetermined rates would be appropriate for the educational institution concerned, the agency should consider both the stability of the institution's indirect costs and bases over a period of years and any anticipated changes in the amount of the direct and indirect costs.

(3) Unless their use is approved at a level in the agency (see subparagraph (a)(2) above) higher than the contracting officer, predetermined rates shall not be used when—

(i) There has been no recent audit of the indirect costs;

(ii) There have been frequent or wide fluctuations in the indirect cost rates and the bases over a period of years; or

(iii) The estimated reimbursable costs for any individual contract are expected to exceed \$1 million annually.

(4)(i) If predetermined rates are to be used and no rates have been previously established for the institution's current fiscal year, the agency shall obtain from the institution a proposal for predetermined rates.

(ii) If the proposal is found to be generally acceptable, the agency shall negotiate the predetermined rates with the institution. The rates should be based on an audit of the institution's costs for the year immediately preceding the year in which the rates are being negotiated. If this is not possible, an earlier audit may be used, but appropriate steps should be taken to identify and evaluate significant variations in costs incurred or in bases used that may have a bearing on the reasonableness of the proposed rates. However, in the case of smaller contracts (e.g., \$100,000 or less), an audit made at an earlier date is acceptable if (A) there have been no significant changes in the contractor's organization and (B) it is reasonably apparent that another audit would have little effect on the rates finally agreed upon and the potential for overpayment of indirect cost is relatively insignificant.

(5) If predetermined rates are used—

(i) The contracting officer shall include the negotiated rates and bases in the contract Schedule; and

(ii) See 16.307(i), which prescribes the clause at 52.216-15, Predetermined Indirect Cost Rates.

(6) Predetermined indirect cost rates shall be applicable for a period of not more than four years. The agency shall obtain the contractor's proposal for new predetermined rates sufficiently in advance so that the new rates, based on current data, may be promptly negotiated near the beginning of the new fiscal year or other period agreed to

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by the parties (see paragraphs (b) and (d) of the clause at 52.216-15, Predetermined Indirect Cost Rates).

(7) Contracting officers shall use billing rates established by the agency to reimburse the contractor for work performed during a period not covered by predetermined rates.

**42.705-4 State and local governments.**

OMB Circular No. A-87 concerning cost principles for state and local governments (see Subpart 31.6) establishes the cognizant agency concept and procedures for determining a cognizant agency for approving state and local government indirect costs associated with federally-funded programs and activities. The indirect cost rates negotiated by the cognizant agency will be used by all Federal agencies that also award contracts to these same state and local governments.

**42.705-5 Nonprofit organizations other than educational and state and local governments.**

See OMB Circular No. A-122.

**42.706 Distribution of documents.**

(a) The contracting officer or auditor shall promptly distribute executed copies of the indirect cost rate agreement to the contractor and to each affected contracting agency and shall provide copies of the agreement for the contract files, in accordance with the guidance for contract modifications in Subpart 4.2, Contract Distribution.

(b) Copies of the negotiation memorandum prepared under contracting officer determination or audit report prepared under auditor determination shall be furnished, as appropriate, to the contracting offices and Government audit offices.

**42.707 Cost-sharing rates and limitations on indirect cost rates.**

(a) Cost-sharing arrangements, when authorized, may call for the contractor to participate in the costs of the contract by accepting indirect cost rates lower than the anticipated actual rates. In such cases, a negotiated indirect cost rate ceiling may be incorporated into the contract for prospective application. For cost sharing under research and development contracts, see 35.003(b).

(b)(1) Other situations may make it prudent to provide a final indirect cost rate ceiling in a contract. Examples of such circumstances are when the proposed contractor—

(i) Is a new or recently reorganized company, and there is no past or recent record of incurred indirect costs;

(ii) Has a recent record of a rapidly increasing indirect cost rate due to a declining volume of sales without a commensurate decline in indirect expenses; or

(iii) Seeks to enhance its competitive position in a particular circumstance by basing its proposal on

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indirect cost rates lower than those that may reasonably be expected to occur during contract performance, thereby causing a cost overrun.

(2) In such cases, an equitable ceiling covering the final indirect cost rates may be negotiated and specified in the contract.

(c) When ceiling provisions are utilized, the contract shall also provide that (1) the Government will not be obligated to pay any additional amount should the final indirect cost rates exceed the negotiated ceiling rates and, (2) in the event the final indirect cost rates are less than the negotiated ceiling rates, the negotiated rates will be reduced to conform with the lower rates.

**42.708 Quick-closeout procedure.**

(a) The contracting officer responsible for contract closeout shall negotiate the settlement of indirect costs for a specific contract, in advance of the determination of final indirect cost rates, if—

(1) The contract is physically complete;

(2) The amount of unsettled indirect cost to be allocated to the contract is relatively insignificant. Indirect cost amounts will be considered insignificant when—

(i) The total unsettled indirect cost to be allocated to any one contract does not exceed \$1,000,000; and

(ii) Unless otherwise provided in agency procedures, the cumulative unsettled indirect costs to be allocated to one or more contracts in a single fiscal year do not exceed 15 percent of the estimated, total unsettled indirect costs allocable to cost-type contracts for that fiscal year. The contracting officer may waive the 15 percent restriction based upon a risk assessment that considers the contractor's accounting, estimating, and purchasing systems; other concerns of the cognizant contract auditors; and any other pertinent information; and

(3) Agreement can be reached on a reasonable estimate of allocable dollars.

(b) Determinations of final indirect costs under the quick-closeout procedure provided for by the Allowable Cost and Payment clause at 52.216-7 or 52.216-13 shall be final for the contract it covers and no adjustment shall be made to other contracts for over- or under-recoveries of costs allocated or allocable to the contract covered by the agreement.

(c) Indirect cost rates used in the quick closeout of a contract shall not be considered a binding precedent when establishing the final indirect cost rates for other contracts.

**42.709 Scope.**

(a) This section implements 10 U.S.C. 2324(a) through (d) and 41 U.S.C. 256(a) through (d). It covers the assessment of penalties against contractors which include unallowable indirect costs in—

(1) Final indirect cost rate proposals; or

(2) The final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract.

(b) This section applies to all contracts in excess of \$500,000, except fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of commercial items.

**42.709-1 General.**

(a) The following penalties apply to contracts covered by this section:

(1) If the indirect cost is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the penalty is equal to—

(i) The amount of the disallowed costs allocated to contracts that are subject to this section for which an indirect cost proposal has been submitted; plus

(ii) Interest on the paid portion, if any, of the disallowance.

(2) If the indirect cost was determined to be unallowable for that contractor before proposal submission, the penalty is two times the amount in paragraph (a)(1)(i) of this section.

(b) These penalties are in addition to other administrative, civil, and criminal penalties provided by law.

(c) It is not necessary for unallowable costs to have been paid to the contractor in order to assess a penalty.

**42.709-2 Responsibilities.**

(a) The cognizant contracting officer is responsible for—

(1) Determining whether the penalties in 42.709-1(a) should be assessed;

(2) Determining whether such penalties should be waived pursuant to 42.709-5; and

(3) Referring the matter to the appropriate criminal investigative organization for review and for appropriate coordination of remedies, if there is evidence that the contractor knowingly submitted unallowable costs.

(b) The contract auditor, in the review and/or the determination of final indirect cost proposals for contracts subject to this section, is responsible for—

(1) Recommending to the contracting officer which costs may be unallowable and subject to the penalties in 42.709-1(a);

(2) Providing rationale and supporting documentation for any recommendation; and

(3) Referring the matter to the appropriate criminal investigative organization for review and for appropriate coordination of remedies, if there is evidence that the contractor knowingly submitted unallowable costs.

**42.709-3 Assessing the penalty.**

Unless a waiver is granted pursuant to 42.709-5, the cognizant contracting officer shall—

(a) Assess the penalty in 42.709-1(a)(1), when the submitted cost is expressly unallowable under a cost principle in the FAR or an executive agency supplement that defines

the allowability of specific selected costs; or

(b) Assess the penalty in 42.709-1(a)(2), when the submitted cost was determined to be unallowable for that contractor prior to submission of the proposal. Prior determinations of unallowability may be evidenced by—

(1) A DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved (see 48 CFR 242.705-2), or any similar notice which the contractor elected not to appeal and was not withdrawn by the cognizant Government agency;

(2) A contracting officer final decision which was not appealed;

(3) A prior executive agency Board of Contract Appeals or court decision involving the contractor, which upheld the cost disallowance; or

(4) A determination or agreement of unallowability under 31.201-6.

(c) Issue a final decision (see 33.211) which includes a demand for payment of any penalty assessed under paragraph (a) or (b) of this section. The letter shall state that the determination is a final decision under the Disputes clause of the contract. (Demanding payment of the penalty is separate from demanding repayment of any paid portion of the disallowed cost.)

**42.709-4 Computing interest.**

For 42.709-1(a)(1)(ii), compute interest on any paid portion of the disallowed cost as follows:

(a) Consider the overpayment to have occurred, and interest to have begun accumulating, from the midpoint of the contractor's fiscal year. Use an alternate equitable method if the cost was not paid evenly over the fiscal year.

(b) Use the interest rate specified by the Secretary of the Treasury pursuant to Pub. L. 92-41 (85 Stat. 97).

(c) Compute interest from the date of overpayment to the date of the demand letter for payment of the penalty.

(d) Determine the paid portion of the disallowed costs in consultation with the contract auditor.

**42.709-5 Waiver of the penalty.**

The cognizant contracting officer shall waive the penalties at 42.709-1(a) when—

(a) The contractor withdraws the proposal before the Government formally initiates an audit of the proposal and the contractor submits a revised proposal (an audit will be deemed to be formally initiated when the Government provides the contractor with written notice, or holds an entrance conference, indicating that audit work on a specific final indirect cost proposal has begun);

(b) The amount of the unallowable costs under the proposal which are subject to the penalty is \$10,000 or less (i.e., if the amount of expressly or previously determined unallowable costs which would be allocated to the contracts specified in 42.709(b) is \$10,000 or less); or

(c) The contractor demonstrates, to the cognizant contracting officer's satisfaction, that—

(1) It has established policies and personnel training and an internal control and review system that provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor's final indirect cost rate proposals (e.g., the types of controls required for satisfactory participation in the Department of Defense sponsored self-governance programs, specific accounting controls over indirect costs, compliance tests which demonstrate that the controls are effective, and Government audits which have not disclosed recurring instances of expressly unallowable costs); and

(2) The unallowable costs subject to the penalty were inadvertently incorporated into the proposal; i.e., their inclusion resulted from an unintentional error, notwithstanding the exercise of due care.

**42.709-6 Contract clause.**

Use the clause at 52.242-3, Penalties for Unallowable Costs, in all solicitations and contracts over \$500,000 except fixed-price contracts without cost incentives or any firm-fixed-price contract for the purchase of commercial items. Generally, covered contracts are those which contain one of the clauses at 52.216-7, 52.216-13, 52.216-16, or 52.216-17, or a similar clause from an executive agency's supplement to the FAR.

**SUBPART 42.8—DISALLOWANCE OF COSTS**

**42.800 Scope of subpart.**

This subpart prescribes policies and procedures for (a) issuing notices of intent to disallow costs and (b) disallowing costs already incurred during the course of performance.

**42.801 Notice of intent to disallow costs.**

(a) At any time during the performance of a contract of a type referred to in 42.802, the cognizant contracting officer responsible for administering the contract may issue the contractor a written notice of intent to disallow specified costs incurred or planned for incurrence. However, before issuing the notice, the contracting officer responsible for administering the contract shall make every reasonable effort to reach a satisfactory settlement through discussions with the contractor.

(b) A notice of intent to disallow such costs usually results from monitoring contractor costs. The purpose of the notice is to notify the contractor as early as practicable during contract performance that the cost is considered unallowable under the contract terms and to provide for timely resolution of any resulting disagreement. In the event of disagreement, the contractor may submit to the contracting officer a written response. Any such response

shall be answered by withdrawal of the notice or by making a written decision within 60 days.

(c) As a minimum, the notice shall—

(1) Refer to the contract's Notice of Intent to Disallow Costs clause;

(2) State the contractor's name and list the numbers of the affected contracts;

(3) Describe the costs to be disallowed, including estimated dollar value by item and applicable time periods, and state the reasons for the intended disallowance;

(4) Describe the potential impact on billing rates and forward pricing rate agreements;

(5) State the notice's effective date and the date by which written response must be received;

(6) List the recipients of copies of the notice; and

(7) Request the contractor to acknowledge receipt of the notice.

(d) The contracting officer issuing the notice shall furnish copies to all contracting officers cognizant of any segment of the contractor's organization.

(e) If the notice involves elements of indirect cost, it shall not be issued without coordination with the contracting officer or auditor having authority for final indirect cost settlement (see 42.705).

(f) In the event the contractor submits a response that disagrees with the notice (see paragraph (b) above), the contracting officer who issued the notice shall either withdraw the notice or issue the written decision, except when elements of indirect cost are involved, in which case the contracting officer responsible under 42.705 for determining final indirect cost rates shall issue the decision.

**42.802 Contract clause.**

The contracting officer shall insert the clause at 52.242-1, Notice of Intent to Disallow Costs, in solicitations and contracts when a cost-reimbursement contract, a fixed-price incentive contract, or a contract providing for price redetermination is contemplated.

**42.803 Disallowing costs after incurrence.**

Cost-reimbursement contracts, the cost-reimbursement portion of fixed-price contracts, letter contracts that provide for reimbursement of costs, and time-and-material and labor-hour contracts provide for disallowing costs during the course of performance after the costs have been incurred. The following procedures shall apply:

(a) *Contracting officer receipt of vouchers.* When contracting officers receive vouchers directly from the contractor and, with or without auditor assistance, approve or disapprove them, the process shall be conducted in accordance with the normal procedures of the individual agency.

(b) *Auditor receipt of vouchers.* (1) When authorized by

agency regulations, the contract auditor may be authorized to (i) receive reimbursement vouchers directly from contractors, (ii) approve for payment those vouchers found acceptable, and (iii) suspend payment of questionable costs. The auditor shall forward approved vouchers for payment to the cognizant contracting, finance, or disbursing officer, as appropriate under the agency's procedures.

(2) If the examination of a voucher raises a question regarding the allowability of a cost under the contract terms, the auditor, after informal discussion as appropriate, may, where authorized by agency regulations, issue a notice of contract costs suspended and/or disapproved simultaneously to the contractor and the disbursing officer, with a copy to the cognizant contracting officer, for deduction from current payments with respect to costs claimed but not considered reimbursable.

(3) If the contractor disagrees with the deduction from current payments, the contractor may—

- (i) Submit a written request to the cognizant contracting officer to consider whether the unreimbursed costs should be paid and to discuss the findings with the contractor;
- (ii) File a claim under the Disputes clause, which the cognizant contracting officer will process in accordance with agency procedures; or
- (iii) Do both of the above.

**SUBPART 42.9—BANKRUPTCY**

**42.900 Scope of subpart.**

This subpart prescribes policies and procedures regarding actions to be taken when a contractor enters into proceedings relating to bankruptcy. It establishes a requirement for the contractor to notify the contracting officer upon filing a petition for bankruptcy. It further establishes minimum requirements for agencies to follow in the event of a contractor bankruptcy.

**42.901 General.**

The contract administration office shall take prompt action to determine the potential impact of a contractor bankruptcy on the Government in order to protect the interests of the Government.

**42.902 Procedures.**

(a) When notified of bankruptcy proceedings, agencies shall, as a minimum—

- (1) Furnish the notice of bankruptcy to legal counsel and other appropriate agency offices (e.g., contracting, financial, property) and affected buying activities;
- (2) Determine the amount of the Government's potential claim against the contractor (in assessing this impact, identify and review any contracts that have not been closed out, including those physically completed or terminated);

(3) Take actions necessary to protect the Government's financial interests and safeguard Government property; and

(4) Furnish pertinent contract information to the legal counsel representing the Government.

(b) The contracting officer shall consult with legal counsel, whenever possible, prior to taking any action regarding the contractor's bankruptcy proceedings.

**42.903 Solicitation provision and contract clause.**

The contracting officer shall insert the clause at 52.242-13, Bankruptcy, in all solicitations and contracts exceeding the simplified acquisition threshold.

**SUBPART 42.10—NEGOTIATING ADVANCE AGREEMENTS FOR INDEPENDENT RESEARCH AND DEVELOPMENT/BID AND PROPOSAL COSTS**

**42.1001 Definitions.**

See 31.205-18(a).

**42.1002 Applicability.**

The procedures in this subpart shall be used for negotiating advance agreements containing dollar ceilings for allowability of independent research and development and bid and proposal (IR&D/B&P) costs when these agreements are required by 31.205-18(c)(1) until contractors' fiscal years beginning on or after October 1, 1992, after which there is no requirement for advance agreement negotiations and formal IR&D technical reviews and evaluations.

**42.1003 Designation of lead negotiating agency.**

A single lead agency shall negotiate all required advance agreements for IR&D/B&P costs for each company required to negotiate an advance agreement under 31.205-18(c)(1). These agreements are binding on the company and on all Government agencies, unless prohibited by statute. The lead agency shall be designated as follows:

(a) To implement section 203 of Pub. L. 91-441, as amended by section 208 of Pub. L. 96-342, the Department of Defense (DOD) shall be the lead agency for each company receiving combined IR&D/B&P payments from DOD during the company's previous fiscal year exceeding the threshold 31.205-18(c)(1).

(b) When DOD is not the lead agency as indicated in paragraph (a) preceding, and more than one agency has contracts with the company, the agency that paid the largest dollar amount of IR&D/B&P costs in the company's previous fiscal year shall (1) be the lead agency or (2) arrange for another agency having contracts with that company to be the lead agency.

(c) In the case of DOD, the term "lead negotiating agency" means the military service responsible for performing the negotiation of IR&D/B&P costs.



**42.1004 Location of negotiators in a central office.**

In order to facilitate participation, consistency, and interagency coordination, agencies with negotiating responsibilities shall locate at a central office(s) all personnel responsible for negotiating and executing advance agreements required under 31.205-18(c)(1). These agencies shall issue instructions on the use, by contracting officers, of estimated IR&D/B&P factors in forward pricing, interim billings, etc. Contracting officers shall obtain such factors, when applicable, from the cognizant central office.

**42.1005 Lead negotiating agency responsibilities.**

The lead agency shall perform the functions listed in paragraphs (a) through (h) following:

(a) Furnish contractors with guidance on the technical and financial information needed to support IR&D/B&P proposals, as well as how and when to submit the proposals.

(b) Perform, or arrange for performance of, a technical evaluation of the IR&D proposed by the contractor, to assist the contracting officer in evaluating the reasonableness and technical quality of the IR&D program. The technical evaluation shall include an opinion concerning the proposed IR&D program and any agency special rules on allowability.

(c) Provide the contractor with a contracting officer's determination concerning the proposed IR&D/B&P projects and any agency special rules on allowability.

(d) When advance agreements have not yet been negotiated, provide information regarding estimated ceilings, the allocation base, and indirect rate data, as appropriate, to contracting officers or other interested agency personnel who require information on IR&D/B&P costs for forward pricing and interim billing.

(e) Coordinate participation by affected agencies in prenegotiation meetings and in negotiations (see 31.109(f)).

(f) Prepare a prenegotiation position in coordination with the affected agencies.

(g) Negotiate advance agreements establishing dollar ceilings for IR&D/B&P costs allowable during the company's fiscal year for allocation to all work of that part of the company's operation covered by the agreement.

(h) Prepare advance agreements and distribute them to affected agencies (see 31.109(g)).

(i) Prepare negotiation memorandums and distribute them to affected agencies upon request. The contracting officer may delete from the distributed copy portions of a memorandum that are not pertinent to the affected agency. When a negotiation memorandum must contain company data subject to protection, that data should be so marked, and when it is useful and feasible to do so, it may be separated from the body of the memorandum.

**42.1006 Conducting negotiations.**

(a) Each contractor required to negotiate an advance 42-14 (FAC 90-40)

agreement under 31.205-18(c)(1) shall submit, in accordance with agency guidance, technical and financial information to support its proposed IR&D/B&P programs (see 42.1005(a)). Separate dollar ceilings shall be negotiated for IR&D costs and for B&P costs. In negotiating the ceilings, in addition to other considerations, contracting officers shall pay particular attention to—

(1) Comparison with the previous year's programs, including the level of Government participation;

(2) Changes in the company's current business activities and projected future business activities, to the extent these future activities can be determined with reasonable certainty;

(3) The results of the technical evaluation of IR&D;

(4) The extent to which the company's B&P program is well planned and managed; and

(5) The determination concerning the company's IR&D/B&P projects and any agency special rules on allowability.

(b) Negotiated ceilings must take into account the general rules of reasonableness (see 31.201-3) and the preceding considerations.

**42.1007 Content of advance agreements.**

Agreements negotiated in accordance with this subpart shall include the items specified in paragraphs (a) through (j) following:

(a) A dollar ceiling for total IR&D costs.

(b) A dollar ceiling for total B&P costs.

(c) A total dollar ceiling for IR&D/B&P costs equal to the sum of paragraphs (a) and (b) above.

(d) The base or other information necessary for allocating IR&D/B&P costs.

(e) A statement that a review in accordance with 42.1005 has been performed.

(f) For those companies meeting the threshold requirements, a provision that the recovery of IR&D/B&P costs under Government contracts shall not exceed the lesser of—

(1) Such contracts' allocable share of incurred costs up to the total ceiling specified in (c) above; or

(2) The amount of incurred costs as determined under any agency special rules on allowability.

(g) Any additional agreements concerning the allocability or allowability of IR&D costs or B&P costs.

(h) A provision stating whether recovery is authorized under either paragraph (a) or (b) above in excess of the established ceiling, provided the total recovery in the two categories does not exceed the total ceiling in paragraph (c) above.

(i) A requirement that the lesser of (1) the current IR&D/B&P estimates or (2) the appropriate ceiling amounts shall be used by the Government and the contractor for estimating and pricing contractual actions. (Also see (e) above.)

(j) A requirement that the lesser of (1) the actual costs

incurred or (2) the appropriate ceiling amounts shall be used by the Government and the contractor for final price determinations. (Also see (f) above.)

**42.1008 Administrative appeals.**

If negotiations are held and an advance agreement is not reached, the contracting officer shall make a determination of a reduced amount of payment for IR&D/B&P (see 31.205-18(c)(1)(v) and (vi)). Each lead negotiating agency shall establish an administrative appeals hearing group and procedures for hearing and deciding contractor appeals of the contracting officer's decision to reduce payment. Appeal procedures under this section are separate and distinct from board or court appeals under the Contract Disputes Act of 1978 (41 U.S.C. 601-613).

**SUBPART 42.11—PRODUCTION SURVEILLANCE AND REPORTING**

**42.1101 General.**

Production surveillance is a function of contract administration used to determine contractor progress and to identify any factors that may delay performance. Production surveillance involves Government review and analysis of (a) contractor performance plans, schedules, controls, and industrial processes and (b) the contractor's actual performance under them.

**42.1102 Applicability.**

This subpart applies to all contracts for supplies or services other than facilities, construction contracts, and Federal Supply Schedule contracts.

**42.1103 Policy.**

The contractor is responsible for timely contract performance. The Government will maintain surveillance of contractor performance as necessary to protect its interests. When the contracting office retains a contract for administration, the contracting officer administering the contract shall determine the extent of surveillance.

**42.1104 Surveillance requirements.**

(a) The contract administration office determines the extent of production surveillance on the basis of (1) the criticality (degree of importance to the Government) assigned by the contracting officer (see 42.1105) to the supplies or services and (2) consideration of the following factors:

- (i) Contract requirements for reporting production progress and performance.
- (ii) The contract performance schedule.
- (iii) The contractor's production plan.
- (iv) The contractor's history of contract performance.
- (v) The contractor's experience with the contract

supplies or services.

(vi) The contractor's financial capability.

(vii) Any supplementary written instructions from the contracting office.

(b) Contracts at or below the simplified acquisition threshold should not normally require production surveillance.

(c) In planning and conducting surveillance, contract administration offices shall make maximum use of any reliable contractor production control or data management systems.

(d) In performing surveillance, contract administration office personnel shall avoid any action that may (1) be inconsistent with any contract requirement or (2) result in claims of waivers, of changes, or of other contract modifications.

**42.1105 Assignment of criticality designator.**

Contracting officers shall assign a criticality designator to each contract in the space for designating the contract administration office, as follows:

| <i>Criticality Designator</i> | <i>Criterion</i>  |
|-------------------------------|---|
| A                             | Critical contracts, including DX-rated contracts (see Subpart 12.3), contracts citing the authority in 6.302-2 (unusual and compelling urgency), and contracts for major systems.                             |
| B                             | Contracts (other than those designated "A") for items needed to maintain a Government or contractor production or repair line, to preclude out-of-stock conditions or to meet user needs for non-stock items. |
| C                             | All contracts other than those designated "A" or "B."   |

**42.1106 Reporting requirements.**

(a) When information on contract performance status is needed, contracting officers may require contractors to submit production progress reports (see 42.1107(a)). Reporting requirements shall be limited to that information essential to Government needs and shall take maximum advantage of data output generated by contractor management systems.

(b) Contract administration offices shall review and verify the accuracy of contractor reports and advise the contracting officer of any required action. The accuracy of contractor-prepared reports shall be verified either by a program of continuous surveillance of the contractor's report-preparation system or by individual review of each report.

(c) The contract administration office may at any time initiate a report to advise the contracting officer (and the inventory manager, if one is designated in the contract) of any potential or actual delay in performance. This advice

shall (1) be in writing, (2) be provided in sufficient time for the contracting officer to take necessary action, and (3) provide a definite recommendation, if action is appropriate.

#### **42.1107 Contract clause.**

(a) The contracting officer shall insert the clause at 52.242-2, Production Progress Reports, in solicitations and contracts when production progress reporting is required; unless a facilities contract, a construction contract, or a Federal Supply Schedule contract is contemplated.

(b) When the clause at 52.242-2 is used, the contracting officer shall specify appropriate reporting instructions in the Schedule (see 42.1106(a)).

### **SUBPART 42.12—NOVATION AND CHANGE-OF-NAME AGREEMENTS**

#### **42.1200 Scope of subpart.**

This subpart prescribes policies and procedures for—

(a) Recognition of a successor in interest to Government contracts when contractor assets are transferred;

(b) Recognition of a change in a contractor's name; and

(c) Execution of novation agreements and change-of-name agreements by the responsible contracting officer.

#### **42.1201 Definitions.**

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

“Novation agreement” means a legal instrument executed by (a) the contractor (transferor), (b) the successor in interest (transferee), and (c) the Government by which, among other things, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the Government recognizes the transfer of the contract and related assets.

#### **42.1202 Responsibility for executing agreements.**

The contracting officer responsible for processing and executing novation and change-of-name agreements shall be determined as follows:

(a) If any of the affected contracts held by the transferor have been assigned to an administrative contracting officer (ACO) (see 2.1 and 42.202), the responsible contracting officer shall be—

(1) This ACO; or

(2) The ACO responsible for the corporate office, if affected contracts are in more than one plant or division of the transferor.

(b) If none of the affected contracts held by the transferor have been assigned to an ACO, the contracting officer responsible for the largest unsettled (unbilled plus billed but unpaid) dollar balance of contracts shall be the responsible contracting officer.

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(c) If several transferors are involved, the responsible contracting officer shall be—

(1) The ACO administering the largest unsettled dollar balance; or

(2) The contracting officer (or ACO) designated by the agency having the largest unsettled dollar balance, if none of the affected contracts have been assigned to an ACO.

#### **42.1203 Processing agreements.**

(a) When a firm performing Government contracts wishes the Government to recognize (1) a successor in interest to these contracts or (2) a name change, the contractor shall submit a written request to the responsible contracting officer (see 42.1202).

(b) The responsible contracting officer shall—

(1) Promptly notify each contract administration office and contracting office affected by a proposed agreement for recognizing a successor in interest;

(2) Provide these offices with a list of all affected contracts; and

(3) Request submission within 30 days of their comments, which shall include technical considerations, if appropriate.

(c) The responsible contracting officer shall determine whether or not it is in the Government's interest to recognize the proposed successor in interest on the basis of—

(1) The comments received from the affected contract administration offices and contracting offices (failure to comment by the specified date shall be taken as consent); and

(2) A determination that the proposed successor is responsible under Subpart 9.1, Responsible Prospective Contractors.

(d) Before novation and change-of-name agreements are executed, the responsible contracting officer shall ensure that Government counsel has reviewed them for legal sufficiency.

(e) The responsible contracting officer shall (1) forward a signed copy of the executed novation or change-of-name agreement to the transferor and to the transferee and (2) retain a signed copy in the case file.

(f) Following distribution of the agreement, the responsible contracting officer shall—

(1) Prepare a Standard Form 30, Amendment of Solicitation/Modification of Contract, incorporating a summary of the agreement and attaching a complete list of contracts affected;

(2) Retain the original Standard Form 30 with the attached list in the case file;

(3) Send a signed copy of the Standard Form 30, with attached list to the transferor and to the transferee; and

(4) Send a copy of this Standard Form 30 with attached list to each contract administration office or contracting office involved, which shall be responsible for further appropriate distribution.

**42.1204 Agreement to recognize a successor in interest (novation agreement).**

(a) The law (41 U.S.C. 15) prohibits transfer of Government contracts. However, the Government may, in its interest, recognize a third party as the successor in interest to a Government contract when the third party's interest in the contract arises out of the transfer of (1) all the contractor's assets or (2) the entire portion of the assets involved in performing the contract. (See 14.404-2(k) for the effect of novation agreements after bid opening but before award.) Examples include but are not limited to—

- (i) Sale of these assets with a provision for assuming liabilities;
- (ii) Transfer of these assets incident to a merger or corporate consolidation; and
- (iii) Incorporation of a proprietorship or partnership, or formation of a partnership.

(b) When it is in the Government's interest not to concur in the transfer of a contract from one company to another company, the original contractor remains under contractual obligation to the Government, and the contract may be terminated for reasons of default, should the original contractor not perform.

(c) When a contractor asks the Government to recognize a successor in interest, the responsible contracting officer shall obtain from the contractor three signed copies of the proposed novation agreement and one copy each, as applicable, of the following:

- (1) An authenticated copy of the instrument effecting the transfer of assets; e.g., bill of sale, certificate of merger, contract, deed, agreement, or court decree.
- (2) A list of all affected contracts and purchase orders remaining unsettled between the transferor and the Government, showing for each the (i) contract number and type, (ii) name and address of the contracting office, (iii) total dollar value as amended, and (iv) remaining unpaid balance.
- (3) A certified copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets.
- (4) A certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets.
- (5) An authenticated copy of the transferee's certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the Government contracts.
- (6) The opinion of legal counsel for the transferor and transferee stating that the transfer was properly effected under applicable law and the effective date of transfer.
- (7) Evidence of the transferee's capability to perform the contracts.

(8) Balance sheets of the transferor and transferee as of the dates immediately before and after the transfer of assets, certified for accuracy by independent accountants.

(9) Evidence that any security clearance requirements have been met.

(10) The consent of sureties on all contracts listed under subparagraph (2) above if bonds are required, or a statement from the transferor that none are required.

(d) When recognizing a successor in interest to a Government contract is consistent with the Government's interest, the responsible contracting officer shall execute a novation agreement with the transferor and the transferee. It shall ordinarily provide in part that—

- (1) The transferee assumes all the transferor's obligations under the contract;
- (2) The transferor waives all rights under the contract against the Government;
- (3) The transferor guarantees performance of the contract by the transferee (a satisfactory performance bond may be accepted instead of the guarantee); and
- (4) Nothing in the agreement shall relieve the transferor or transferee from compliance with any Federal law.

(e) The responsible contracting officer shall use the following format for agreements when the transferor and transferee are corporations and all the transferor's assets are transferred. This format may be adapted to fit specific cases and may be used as a guide in preparing similar agreements for other situations.

**NOVATION AGREEMENT**

The ABC CORPORATION (Transferor), a corporation duly organized and existing under the laws of \_\_\_\_\_ [*insert State*] with its principal office in \_\_\_\_\_ [*insert city*]; the XYZ CORPORATION (Transferee), [*if appropriate add "formerly known as the EFG Corporation"*] a corporation duly organized and existing under the laws of \_\_\_\_\_ [*insert State*] with its principal office in \_\_\_\_\_ [*insert city*]; and the UNITED STATES OF AMERICA (Government) enter into this Agreement as of \_\_\_\_\_ [*insert the date transfer of assets became effective under applicable State law*].

(a) THE PARTIES AGREE TO THE FOLLOWING FACTS:

- (1) The Government, represented by various Contracting Officers of the \_\_\_\_\_ [*insert name(s) of agency(ies)*], has entered into certain contracts with the Transferor, namely: \_\_\_\_\_ [*insert contract or purchase order identifications*]; [*or delete "namely" and insert "as shown in the attached list marked 'Exhibit A' and incorporated in this Agreement by reference."*]. The term "the contracts," as used in this Agreement, means the above contracts and purchase orders and all other contracts and purchase orders,

including all modifications, made between the Government and the Transferor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Transferor has any remaining rights, duties, or obligations under these contracts and purchase orders). Included in the term “the contracts” are also all modifications made under the terms and conditions of these contracts and purchase orders between the Government and the Transferee, on or after the effective date of this Agreement.

(2) As of \_\_\_\_\_, 19\_\_, the Transferor has transferred to the Transferee all the assets of the Transferor by virtue of a \_\_\_\_\_ [*insert term descriptive of the legal transaction involved*] between the Transferor and the Transferee.

(3) The Transferee has acquired all the assets of the Transferor by virtue of the above transfer.

(4) The Transferee has assumed all obligations and liabilities of the Transferor under the contracts by virtue of the above transfer.

(5) The Transferee is in a position to fully perform all obligations that may exist under the contracts.

(6) It is consistent with the Government’s interest to recognize the Transferee as the successor party to the contracts.

(7) Evidence of the above transfer has been filed with the Government.

*[When a change of name is also involved; e.g., a prior or concurrent change of the Transferee’s name, an appropriate statement shall be inserted (see example in paragraph (8) below)].*

(8) A certificate dated \_\_\_\_\_, 19\_\_, signed by the Secretary of State of \_\_\_\_\_ [*insert State*], to the effect that the corporate name of EFG CORPORATION was changed to XYZ CORPORATION on \_\_\_\_\_, 19\_\_, has been filed with the Government.

**(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT BY THIS AGREEMENT—**

(1) The Transferor confirms the transfer to the Transferee, and waives any claims and rights against the Government that it now has or may have in the future in connection with the contracts.

(2) The Transferee agrees to be bound by and to perform each contract in accordance with the conditions contained in the contracts. The Transferee also assumes all obligations and liabilities of, and all claims against, the Transferor under the contracts as if the Transferee were the original party to the contracts.

(3) The Transferee ratifies all previous actions taken by the Transferor with respect to the contracts, with the same force and effect as if the action had been taken by the Transferee.

(4) The Government recognizes the Transferee as the Transferor’s successor in interest in and to the contracts. The Transferee by this Agreement becomes entitled to all rights, titles, and interests of the Transferor in and to the contracts as if the Transferee were the original party to the contracts. Following the effective date of this Agreement, the term “Contractor,” as used in the contracts, shall refer to the Transferee.

(5) Except as expressly provided in this Agreement, nothing in it shall be construed as a waiver of any rights of the Government against the Transferor.

(6) All payments and reimbursements previously made by the Government to the Transferor, and all other previous actions taken by the Government under the contracts, shall be considered to have discharged those parts of the Government’s obligations under the contracts. All payments and reimbursements made by the Government after the date of this Agreement in the name of or to the Transferor shall have the same force and effect as if made to the Transferee, and shall constitute a complete discharge of the Government’s obligations under the contracts, to the extent of the amounts paid or reimbursed.

(7) The Transferor and the Transferee agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement, other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts.

(8) The Transferor guarantees payment of all liabilities and the performance of all obligations that the Transferee (i) assumes under this Agreement or (ii) may undertake in the future should these contracts be modified under their terms and conditions. The Transferor waives notice of, and consents to, any such future modifications.

(9) The contracts shall remain in full force and effect, except as modified by this Agreement. Each party has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA,

By \_\_\_\_\_  
Title \_\_\_\_\_

ABC CORPORATION,

By \_\_\_\_\_  
Title \_\_\_\_\_

[CORPORATE SEAL]

XYZ CORPORATION,

By \_\_\_\_\_  
Title \_\_\_\_\_

[CORPORATE SEAL]

CERTIFICATE

I, \_\_\_\_\_, certify that I am the Secretary of ABC CORPORATION; that \_\_\_\_\_, who signed this Agreement for this corporation, was then \_\_\_\_\_ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers. Witness my hand and the seal of this corporation this day of \_\_\_\_\_ 19 \_\_\_\_\_.  
By \_\_\_\_\_  
[CORPORATE SEAL]

CERTIFICATE

I, \_\_\_\_\_, certify that I am the Secretary of XYZ CORPORATION; that \_\_\_\_\_, who signed this Agreement for this corporation, was then \_\_\_\_\_ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers. Witness my hand and the seal of this corporation this day of \_\_\_\_\_ 19 \_\_\_\_\_.  
By \_\_\_\_\_  
[CORPORATE SEAL]

**42.1205 Agreement to recognize contractor’s change of name.**

(a) If only a change of the contractor’s name is involved and the Government’s and contractor’s rights and obligations remain unaffected, the parties shall execute an agreement to reflect the name change. The contractor shall forward to the responsible contracting officer three signed copies of the Change-of-Name Agreement, and one copy each of the following:

(1) The document effecting the name change, authenticated by a proper official of the State having jurisdiction.

(2) The opinion of the contractor’s legal counsel stating that the change of name was properly effected under applicable law and showing the effective date.

(3) A list of all affected contracts and purchase orders remaining unsettled between the contractor and the Government, showing for each the contract number and type, and name and address of the contracting office. The contracting officer may request the total dollar value as amended and the remaining unpaid balance for each contract.

(b) The following suggested format for an agreement may be adapted for specific cases:

CHANGE-OF-NAME AGREEMENT

The ABC CORPORATION (Contractor), a corporation duly organized and existing under the laws of \_\_\_\_\_ [insert State], and the UNITED STATES OF AMERICA (Government), enter into this Agreement as of \_\_\_\_\_ [insert date when the change of name became effective under applicable State law].

(a) THE PARTIES AGREE TO THE FOLLOWING FACTS:

(1) The Government, represented by various Contracting Officers of the \_\_\_\_\_ [insert name(s) of agency(ies)], has entered into certain contracts and purchase orders with the XYZ CORPORATION, namely: \_\_\_\_\_ [insert contract or purchase order identifications]; [or delete “namely” and insert “as shown in the attached list marked “Exhibit A” and incorporated in this Agreement by reference.”]. The term “the contracts,” as used in this Agreement, means the above contracts and purchase orders and all other contracts and purchase orders, including all modifications, made by the Government and the Contractor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Contractor has any remaining rights, duties, or obligations under these contracts and purchase orders).

(2) The XYZ CORPORATION, by an amendment to its certificate of incorporation, dated \_\_\_\_\_ 19\_\_, has changed its corporate name to ABC CORPORATION.

(3) This amendment accomplishes a change of corporate name only and all rights and obligations of the Government and of the Contractor under the contracts are unaffected by this change.

(4) Documentary evidence of this change of corporate name has been filed with the Government.

(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT—

(1) The contracts covered by this Agreement are amended by substituting the name “ABC CORPORATION” for the name “XYZ CORPORATION” wherever it appears in the contracts; and

(2) Each party has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA,  
By \_\_\_\_\_  
Title \_\_\_\_\_  
ABC CORPORATION,

By \_\_\_\_\_  
Title \_\_\_\_\_  
[CORPORATE SEAL]

CERTIFICATE

I, \_\_\_\_\_, certify that I am the Secretary of ABC CORPORATION; that \_\_\_\_\_, who signed this Agreement for this corporation, was then \_\_\_\_\_ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers. Witness my hand and the seal of this corporation this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_.  
By \_\_\_\_\_  
[CORPORATE SEAL]

42.1301

FEDERAL ACQUISITION REGULATION (FAR)

**SUBPART 42.13—SUSPENSION OF WORK, STOP-WORK ORDERS, AND GOVERNMENT DELAY OF WORK**

**42.1301 General.**

Situations may occur during contract performance that cause the Government to order a suspension of work, or a work stoppage. This subpart provides clauses to meet these situations and a clause for settling contractor claims for unordered Government caused delays that are not otherwise covered in the contract.

**42.1302 Suspension of work.**

A suspension of work under a construction or architect-engineer contract may be ordered by the contracting officer for a reasonable period of time. If the suspension is unreasonable, the contractor may submit a written claim for increases in the cost of performance, excluding profit.

**42.1303 Stop-work orders.**

(a) Stop-work orders may be used, when appropriate, in any negotiated fixed-price or cost-reimbursement supply, research and development, or service contract if work stoppage may be required for reasons such as advancement in the state-of-the-art, production or engineering breakthroughs, or realignment of programs.

(b) Generally, a stop-work order will be issued only if it is advisable to suspend work pending a decision by the Government and a supplemental agreement providing for the suspension is not feasible. Issuance of a stop-work order shall be approved at a level higher than the contracting officer. Stop-work orders shall not be used in place of a termination notice after a decision to terminate has been made.

(c) Stop-work orders should include—

- (1) A description of the work to be suspended;
- (2) Instructions concerning the contractor's issuance of further orders for materials or services;
- (3) Guidance to the contractor on action to be taken on any subcontracts; and
- (4) Other suggestions to the contractor for minimizing costs.

(d) Promptly after issuing the stop-work order, the contracting officer should discuss the stop-work order with the contractor and modify the order, if necessary, in light of the discussion.

(e) As soon as feasible after a stop-work order is issued, but before its expiration, the contracting officer shall take appropriate action to—

- (1) Terminate the contract;
- (2) Cancel the stop-work order (any cancellation of a stop-work order shall be subject to the same approvals as were required for its issuance); or
- (3) Extend the period of the stop-work order if it is necessary and if the contractor agrees (any extension of

the stop-work order shall be by a supplemental agreement).

**42.1304 Government delay of work.**

(a) The clause at 52.242-17, Government Delay of Work, provides for the administrative settlement of contractor claims that arise from delays and interruptions in the contract work caused by the acts, or failures to act, of the contracting officer. This clause is not applicable if the contract otherwise specifically provides for an equitable adjustment because of the delay or interruption; e.g., when the Changes clause is applicable.

(b) The clause does not authorize the contracting officer to order a suspension, delay, or interruption of the contract-work and it shall not be used as the basis or justification of such an order.

(c) If the contracting officer has notice of an unordered delay or interruption covered by the clause, the contracting officer shall act to end the delay or take other appropriate action as soon as practicable.

(d) The contracting officer shall retain in the file a record of all negotiations leading to any adjustment made under the clause, and related cost or pricing data, or information other than cost or pricing data.

**42.1305 Contract clauses.**

(a) The contracting officer shall insert the clause at 52.242-14, Suspension of Work, in solicitations and contracts when a fixed-price construction or architect-engineer contract is contemplated.

(b)(1) The contracting officer may, when contracting by negotiation, insert the clause at 52.242-15, Stop-Work Order, in solicitations and contracts for supplies, services, or research and development.

(2) If a cost-reimbursement contract is contemplated, the contracting officer shall use the clause with its Alternate I.

(c) The contracting officer shall insert the clause at 52.242-16, Stop-Work Order—Facilities, in solicitations and contracts when a facilities acquisition contract or a consolidated facilities contract is contemplated.

(d) The contracting officer shall insert the clause at 52.242-17, Government Delay of Work, in solicitations and contracts when a fixed-price contract is contemplated for supplies other than commercial or modified-commercial items. The clause use is optional when a fixed-price contract is contemplated for services, or for supplies that are commercial or modified-commercial items.

**SUBPART 42.14—TRAFFIC AND TRANSPORTATION MANAGEMENT**

**42.1401 General.**

(a) The contract administration office (CAO) shall



ensure that instructions to contractors result in the most efficient and economical use of carrier services and equipment. If the transportation data regarding f.o.b. origin contracts is insufficient for Government transportation management purposes, the CAO shall obtain the data used in the evaluation of offers.

(b) Transportation personnel assigned to or supporting the CAO, or appropriate agency personnel, are responsible for—

(1) Furnishing timely routings and releases for port shipments;

(2) Monitoring shipments to provide for carload or truckload quantities when practicable;

(3) Controlling and issuing U.S. Government bills of lading (GBL's) and determining proper freight classification descriptions;

(4) Reviewing documentation to ensure the proper distribution and validation of shipping documents;

(5) Developing, and advising on, transportation cost differentials brought on by proposed changes in contract terms; e.g., delivery schedules;

(6) Determining, for contract requirements, the size and carrying capability of carrier equipment to transport overdimensional and/or overweight supplies, hazardous materials, or supplies requiring special shipping arrangements;

(7) Developing information and reporting movements that may be the basis for negotiating special rates for volume movements or for rate adjustments (see 42.1402(b));

(8) Exercising control of irregularities in preservation, packing, loading, blocking and bracing, and other causes contributing to loss and damage; sealing of carrier equipment and documentation;

(9) Providing information on the use of transit arrangements;

(10) Recommending, when appropriate, prepayment by contractor for f.o.b. origin shipments or parcel post (see 47.303-17 and 42.1404);

(11) Recommending, when appropriate, the use of commercial forms and procedures for small shipments of a recurring nature if transportation costs do not exceed \$100, as authorized in 41 CFR 101-41.304-2 and, for the Department of Defense (DOD), in Chapter 32, Defense Traffic Management Regulation (DTMR) (AR 55-355, NAVSUPINST 4600.70, AFM 75-2, MCO P-4600.14A, DLAR 4500.3);

(12) Diverting, reassigning, tracing, and expediting shipments;

(13) Considering the capabilities of contractors for meeting new or emergency requirements that arise during the contract administration and using these capabilities when appropriate; and

(14) Using routings through established consolida-

tion stations when it is in the Government's interest.

(c) Civilian agencies shall consult and cooperate with the Office of Transportation of the General Services Administration (GSA) as required in 41 CFR 101-40. (See 47.105, Transportation assistance, for assistance to civilian Government activities or to military installations.)

#### **42.1402 Volume movements within the continental United States.**

(a)(1) For purposes of contract administration, a volume movement is—

(i) In DOD, the aggregate of freight shipments amounting to or exceeding 25 carloads, 25 truckloads, or 500,000 pounds, to move during the contract period from one origin point for delivery to one destination point or area; and

(ii) In civilian agencies, 50 short tons (100,000 pounds) in the aggregate to move during the contract period from one origin point for delivery to one destination point or area.

(2) Transportation personnel assigned to or supporting the CAO, or appropriate agency personnel, shall report planned and actual volume movements in accordance with agency regulations. DOD activities report to the Military Traffic Management Command (MTMC) under the Defense Traffic Management Regulation (DTMR). Civilian agencies report to GSA, Office of Transportation, or other designated offices under the Federal Property Management Regulations (FPMR), specifically 41 CFR 101-40.305-2.

(b) Reporting of volume movements permits MTMC and GSA transportation personnel to determine the reasonableness of applicable current rates and, when appropriate, to negotiate adjusted or modified rates.

#### **42.1403 Shipping documents covering f.o.b. origin shipments.**

(a) Except as provided in 47.303-17, when a contract specifies delivery of supplies f.o.b. origin with transportation costs to be paid by the Government, the contractor shall make shipments on U.S. Government bills of lading (GBL's), or on other shipping documents prescribed by MTMC in the case of seavan containers, furnished by the CAO or the appropriate agency transportation office. Each agency shall establish appropriate procedures by which the contractor shall obtain GBL's. The contracting officer shall not authorize the contractor to ship on commercial bills of lading for conversion to GBL's unless delivery is extremely urgent and GBL's are not readily available.

(b) The possible application of reduced rates under section 10721 of the Interstate Commerce Act for shipments on commercial bills of lading and the Commercial Bill of Lading Notations clause are discussed at 47.104.

(c)(1) The limited authority for the use of commercial

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forms and procedures to acquire freight or express transportation for small shipments of a recurring nature when transportation costs do not exceed \$100, is prescribed in the Transportation Documentation and Audit Regulation, specifically 41 CFR 101-41.304-2.

(2) For DOD shipments, corresponding guidance is in Chapter 32 of the DTMR.

### **42.1404 Shipments by parcel post or other classes of mail.**

#### **42.1404-1 Parcel post eligible shipments.**

(a)(1) Use of parcel post or other classes of mail permits direct movements from source of supply to the user, without the intermediate documentation that is required when supplies are transported through depots or air or water terminals. However, the use of parcel post and other classes of mail shall be confined to deliveries of mailable matter that meet the size, weight, and distance limitations prescribed by the U.S. Postal Service. Parcel post eligible shipments for overseas destinations will not be sent via Small Package Delivery services or parcel post to CONUS military air or water terminals. These shipments will be mailed through the APO or FPO to the overseas user. Contractors shall not divide delivery quantities into mailable parcels for the purpose of avoiding shipments by other modes of transportation.

(2) When parcel post or other classes of mail are used by contractors, they shall prepay the postage costs by using their own mailing labels or stamps and include prepaid postage costs as separate items in the invoices for supplies shipped.

(b)(1) Authority for contractors to use indicia mail may be obtained by submitting Postal Service (PS) Form 3601, Application to Mail Without Affixing Postage Stamps, to the U.S. Postal Service for approval following agency procedures. If approval is granted, the agency shall follow the U.S. Postal Service permit requirements.

(2) When indicia mail is used, the contractor will be provided with a completed PS Form 3601 and official penalty permit imprint mailing labels, envelopes, or cards printed on the top right side in a rectangular box: Postage and Fees Paid (first line); Government Agency Name (second line); and, the proper permit imprint number (G-000) on the third line. These must also bear in the upper left corner in every case the printed return address of the agency concerned above the printed phrases "Official Business" and "Penalty for Private Use, \$300." The name and address of a private person or firm shall not be shown.

(c) When a contractor uses the contractor's own label for making a shipment to a post office servicing military and other agency consignees outside the United States, the contractor shall stamp or imprint the parcel immediately

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above the label in 1/4 inch block letters with (i) the name of the agency and (ii) the words "Official Mail-Contents for Official Use-Exempt from Customs Requirements." This permits identification and expedites handling within the postal system. Use of this marking does not eliminate the requirement for payment of postage by the contractor when so required by the contract or when the contractor is to be reimbursed for the cost of postage.

(d) Contractors may not insure shipments at Government expense for the purpose of recovery in case of loss and/or damage, except that minimum insurance required for the purposes of obtaining receipts at point of origin and upon delivery is authorized.

#### **42.1404-2 Contract clauses.**

(a) The contracting officer shall insert the clause at 52.242-10, F.o.b. Origin—Government Bills of Lading or Prepaid Postage, in solicitations and contracts when f.o.b. origin shipments are to be made using Government bills of lading or prepaid postage.

(b) The contracting officer shall insert the clause at 52.242-11, F.o.b. Origin—Government Bills of Lading or Indicia Mail, in solicitations and contracts when f.o.b. origin shipments are to be made using Government bills of lading or indicia mail, if indicia mail has been authorized by the U.S. Postal Service.

#### **42.1405 Discrepancies incident to shipment of supplies.**

(a) Discrepancies incident to shipment include overage, shortage, loss, damage, and other discrepancies between the quantity and/or condition of supplies received from commercial carriers and the quantity and/or condition of these supplies as shown on the covering bill of lading or other transportation document. Regulations and procedures for reporting and adjusting discrepancies in Government shipments are in Subpart 40.7 of the Federal Property Management Regulations (41 CFR 101-40.7). (Military installations shall consult "Reporting of Transportation Discrepancies in Shipments," AR 55-38, NAVSUP INST 4610.33C, AFR 75-18, MCO P4610.19D, DLAR 4500.15.)

(b) Generally, when the place of delivery is f.o.b. origin, the Government consignee at destination is also accountable for the supplies, and all claims or reports dealing with discrepancies shall be initiated at that point in accordance with the property accountability regulations of the agency concerned.

(c) If supplies are acquired on an f.o.b. destination basis, any claim arising from a discrepancy occurring in transit is a matter for settlement between the contractor and the carrier. However, the Government consignee shall (1) notify the carrier of the discrepancy by noting the exception on the carrier's delivery receipt and (2) furnish all available

data to the CAO or appropriate agency office, which shall promptly transmit the data to the contractor.

#### **42.1406 Report of shipment.**

##### **42.1406-1 Advance notice.**

Military (and as required, civilian agency) storage and distribution points, depots, and other receiving activities require advance notice of shipments en route from contractors' plants. Generally, this notification is required only for classified material; sensitive, controlled, and certain other protected material; explosives, and some other hazardous materials; selected shipments requiring movement control; or minimum carload or truckload shipments. It facilitates arrangements for transportation control, labor, space, and use of materials handling equipment at destination. Also, timely receipt of notices by the consignee transportation office precludes the incurring of demurrage and vehicle detention charges.

##### **42.1406-2 Contract clause.**

The contracting officer shall insert the clause at 52.242-12, Report of Shipment (REPSHIP), in solicitations and contracts when advance notice of shipment is required for safety or security reasons, or where carload or truckload shipments will be made to DoD installations or, as required, to civilian agency facilities.

### **SUBPART 42.15—CONTRACTOR PERFORMANCE INFORMATION**

#### **42.1500 Scope of subpart.**

This subpart provides policies and establishes responsibilities for recording and maintaining contractor performance information. It implements Office of Federal Procurement Policy Letter 92-5, Past Performance Information. This subpart does not apply to procedures used by agencies in determining fees under award or incentive fee contracts. However, the fee amount paid to contractors should be reflective of the contractor's performance and the past performance evaluation should closely parallel the fee determinations.

##### **42.1501 General.**

Past performance information is relevant information, for future source selection purposes, regarding a contractor's actions under previously awarded contracts. It includes, for example, the contractor's record of conforming to contract requirements and to standards of good workmanship; the contractor's record of forecasting and controlling costs; the contractor's adherence to contract schedules, including the administrative aspects of performance; the contractor's history of reasonable and cooperative behavior and commitment to customer satisfaction;

and generally, the contractor's business-like concern for the interest of the customer.

#### **42.1502 Policy.**

(a) Except as provided in paragraph (b) of this section, agencies shall prepare an evaluation of contractor performance for each contract in excess of \$1,000,000 beginning July 1, 1995, \$500,000 beginning July 1, 1996, and \$100,000 beginning January 1, 1998, (regardless of the date of contract award) at the time the work under the contract is completed. In addition, interim evaluations should be prepared as specified by the agencies to provide current information for source selection purposes, for contracts with a period of performance, including options, exceeding one year. This evaluation is generally for the entity, division, or unit that performed the contract. The content and format of performance evaluations shall be established in accordance with agency procedures and should be tailored to the size, content, and complexity of the contractual requirements.

(b) Agencies shall not evaluate performance for contracts awarded under Subparts 8.6 and 8.7. Agencies shall evaluate construction contractor performance and architect/engineer contractor performance in accordance with 36.201 and 36.604, respectively.

#### **42.1503 Procedures.**

(a) Agency procedures for the past performance evaluation system shall generally provide for input to the evaluations from the technical office, contracting office and, where appropriate, end users of the product or service.

(b) Agency evaluations of contractor performance prepared under this subpart shall be provided to the contractor as soon as practicable after completion of the evaluation. Contractors shall be given a minimum of 30 days to submit comments, rebutting statements, or additional information. Agencies shall provide for review at a level above the contracting officer to consider disagreements between the parties regarding the evaluation. The ultimate conclusion on the performance evaluation is a decision of the contracting agency. Copies of the evaluation, contractor response, and review comments, if any, shall be retained as part of the evaluation. These evaluations may be used to support future award decisions, and should therefore be marked "Source Selection Information". The completed evaluation shall not be released to other than Government personnel and the contractor whose performance is being evaluated during the period the information may be used to provide source selection information. Disclosure of such information could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations. Evaluations used in determining award or incentive fee payments may also be used to satisfy the requirements of this subpart.

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(c) Departments and agencies shall share past performance information with other departments and agencies when requested to support future award decisions. The information may be provided through interview and/or by sending the evaluation and comment documents to the requesting source selection official.

(d) Any past performance information systems, including automated systems, used for maintaining contractor performance information and/or evaluations should include appropriate management and technical controls to ensure that only authorized personnel have access to the data.

(e) The past performance information shall not be retained to provide source selection information for longer than three years after completion of contract performance.

**SUBPART 42.16—SMALL BUSINESS CONTRACT ADMINISTRATION**

**42.1601 General.**

The contracting officer shall make every reasonable effort to respond in writing within 30 days to any written request to the contracting officer from a small business concern with respect to a contract administration matter. In the event the contracting officer cannot respond to the request within the 30-day period, the contracting officer shall, within the period, transmit to the contractor a written notification of the specific date the contracting officer expects to respond. This provision shall not apply to a request for a contracting officer decision under the Contract Disputes Act of 1978 (41 U.S.C. 601-613).