

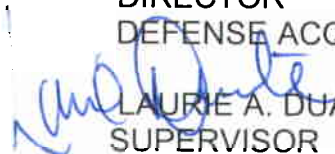


SEP 16 2004

MEMORANDUM FOR RONALD POUSSARD

DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM:


LAURIE A. DUARTE
SUPERVISOR
REGULATORY SECRETARIAT

SUBJECT: FAR Case 2002-015, Government Property Rental and Special Tooling

Attached are comments received on the subject FAR case published at 69 FR 42544; July 15, 2004. The comment closing date was September 13, 2004.

| <u>Response Number</u> | <u>Date Received</u> | <u>Comment Date</u> | <u>Commenter</u> |
|------------------------|----------------------|---------------------|--------------------|
| 2002-015-1 | 09/08/04 | 09/08/04 | James W. Waak |
| 2002-015-2 | 09/10/04 | 09/10/04 | DCMA (DOD) |
| 2002-015-3 | 09/14/04 | 09/14/04 | The Boeing Company |
| 2002-015-4 | 10/05/04 | 09/16/04 | AIA |

Attachments

2002-015-1



jimwaak@comcast.net

09/08/2004 04:39 PM

To: farcase.2002-015@gsa.gov

cc:

Subject: Use and Charges, Special Tooling Deviation

General Services Administration, Regulatory Secretariat (VR)
Attn: Laurie Duarte
1800 F Street, NW, Room 4035
Washington, DC 20405

Re: FAR Case 2002-15

The above FAR case deals with two class deviations regarding use and charges and special tooling (ST), both of which have been applicable to DOD contracts since 1998.

As a private citizen and a Consulting Fellow in the world of Government property management I would like to submit two comments on the above subject.

1. The deviation to the Clause 52.245-9 sets a fair and equitable method for charging rental usage when Government property is used for commercial purposes or existing Government property is used for future contracts and equitable adjustment is needed to climate unfair competitive advantage. The deviation above should be incorporated as written.

2. The deviation to the Clause 52.245-17 allows a practice of classifying property (other than PP&E) as something special, in this case, Special Tooling. An analogy to this is the classification of Special Test Equipment (STE) whose time has come and gone. The need for Special Tooling has also come and gone and it is my recommendation to eliminate the Clause altogether. It would make more sense to treat ST as any other property acquired or procured under contract with the ownership and disposition declared at the time of acquisition. Therefore, cost would be known, eventual ownership would be known, and the ultimate disposition instructions would be agreed upon prior to the actual triggering event.

As a side benefit, the elimination of the classification of Special Tooling for reporting purposes (and perhaps Special Test Equipment) which would help move us toward the more standardized industry accounting of property under the rules of Plant, Property and Equipment as recognized in the Joint Financial Improvement Program and associated documents aiming toward a sound audit opinion under the Chief Financial Officers Act.

Thank you for your consideration of this comment.

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James W. Waak CPPM, CF
24607 145th Pl SE
Kent, WA 98042
206-655-8409

2002-015-2



"Blankenstein, Dianne
C"
<Dianne.Blankenstein
@dcma.mil>

To: FARcase.2002-015@gsa.gov
cc:
Subject: FAR Case 2002-015

09/10/2004 11:44 AM

I believe the Special Tooling Clause is more cumbersome and confusing to administer than it is worth, so I believe it should be abolished. I'm not sure when the original clause was written or its intent, but in my experience with the Special Tooling Clause, I see it being misunderstood. I know there is some interpretation that the government being offered title "at the end of the contract" means "at the end of the program" so title is not offered or taken until the program ends. While the Government pays for the Right-to-Title Tooling (RTT) and has a vested title in it, it is not considered Government property, and the Government property (GP) clauses do not apply. I believe the fact the contractor is liable under the Progress Payment Clause and the Performance Based Payment Clause rather than having limited liability under the GP clauses is not understood. That was not adequately addressed in my contracting classes. I do not believe the losses or damages to RTT are always reported as they should be. Because RTT is not part of the Government Property Control System Analysis, no one is monitoring that. In my opinion, the Contracting Officers should decide up front whether or not they want to own the tooling under a contract. Then the contractors would not have to distinguish between Government-owned Special Tooling and RTT on their records or with separate identification tags. One process for all tooling under a program would make the contracts easier to administer for both the Government and the contractors, less confusing, and would be a cost savings in the long run.

Dianne Blankenstein

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September 2, 2004

2002-015-3

The Boeing Company
P. O. Box 3707, M/C 42-18
Seattle, WA 98124

General Services Administration, Regulatory Secretariat (VR)
Attn: Laurie Duarte
1800 F Street, NW, Room 4035
Washington, DC 20405

Re: FAR Case 2002-15

The above FAR case deals with two class deviations regarding use and charges and special tooling (ST), both of which have been applicable to DOD contracts since 1998.

It is our desire to support the effort where the simplification and promotion of processes that provide the use of common and sensible business practices that both benefit the Government and the Contractor as well as supporting the war fighter in their need to get the right equipment at the right time. Relative to those ends, please accept our comments on the referenced FAR case as our concerned desire to achieve the above.

Deviation 98-O0010, Use and Charges

After substantial review and consideration, it is considered appropriate by Boeing, that the above Deviation be incorporated intact as described in the proposed FAR 52.245-9 clause and associated FAR subparts.

Having said this, we would like to suggest that paragraph 52.245-9(h) be amended to strike 'person' and replace it with 'Contractor'. Rational is that a company would control their personnel through their administrative procedures when wrong doing is discovered and that the Government may control the Contractor in a like manner. It may make sense to provide a time frame where an immediate need for usage of property from another contract becomes imminent and use of the property would not interfere with the owning contract, and the ACO is not available for authorization, a period of 48 hours, documented by the losing contract, would be allowed for transfer of tooling and use of such tooling be paid for at a higher rate than the proposed schedule. Tooling would be returned immediately if authorization were not received.

Deviation 98-O0011, superceded by Deviation 99-O0012, Special Tooling

Relative to this deviation above, similar to the STE clause at 52.245-18 (which is slated for removal in the FAR re-write, FAR Case 2004-025), it is our proposal that the ST clause be eliminated altogether.

As a replacement to the control, maintenance and right to title issues as addressed in the deviation as well as the 1984 FAR version at 52.245-17 and the 1989 replacement clause now in deviation, we would like to submit the following.

If we look toward the premise that contractors are required to provide all property necessary to perform on Government contracts and that Government property shall not be provided unless

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clearly determined to be in the Governments best interest, thus it should follow that tooling that is special to the needs of a contract should be provided by the contractor whenever possible and ownership determination should be made at the time of contract negotiation.

This would make sense on both Fixed Priced and Cost type contracts relative to any special provisions in the negotiations of the contract. The need for tooling should be known in the proposal and the pre-award stage. Upon the discovery of additional needs in the award and production stage, the Government will make a determination as to ownership at that time as well as disposition of that tooling to be effective when the tooling is no longer needed for the instant contract. This would apply to tooling furnished by the Government, or acquired or fabricated by the contractor for the Government, other than special tooling to be delivered as an end item under the contract.

This would promote at least three important premises relative to use of Government property in performance of a contract.

1. It would eliminate to the maximum practical extent any competitive advantage a prospective contractor may have by using Government property and ensure maximum practical reutilization of Contractor inventory within the Government.
2. It would require contractors to use Government property already in their possession to the maximum extent possible in performing Government contracts.
3. It would require contractors to justify retaining Government property at the start of the contract performance and during the production stage as well as give firm disposition instructions in the contract.

A special benefit to the contractor may be the elimination of the classification of Special Tooling for reporting purposes (and perhaps Special Test Equipment) which would help move us toward the more standardized industry accounting of property under the rules of Plant, Property and Equipment as recognized in the Joint Financial Improvement Program and associated documents aiming toward a sound audit opinion under the Chief Financial Officers Act.

James W. Waak
For:
Kenneth R. Wolfe
Director of Government Assets
Boeing – Integrated Defense Systems
206-655-8409

2002-015-4



September 13, 2004

General Services Administration
Regulatory Secretariat (VR)
ATTN: Laurie Duarte
1800 F. Street NW
Room 4035
Washington, DC 20405

Dear Ms. Duarte:

The Aerospace Industries Association appreciates the opportunity to provide comments on the proposed rule amending the FAR by incorporating the class deviations regarding use and charges and special tooling, FAR Case 2002-015. Our line-in, line-out recommended changes are provided in the attached document.

If there are any questions or if we can be of further assistance, please contact the undersigned at (703) 358-1045.

Sincerely,

A handwritten signature in black ink, appearing to read 'Patrick D. Sullivan', written over a horizontal line.

Patrick D. Sullivan
Assistant Vice President
Procurement and Finance

Attachment

2002-015-4

The Aerospace Industries Association provides the following imbedded changes and comments. We are pleased that the proposed clauses are an improvement over the existing clauses. The AIA suggested changes are provided to reflect additional improvements based upon recent events and progress toward achieving a "best value" situation by reducing administrative cost and increasing the opportunity to capitalize on the dual use of assets. As discussed below, our principal recommendation is the need to consider the elimination of the Special Tooling Clause in its entirety.

[Federal Register: July 15, 2004 (Volume 69, Number 135)]
[Proposed Rules]
[Page 42543-42547]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr15jy04-23]

Department of Defense

General Services Administration

National Aeronautics and Space Administration

48 CFR Parts 45 and 52

Federal Acquisition Regulation; Government Property Rental and Special Tooling; Proposed Rule

[FAR Case 2002-015]
RIN 9000-AJ99

Federal Acquisition Regulation; Government Property Rental and Special Tooling

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) by incorporating the Class Deviations regarding use and charges and special tooling, both of which have been applicable to the Department of Defense since 1998.

DATES: Interested parties should submit comments in writing on or before September 13, 2004 to be considered in the formulation of a final rule.

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ADDRESSES: Submit comments identified by FAR case 2002-015 by any of the following methods:

Federal eRulemaking Portal: <http://frwebgate.access.gpo.gov/cgi-bin/leaving.cgi?from=leavingFR.html&log=linklog&to=http://www.regulations.gov>.

Follow the instructions for submitting comments.

Agency Web Site: <http://frwebgate.access.gpo.gov/cgi-bin/leaving.cgi?from=leavingFR.html&log=linklog&to=http://www.acqnet.gov/far/ProposedRules/proposed.htm>.

Click on the FAR case number to submit comments. E-mail: farcase.2002-015@gsa.gov. Include FAR case 2002-

015 in the subject line of the message.

Fax: 202-501-4067.

Mail: General Services Administration, Regulatory Secretariat (VR), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAR case 2002-015 in all correspondence related to this case. All comments received will be posted without change to <http://frwebgate.access.gpo.gov/cgi-bin/leaving.cgi?from=leavingFR.html&log=linklog&to=http://www.acqnet.gov/far/ProposedRules/proposed.htm>, including any personal information provided.

PART 45--GOVERNMENT PROPERTY

2. Amend section 45.106 by adding paragraph (h) to read as follows:

45.106 Government property clauses.

* * * * *

(h)(1) Insert the clause at 52.245-9, Use and Charges--

(i) In fixed-price or labor-hour solicitations and contracts under which the Government will furnish property for performance of the contract;

(ii) In all cost-reimbursement and time-and-materials solicitations and contracts; and

(iii) When a consolidated facilities contract or a facilities use contract is contemplated.

(2) The contracting officer may modify the clause if an alternative rental methodology is used in accordance with 45.403.

(3) Contractors shall be encouraged to submit plans and enter into advance agreements to minimize unnecessary delays, administrative costs and possible legal exposure.

Comment: Approved plans for use and charges of a contract, program, site or entity would be beneficial to both the Government and the contractor in that the clause as now written will cause unnecessary delays, administrative cost and legal exposure. This type of plan would be similar to a site scrap plan as now provide in FAR 45.

Deleted: 45.306-5 Contract clause.¶
¶ Insert the clause at 52.245-17, Special Tooling, in solicitations ¶ and contracts when--¶
(a) A fixed-price contract is contemplated;¶
(b) The Government desires to reserve the right to obtain title in ¶ the special tooling acquired by the contractor; and¶
(c) The Special Tooling is not a required deliverable.¶
5. Revise section 45.403 to read as follows:¶

- Comment: AIA recommends that the Special Tooling clause be eliminated. The following are some of the reasons:
- The Special Tooling clause in practice has not provided benefits that exceed the administrative cost.
- Special Tooling acquired under this clause is rarely used by the Government to acquire non-identical items. Most tooling cannot be used in an alternate environment because the Government does not acquire the associated general-purpose items along with the know-how to use the Special Tooling.
- Valuation of the right to title Special Tooling is complex, given the Government accounting requirements. The costs of the tooling are generally included in the price of the delivered end item. Upon delivery of the tooling to the Government they would either have to be accounted for at zero value - or in some other manner that does not result in double counting.
- Company ownership of all special tooling under a fixed price contract facilitates follow-on work in the international or commercial market place, which at a minimum provides the Government indirect benefits of lower overhead cost.
- Company ownership promotes reduced amounts of Government property in the custody of contractors, which results in less administrative cost.
- Government ownership does not result in greater incentives to better manage these items. On fixed priced contracts the foremost incentive for taking care of needed Special Tooling is to ensure their availability at the right time in order to guarantee delivery in order to get paid for the product.
- Having the Special Tooling Clause in the contracts throughout the supply chain increases the likelihood that it will increase administrative costs.
- Using a right to title provision creates uncertainty and runs counter to managing to a predictable outcome. Better up front planning results in lesser overall cost.
- If a government owned special tool becomes worn out during contract performance, it is the Government's responsibility for the cost of replacing the needed item. Replacement cost of obsolete or worn out contractor owned special tooling on programs that have multiple customers may in some cases be treated as an indirect capital cost. In such cases dual use of contractor owned special tooling benefits all customers.

52.245-9 Use and Charges.

Deleted: 1
1

As prescribed in 45.106(h), insert the following clause in solicitations and contracts:

USE AND CHARGES (DATE)

(a) Definitions. As used in this clause:

Acquisition cost means the acquisition cost recorded in the Contractor's property control system or, in the absence of such record, the value attributed by the Government to a Government property item for purposes of determining a reasonable rental charge.

Government property means all real and personal property owned by or leased to the Government or acquired by the Government under the terms of the contract. It includes both Government-furnished property and contractor-acquired property as defined in FAR 45.101.

(c) Rental. If granted written permission by the Contracting Officer, or if it is specifically provided for in the Schedule, the Contractor may use the Government property (except production material) for a rental fee for work other than that provided in paragraph (b) of this clause.

Comment: Non-production material (expendable items) may be suitable for rental in some circumstances.

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(d) General. (1) Rental requests shall be submitted to the administrative Contracting Officer, identify the property for which rental is requested, propose a rental period, and compute an estimated rental charge by using the Contractor's best estimate of rental time in the formulae described in paragraph (e) of this clause.

(2) The Contractor shall not use Government property for nongovernmental purposes, including Independent Research and Development, until a rental charge for real property, or estimated rental charge for personal property, is agreed upon. Rented property shall be used only on a non-interference basis.

Deleted: other

(g) Use revocation. At any time during the rental period, the Government may revoke nongovernmental use authorization and require the Contractor, at the Contractor's expense, to return the property to the Government, restore the property to its pre-rental condition (less normal wear and tear), or both. The Government shall disclose any intent to revoke use authorization prior to agreeing to contractor use.

Comment: A practice of full disclosure is necessary as part of good relations and business practices - otherwise contractors may acquire resources unnecessarily.

Comment: There is no need to restate this law - or any other law - in a regulation. The contractor has an obligation to establish internal controls to prevent unauthorized use and including a reference to the U. S. Code is unnecessary.

Deleted: (h) Unauthorized use. The unauthorized use of Government

Deleted: property can subject a person to fines, imprisonment, or both, under 18 U.S.C. 641.

(End of clause)

52.245-17 Special Tooling.

As prescribed in 45.306-5, insert the following clause:

SPECIAL TOOLING (DATE)

(f) Initial list of special tooling. If the Contracting Officer so requests, the Contractor shall furnish the Government an initial list of all special tooling acquired or manufactured by the Contractor for performing this contract. The list shall specify the nomenclature, tool number, related product part number (or service performed), retention determination (see paragraph (e) of this clause), original acquisition date and unit acquisition cost of the special tooling.

Comment: Providing a separate listing for obsolete items due to design changes may be interesting but is not useful. The Government is normally aware of these design changes as they occur. This requirement causes unnecessary administrative cost to capture such occurrences.

The last sentence conflicts with the first sentence of this paragraph and should be deleted.

Deleted: The list shall separately identify special tooling that has become obsolete due to design or specification changes. The list shall be furnished within 60 days after delivery of the first production end item under this contract unless a later date is prescribed.

(g) Contractor's offer to retain special tooling. The Contractor may indicate a desire to retain certain items of special tooling at the time it furnishes a list or notification pursuant to paragraph (f) or (j) of this clause. The offer shall be made on one of the following bases:

(1) An amount shall be offered for retention of the items free of any Government interest. This amount should ordinarily not be less than the current fair value of the items.

Deleted: , considering among other things, the value of the items to the Contractor for use in future work.

Comment: The last phrase is redundant and should be deleted.
Paragraph (g) can pose a risk to the contractor who may intend to use the tooling on follow-on fixed priced contracts only to have the Government deny the request for retention. To mitigate that risk the contractor may create additional tooling and include its cost in the price of the contract. It would be better for both parties at inception for either the Government or the contractor to claim total ownership of all tooling.

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(h) Property control records. The Contractor shall maintain adequate property control records of all special tooling in accordance with its normal industrial practice. The records shall be made available for Government inspection at all reasonable times. To the extent practical, the Contractor shall identify all special tooling subject to this clause with an appropriate stamp, serial number, tag, or other mark. The marking should be done in such a way that remarking is unnecessary in the event that the Government requires delivery or full title.

Deleted: practicable

(1) Storage or shipment. The Contractor shall promptly transfer to the Government title to the special tooling specified by the Contracting Officer and arrange for either the shipment or the storage of such tooling in accordance with the final disposition instructions

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in paragraph (k) (1) of this clause. Tooling to be shipped shall be properly packaged, packed, and marked in accordance with the directions of the Contracting Officer. Tooling to be stored shall be stored pursuant to a storage agreement between the Government and the Contractor, and as directed by the Contracting Officer. Tooling shipped or stored shall be accompanied by operation sheets or other appropriate data necessary to show the manufacturing operations or processes for which the items were used or designed. To the extent that the Contractor discloses company intellectual property, documents internal processes, incurs costs for authorized storage or shipment under this paragraph and not otherwise compensated, the contract price shall be equitably adjusted in accordance with the Changes clause of this contract.

Deleted: for

Comment: Any additional work providing information or company owned intellectual property should be subject to an equitable adjustment to the contract.

(End of clause)
[FR Doc. 04-15815 Filed 7-14-04; 8:45 am]