

Federal Acquisition Regulation

27.204-1

27.203-5), but may be used as discussed in 27.203-4 below. A decision to omit a patent indemnity clause in a negotiated fixed-price contract described in this subsection should be based on a price consideration to the Government for forgoing the indemnification rights normally received by commercial purchasers of the same supplies or services.

[49 FR 12974, Mar. 30, 1984, as amended at 51 FR 2665, Jan. 17, 1986]

27.203-4 Clauses for negotiated contracts (excluding construction).

(a) The contracting officer may insert the clause at 52.227-3, Patent Indemnity—

(1) As authorized in 27.203-1(b)(2)(ii); and

(2) Except as prohibited by 27.203-1(b), in solicitations anticipating negotiated contracts (and such contracts) for supplies or services (excluding construction and dismantling, demolition, and removal of improvements), if the contracting officer determines that the supplies or services (or such items with relatively minor modifications) normally are or have been sold or offered for sale by any supplier to the public in the commercial open market. Ordinarily, the contracting officer, in consultation with the prospective contractor, should be able to determine whether the supplies or services being purchased normally are or have been sold or offered for sale by any supplier to the public in the commercial open market. (For negotiated construction contracts, see 27.203-5).

(b) In solicitations and contracts that call in part for specific components, spare parts, or services (or such items with relatively minor modifications) that normally are or have been sold or offered for sale by any supplier to the public in the commercial open market, the contracting officer may use the clause with its Alternate I or II, as appropriate. The choice between Alternate I (identification of excluded items) and Alternate II (identification of included items) should be based upon simplicity, Government administrative convenience, and the ease of identification of the items.

(c) In solicitations and contracts for communication services and facilities

where performance is by a common carrier, and the services are unregulated and are not priced by a tariff schedule set by a regulatory body, the clause shall be used with its Alternate III.

27.203-5 Clause for construction contracts and for dismantling, demolition, and removal of improvements contracts.

Except as prohibited by 27.203-1(b), the contracting officer shall insert the clause at 52.227-4, Patent Indemnity—Construction Contracts, in solicitations and contracts for construction or that are fixed-price for dismantling, demolition, or removal of improvements. If it is determined that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods that are nonstandard, noncommercial, or special, the contracting officer may expressly exclude them from the patent indemnification by using the basic clause with its Alternate I.

27.203-6 Clause for Government waiver of indemnity.

If, in the Government's interest, it is appropriate to exempt one or more specific United States patents from the patent indemnity clause, the contracting officer shall obtain written approval from the agency head or designee and shall insert the clause at 52.227-5, Waiver of Indemnity, in solicitations and contracts in addition to the appropriate patent indemnity clause. The contracting officer shall document the contract file with a copy of the written approval.

27.204 Reporting of royalties—anticipated or paid.

27.204-1 General.

(a)(1) To determine whether royalties anticipated or actually paid under Government contracts are excessive, improper, or inconsistent with any Government rights in particular inventions, patents, or patent applications, contracting officers shall require prospective contractors to furnish certain royalty information and shall require contractors to furnish certain royalty reports. Contracting officers shall take

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appropriate action to reduce or eliminate excessive or improper royalties.

(2) Royalty information shall not be required (except for information under 27.204-3) in sealed bid contracts unless the need for such information is approved at a level above that of the contracting officer as being necessary for proper protection of the Government's interests.

(b) Any solicitations that may result in a negotiated contract for which royalty information is desired or for which cost or pricing data is obtained (see 15.403) should contain a provision requesting information relating to any proposed charge for royalties. If the response to a solicitation includes a charge for royalties, the contracting officer shall, before award of the contract, forward the information relating to the proposed payments of royalties to the office having cognizance of patent matters for the contracting activity concerned. The cognizant office shall promptly advise the contracting officer of appropriate action. Before award, the contracting officer shall take action to protect the Government's interest with respect to such royalties, giving due regard to all pertinent factors relating to the proposed contract and the advice of the cognizant office.

(c) The contracting officer, when considering the approval of a subcontract, shall require and obtain the same royalty information and take the same action with respect to such subcontracts in relation to royalties as required for prime contracts under paragraph (b) of this subsection. However, consent need not be withheld pending receipt of advice in regard to such royalties from the office having cognizance of patent matters.

(d) The contracting officer shall forward the royalty information and/or royalty reports received to the office having cognizance of patent matters for the contracting activity concerned for advice as to appropriate action.

[49 FR 12974, Mar. 30, 1984, as amended at 52 FR 19803, May 27, 1987; 56 FR 15152, Apr. 15, 1991; 62 FR 51271, Sept. 30, 1997]

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27.204-2 Solicitation provision for royalty information.

The contracting officer shall insert a solicitation provision substantially as shown in 52.227-6, Royalty Information, in any solicitation that may result in a negotiated contract for which royalty information is desired or for which cost or pricing data is obtained under 15.403. If the solicitation is for communication services and facilities by a common carrier, use the provision with its Alternate I.

[49 FR 12974, Mar. 30, 1984, as amended at 56 FR 15153, Apr. 15, 1991; 62 FR 51271, Sept. 30, 1997]

27.204-3 Patents—notice of Government as a licensee.

(a) When the Government is obligated to pay a royalty on a patent because of a license agreement between the Government and a patent owner and the contracting officer knows (or has reason to believe) that the licensed patent will be applicable to a prospective contract, the Government should furnish information relating to the royalty to prospective offerors since it serves the interest of both the Government and the offerors. In such situations, the contracting officer should include in the solicitation a notice of the license, the number of the patent, and the royalty rate recited in the license.

(b) When the Government is obligated to pay such a royalty, the solicitation should also require offerors to furnish information indicating whether or not each offeror is a licensee under the patent or the patent owner. This information is necessary so that the Government may either (1) evaluate an offeror's price by adding an amount equal to the royalty, or (2) negotiate a price reduction with an offeror-licensee when the offeror is licensed under the same patent at a lower royalty rate.

(c) If the Government is obligated to pay a royalty on a patent involved in the prospective contract, the contracting officer shall insert in the solicitation, substantially as shown, the provision at 52.227-7, Patents—Notice of Government Licensee.