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SUBPART 212.70—PILOT PROGRAM FOR TRANSITION TO FOLLOW-ON CONTRACTING AFTER USE OF OTHER TRANSACTION AUTHORITY

(Revised April 12, 2006)

212.7000 Scope.

This subpart establishes the pilot program authorized by Section 847 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136).

212.7001 Definitions.

As used in this subpart—

“Nontraditional defense contractor” means a business unit that—

- (1) Has entered into an other transaction agreement with DoD; and
- (2) Has not, for a period of at least 1 year prior to the date of the other transaction agreement, entered into or performed on—
 - (i) Any contract that is subject to full coverage under the cost accounting standards described in FAR Part 30; or
 - (ii) Any other contract exceeding \$500,000 to carry out prototype projects or to perform basic, applied, or advanced research projects for a Federal agency that is subject to the FAR.

“Other transaction” means a transaction that—

- (1) Is other than a contract, grant, or cooperative agreement;
- (2) Is not subject to the FAR or its supplements; and
- (3) Is entered into in accordance with 32 CFR Part 3.

212.7002 Pilot program.

212.7002-1 Contracts under the program.

(a) The contracting officer may use FAR Part 12 procedures to award a contract for an item or process that does not meet the definition of “commercial item,” if the contract—

- (1) Is awarded to a nontraditional defense contractor;
- (2) Is a follow-on contract for the production of an item or process begun as a prototype project under an other transaction agreement;
- (3) Does not exceed \$50,000,000;
- (4) Is awarded on or before September 30, 2008; and
- (5) Is either—

- (i) A firm-fixed-price contract; or
- (ii) A fixed-price contract with economic price adjustment.

(b) See 212.7003 for special procedures pertaining to technical data and computer software.

212.7002-2 Subcontracts under the program.

(a) A subcontract for an item or process that does not meet the definition of “commercial item” may be treated as a subcontract for a commercial item, if the subcontract—

(1) Is for the production of an item or process begun as a prototype project under an other transaction agreement;

(2) Does not exceed \$50,000,000;

(3) Is awarded on or before September 30, 2008;

(4) Is awarded to a nontraditional defense contractor; and

(5) Is either—

(i) A firm-fixed-price subcontract; or

(ii) A fixed-price subcontract with economic price adjustment.

(b) See 212.7003 for special procedures pertaining to technical data and computer software.

212.7003 Technical data and computer software.

For purposes of establishing delivery requirements and license rights for technical data under 227.7102 and for computer software under 227.7202, there shall be a rebuttable presumption that items or processes acquired under a contract or subcontract awarded in accordance with 212.7002 were developed in part with Federal funds and in part at private expense (i.e., mixed funding).

(a) *Delivery requirements.* Acquire only the technical data and computer software that are necessary to satisfy agency needs. Follow the requirements at 227.7103-1 and 227.7103-2 for technical data, and 227.7203-1 and 227.7203-2 for computer software.

(b) *License rights.* Acquire only the license rights in technical data and computer software that are necessary to satisfy agency needs.

(1) For technical data, use the clauses at 252.227-7013, Rights in Technical Data—Noncommercial Items, and 252.227-7037, Validation of Restrictive Markings on Technical Data.

(2) For computer software, use the clauses at 252.227-7014, Rights in Noncommercial Computer Software and Noncommercial Computer Software

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Documentation, and 252.227-7019, Validation of Asserted Restrictions—Computer Software.

(3) Require the contractor to include the clauses prescribed by paragraphs (b)(1) and (2) of this section in subcontracts awarded in accordance with 212.7002-2.

(4) When the standard license rights for items or processes developed with mixed funding do not provide the minimum rights necessary to satisfy agency needs, negotiate for special license rights in accordance with 227.7103-5(d) and 227.7203-5(d).

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SUBPART 222.71--RIGHT OF FIRST REFUSAL OF EMPLOYMENT

- 222.7101 Policy.
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- 222.7201 Contract clauses.

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- 222.7300 Scope of subpart.
- 222.7301 Prohibition on use of nonimmigrant aliens.
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SUBPART 222.1—BASIC LABOR POLICIES

(Revised April 12, 2006)

222.101 Labor relations.

222.101-1 General.

Follow the procedures at PGI 222.101-1 for referral of labor relations matters to the appropriate authorities.

222.101-3 Reporting labor disputes.

Follow the procedures at PGI 222.101-3 for reporting labor disputes.

222.101-3-70 Impact of labor disputes on defense programs.

(a) Each department and agency shall determine the degree of impact of potential or actual labor disputes on its own programs and requirements. For guidance on determining the degree of impact, see PGI 222.101-3-70(a).

(b) Each contracting activity shall obtain and develop data reflecting the impact of a labor dispute on its requirements and programs. Upon determining that the impact of the labor dispute is significant, the head of the contracting activity shall submit a report of findings and recommendations to the labor advisor in accordance with departmental procedures. This reporting requirement is assigned Report Control Symbol DD-AT&L(AR)1153 and must include the information specified at PGI 222.101-3-70(b).

222.101-4 Removal of items from contractors' facilities affected by work stoppages.

(a) When a contractor is unable to deliver urgent and critical items because of a work stoppage at its facility, the contracting officer, before removing any items from the facility, shall—

(i) Before initiating any action, contact the labor advisor to obtain the opinion of the national office of the Federal Mediation and Conciliation Service or other mediation agency regarding the effect movement of the items would have on labor negotiations. Normally removals will not be made if they will adversely affect labor negotiations.

(ii) Upon the recommendation of the labor advisor, provide a written request for removal of the material to the cognizant contract administration office. Include in the request the information specified at PGI 222.101-4(a)(ii).

(iii) With the assistance of the labor advisor or the commander of the contract administration office, attempt to have both the management and the labor representatives involved agree to shipment of the material by normal means.

(iv) If agreement for removal of the needed items cannot be reached following the procedures in paragraphs (a)(i) through (iii) of this subsection, the commander of the contract administration office, after obtaining approval from the labor advisor, may seek the concurrence of the parties to the dispute to permit movement of the material

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by military vehicles with military personnel. On receipt of such concurrences, the commander may proceed to make necessary arrangements to move the material.

(v) If agreement for removal of the needed items cannot be reached following any of the procedures in paragraphs (a)(i) through (iv) of this subsection, refer the matter to the labor advisor with the information required by 222.101-3-70(b). If the labor advisor is unsuccessful in obtaining concurrence of the parties for the movement of the material and further action to obtain the material is deemed necessary, refer the matter to the agency head. Upon review and verification that the items are urgently or critically needed and cannot be moved with the consent of the parties, the agency head, on a nondelegable basis, may order removal of the items from the facility.

222.101-70 Acquisition of stevedoring services during labor disputes.

(a) Use the following procedures only in the order listed when a labor dispute delays performance of a contract for stevedoring services which are urgently needed.

(1) Attempt to have management and labor voluntarily agree to exempt military supplies from the labor dispute by continuing the movement of such material.

(2) Divert vessels to alternate ports able to provide necessary stevedoring services.

(3) Consider contracting with reliable alternative sources of supply within the stevedoring industry.

(4) Utilize civil service stevedores to perform the work performed by contract stevedores.

(5) Utilize military personnel to handle the cargo which was being handled by contract stevedores prior to the labor dispute.

(b) Notify the labor advisor when a deviation from the procedures in paragraph (a) of this subsection is required.

222.102 Federal and State labor requirements.

222.102-1 Policy.

(1) Direct all inquiries from contractors or contractor employees regarding the applicability or interpretation of Occupational Safety and Health Act (OSHA) regulations to the Department of Labor.

(2) Upon request, provide the address of the appropriate field office of the Occupational Safety and Health Administration of the Department of Labor.

(3) Do not initiate any application for the suspension or relaxation of labor requirements without prior coordination with the labor advisor. Any requests for variances or alternative means of compliance with OSHA requirements must be approved by the Occupational Safety and Health Administration of the Department of Labor.

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222.103 Overtime.

222.103-4 Approvals.

(a) The department/agency approving official shall—

(i) Obtain the concurrence of other appropriate approving officials; and

(ii) Seek agreement as to the contracts under which overtime premiums will be approved when—

(A) Two or more contracting offices have current contracts at the same contractor facility; and

(B) The approval of overtime by one contracting office will affect the performance or cost of contracts of another office. In the absence of evidence to the contrary, a contracting officer may rely on a contractor's statement that approval of overtime premium pay for one contract will not affect performance or payments under any other contract.

**SUBPART 222.4—LABOR STANDARDS FOR CONTRACTS INVOLVING
CONSTRUCTION**

(Revised April 12, 2006)

222.402 Applicability.

222.402-70 Installation support contracts.

(a) Apply both the Service Contract Act (SCA) and the Davis-Bacon Act (DBA) to installation support contracts if—

(1) The contract is principally for services but also requires a substantial and segregable amount of construction, alteration, renovation, painting, or repair work; and

(2) The aggregate dollar value of such construction work exceeds or is expected to exceed \$2,000.

(b) *SCA coverage under the contract.* Contract installation support requirements, such as plant operation and installation services (i.e., custodial, snow removal, etc.) are subject to the SCA. Apply SCA clauses and minimum wage and fringe benefit requirements to all contract service calls or orders for such maintenance and support work.

(c) *DBA coverage under the contract.* Contract construction, alteration, renovation, painting, and repair requirements (i.e., roof shingling, building structural repair, paving repairs, etc.) are subject to the DBA. Apply DBA clauses and minimum wage requirements to all contract service calls or orders for construction, alteration, renovation, painting, or repairs to buildings or other works.

(d) *Repairs versus maintenance.* Some contract work may be characterized as either DBA painting/repairs or SCA maintenance. For example, replacing broken windows, spot painting, or minor patching of a wall could be covered by either the DBA or the SCA. In those instances where a contract service call or order requires construction trade skills (i.e., carpenter, plumber, painter, etc.), but it is unclear whether the work required is SCA maintenance or DBA painting/repairs, apply the following rules—

(1) Individual service calls or orders which will require a total of 32 or more work-hours to perform shall be considered to be repair work subject to the DBA.

(2) Individual service calls or orders which will require less than 32 work-hours to perform shall be considered to be maintenance subject to the SCA.

(3) Painting work of 200 square feet or more to be performed under an individual service call or order shall be considered to be subject to the DBA regardless of the total work-hours required.

(e) The determination of labor standards application shall be made at the time the solicitation is prepared in those cases where requirements can be identified. Otherwise, the determination shall be made at the time the service call or order is placed against

the contract. The service call or order shall identify the labor standards law and contract wage determination which will apply to the work required.

(f) Contracting officers may not avoid application of the DBA by splitting individual tasks between orders or contracts.

222.403 Statutory and regulatory requirements.

222.403-4 Department of Labor regulations.

Direct all questions regarding Department of Labor regulations to the labor advisor.

222.404 Davis-Bacon Act wage determinations.

Not later than April 1 of each year, each department and agency shall furnish the Administrator, Wage and Hour Division, with a general outline of its proposed construction program for the coming fiscal year. The Department of Labor uses this information to determine where general wage determination surveys will be conducted.

(1) Indicate by individual project of \$500,000 or more—

(i) The anticipated type of construction;

(ii) The estimated dollar value; and

(iii) The location in which the work is to be performed (city, town, village, county, or other civil subdivision of the state).

(2) The report format is contained in Department of Labor All Agency Memo 144, December 27, 1985.

(3) The report control number is 1671-DOL-AN.

222.406 Administration and enforcement.

222.406-1 Policy.

(a) *General.* The program shall also include—

(i) Training appropriate contract administration, labor relations, inspection, and other labor standards enforcement personnel in their responsibilities; and

(ii) Periodic review of field enforcement activities to ensure compliance with applicable regulations and instructions.

(b) *Preconstruction letters and conferences.*

(1) Promptly after award of the contract, the contracting officer shall provide a preconstruction letter to the prime contractor. This letter should accomplish the following, as appropriate—

(A) Indicate that the labor standards requirements contained in the contract are based on the following statutes and regulations—

- (1) Davis-Bacon Act;
 - (2) Contract Work Hours and Safety Standards Act;
 - (3) Copeland (Anti-Kickback) Act;
 - (4) Parts 3 and 5 of the Secretary of Labor's Regulations (Parts 3 and 5, Subtitle A, Title 29, CFR); and
 - (5) Executive Order 11246 (Equal Employment Opportunity);
- (B) Call attention to the labor standards requirements in the contract which relate to—
- (1) Employment of foremen, laborers, mechanics, and others;
 - (2) Wages and fringe benefits payments, payrolls, and statements;
 - (3) Differentiation between subcontractors and suppliers;
 - (4) Additional classifications;
 - (5) Benefits to be realized by contractors and subcontractors in keeping complete work records;
 - (6) Penalties and sanctions for violations of the labor standards provisions; and
 - (7) The applicable provisions of FAR 22.403; and
- (C) Ensure that the contractor sends a copy of the preconstruction letter to each subcontractor.
- (2) Before construction begins, the contracting officer shall confer with the prime contractor and any subcontractor designated by the prime to emphasize their labor standards obligations under the contract when—
- (A) The prime contractor has not performed previous Government contracts;
 - (B) The prime contractor experienced difficulty in complying with labor standards requirements on previous contracts; or
 - (C) It is necessary to determine whether the contractor and its subcontractors intend to pay any required fringe benefits in the manner specified in the wage determination or to elect a different method of payment. If the latter, inform the contractor of the requirements of FAR 22.406-2.

222.406-6 Payrolls and statements.

(a) *Submission.* Contractors who do not use Department of Labor Form WH 347 or its equivalent must submit a DD Form 879, Statement of Compliance, with each payroll report.

222.406-8 Investigations.

(a) Before beginning an investigation, the investigator shall inform the contractor of the general scope of the investigation, and that the investigation will include examining pertinent records and interviewing employees. In conducting the investigation, follow the procedures at PGI 222.406-8(a).

(c) *Contractor notification.*

(4)(A) Notify the contractor by certified mail of any finding that it is liable for liquidated damages under the Contract Work Hours and Safety Standards Act (CWHSSA). The notification shall inform the contractor that—

(1) It has 60 days after receipt of the notice to appeal the assessment of liquidated damages; and

(2) The appeal must demonstrate either that the alleged violations did not occur at all, occurred inadvertently notwithstanding the exercise of due care, or the assessment was computed improperly.

(B) If an appeal is received, the contracting officer shall process the appeal in accordance with department or agency regulations.

(d) *Contracting officer's report.* Forward a detailed enforcement report or summary report to the agency head in accordance with agency procedures. Include in the report, as a minimum, the information specified at PGI 222.406-8(d).

222.406-9 Withholding from or suspension of contract payments.

(a) *Withholding from contract payments.* The contracting officer shall contact the labor advisor for assistance when payments due a contractor are not available to satisfy that contractor's liability for Davis-Bacon or CWHSSA wage underpayments or liquidated damages.

(c) *Disposition of contract payments withheld or suspended.*

(3) *Limitation on forwarding or returning funds.* When disposition of withheld funds remains the final action necessary to close out a contract, the Department of Labor has given blanket approval to forward withheld funds to the Comptroller General pending completion of an investigation or other administrative proceedings.

(4) *Liquidated damages.*

(A) The agency head may adjust liquidated damages of \$500 or less when the amount assessed is incorrect or waive the assessment when the violations—

(1) Were nonwillful or inadvertent; and

(2) Occurred notwithstanding the exercise of due care by the contractor, its subcontractor, or their agents.

(B) The agency head may recommend to the Administrator, Wage and Hour Division, that the liquidated damages over \$500 be adjusted because the amount assessed is incorrect. The agency head may also recommend the assessment be waived when the violations—

(1) Were nonwillful or inadvertent; and

(2) Occurred notwithstanding the exercise of due care by the contractor, the subcontractor, or their agents.

222.406-10 Disposition of disputes concerning construction contract labor standards enforcement.

(d) Forward the contracting officer's findings and the contractor's statement through the labor advisor.

222.406-13 Semiannual enforcement reports.

Forward these reports through the head of the contracting activity to the labor advisor within 15 days following the end of the reporting period. These reports shall not include information from investigations conducted by the Department of Labor. These reports shall contain the following information, as applicable, for construction work subject to the Davis-Bacon Act and the CWHSSA—

- (1) Period covered;
- (2) Number of prime contracts awarded;
- (3) Total dollar amount of prime contracts awarded;
- (4) Number of contractors/subcontractors against whom complaints were received;
- (5) Number of investigations conducted;
- (6) Number of contractors/subcontractors found in violation;
- (7) Amount of wage restitution found due under—
 - (i) Davis-Bacon Act
 - (ii) CWHSSA;
- (8) Number of employees due wage restitution under—
 - (i) Davis Bacon Act
 - (ii) CWHSSA;
- (9) Amount of liquidated damages assessed under the CWHSSA—

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- (i) Total amount
- (ii) Number of contracts involved;
- (10) Number of employees and amount paid/withheld under—
 - (i) Davis-Bacon Act
 - (ii) CWHSSA
 - (iii) Copeland Act; and
- (11) Preconstruction activities—
 - (i) Number of compliance checks performed
 - (ii) Preconstruction letters sent.

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SUBPART 222.8—EQUAL EMPLOYMENT OPPORTUNITY
(Revised April 12, 2006)

222.806 Inquires.

(b) Refer inquiries through the labor advisor.

222.807 Exemptions.

(c) Follow the procedures at PGI 222.807(c) when submitting a request for an exemption.

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SUBPART 222.10—SERVICE CONTRACT ACT OF 1965, AS AMENDED (Revised April 12, 2006)

222.1003 Applicability.

222.1003-1 General.

For contracts having a substantial amount of construction, alteration, renovation, painting, or repair work, see 222.402-70.

222.1008 Procedures for preparing and submitting Notice (SF 98/98a).

222.1008-2 Preparation of SF 98a.

Follow the procedures at PGI 222.1008-2 regarding use of the Service Contract Act Directory of Occupations when preparing the SF 98a.

222.1008-7 Required time of submission of Notice.

(d) Submit requests for immediate wage determination responses for emergency acquisitions through the labor advisor. If the request is justified, the labor advisor will contact Department of Labor headquarters officials.

222.1014 Delay of acquisition dates over 60 days.

Follow the procedures at PGI 222.1014 for submission of update requests to the Wage and Hour Division.

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SUBPART 222.13—SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA, AND OTHER ELIGIBLE VETERANS

(Revised April 12, 2006)

222.1305 Waivers.

(c) Follow the procedures at PGI 222.1305(c) for submission of waiver requests.

222.1308 Complaint procedures.

The contracting officer shall—

(1) Forward each complaint received as indicated in FAR 22.1308; and

(2) Notify the complainant of the referral. The contractor in question shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint, or the fact that the complaint was received.

222.1310 Solicitation provision and contract clauses.

(a)(1) Use of the clause at FAR 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans, with its paragraph (c), Listing Openings, also satisfies the requirement of 10 U.S.C. 2410k.

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SUBPART 222.14—EMPLOYMENT OF THE HANDICAPPED (Revised April 12, 2006)

222.1403 Waivers.

(c) The contracting officer shall submit a waiver request through contracting channels to the labor advisor. If the request is justified, the labor advisor will endorse the request and forward it for action to—

(i) The agency head for waivers under FAR 22.1403(a). For the defense agencies, waivers must be approved by the Under Secretary of Defense for Acquisition.

(ii) The Secretary of Defense, without the power of redelegation, for waivers under FAR 22.1403(b).

222.1406 Complaint procedures.

The contracting officer shall notify the complainant of such referral. The contractor in question shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint, or the fact that the complaint was received.

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SUBPART 222.71—RIGHT OF FIRST REFUSAL OF EMPLOYMENT (Revised April 12, 2006)

222.7101 Policy.

(a) DoD policy is to minimize the adverse impact on civil service employees affected by the closure of military installations. One means of implementing this policy is to give employees adversely affected by closure of a military installation the right of first refusal for jobs created by award of contracts arising from the closure effort that the employee is qualified to fill.

(b) Closure efforts include acquisitions for preparing the installation for closure (such as environmental restoration and utilities modification) and maintaining the property after closure (such as security and fire prevention services).

222.7102 Contract clause.

Use the clause at 252.222-7001, Right of First Refusal of Employment--Closure of Military Installations, in all solicitations and contracts arising from the closure of the military installation where the contract will be performed.

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SUBPART 222.72—COMPLIANCE WITH LABOR LAWS OF FOREIGN GOVERNMENTS

(Revised April 12, 2006)

222.7201 Contract clauses.

(a) Use the clause at 252.222-7002, Compliance with Local Labor Laws (Overseas), in solicitations and contracts for services or construction to be performed outside the United States and its outlying areas.

(b) Use the clause at 252.222-7003, Permit from Italian Inspectorate of Labor, in solicitations and contracts for porter, janitorial, or ordinary facility and equipment maintenance services to be performed in Italy.

(c) Use the clause at 252.222-7004, Compliance with Spanish Social Security Laws and Regulations, in solicitations and contracts for services or construction to be performed in Spain.

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(Revised April 12, 2006)

232.001 Definitions.

“Incremental funding” means the partial funding of a contract or an exercised option, with additional funds anticipated to be provided at a later time.

232.006 Reduction or suspension of contract payments upon finding of fraud.

232.006-5 Reporting.

Departments and agencies, in accordance with department/agency procedures, shall prepare and submit to the Under Secretary of Defense (Acquisition, Technology, and Logistics), through the Director of Defense Procurement and Acquisition Policy, annual reports (Report Control Symbol DD-AT&L(A)1891) containing the information required by FAR 32.006-5.

232.007 Contract financing payments.

(a) DoD policy is to make contract financing payments as quickly as possible. Generally, the contracting officer shall insert the standard due dates of 7 days for progress payments, and 14 days for performance-based payments and interim payments on cost-type contracts, in the appropriate paragraphs of the respective payment clauses. For interim payments on cost-reimbursement contracts for services, see 232.906(a)(i).

(b) The contracting officer should coordinate contract financing payment terms with offices that will be involved in the payment process to ensure that specified terms can be met. Where justified, the contracting officer may insert a due date greater than, but not less than, the standard. In determining payment terms, consider—

- (i) Geographical separation;
- (ii) Workload;
- (iii) Contractor ability to submit a proper request; and
- (iv) Other factors that could affect timing of payment.

232.070 Responsibilities.

(a) The Director of Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) (OUSD(AT&L)DPAP) is responsible for ensuring uniform administration of DoD contract financing, including DoD contract financing policies and important related procedures. Agency discretion under FAR Part 32 is at the DoD level and is not delegated to the departments and agencies. Proposals by the departments and agencies, to exercise agency discretion, shall be submitted to OUSD(AT&L)DPAP.

(b) Departments and agencies are responsible for their day-to-day contract financing operations. Refer specific cases involving financing policy or important procedural issues to OUSD(AT&L)DPAP for consideration through the

department/agency Contract Finance Committee members (also see Subpart 204.1 for deviation request and approval procedures).

(c) See PGI 232.070(c) for information on department/agency contract financing offices.

232.071 Reserved.

232.072 Financial responsibility of contractors.

Use the policies and procedures in this section in determining the financial capability of current or prospective contractors.

232.072-1 Required financial reviews.

The contracting officer shall perform a financial review when the contracting officer does not otherwise have sufficient information to make a positive determination of financial responsibility. In addition, the contracting officer shall consider performing a financial review—

(a) Prior to award of a contract, when—

(1) The contractor is on a list requiring preaward clearance or other special clearance before award;

(2) The contractor is listed on the Consolidated List of Contractors Indebted to the Government (Hold-Up List), or is otherwise known to be indebted to the Government;

(3) The contractor may receive Government assets such as contract financing payments or Government property;

(4) The contractor is experiencing performance difficulties on other work; or

(5) The contractor is a new company or a new supplier of the item.

(b) At periodic intervals after award of a contract, when—

(1) Any of the conditions in paragraphs (a)(2) through (a)(5) of this subsection are applicable; or

(2) There is any other reason to question the contractor's ability to finance performance and completion of the contract.

232.072-2 Appropriate information.

(a) The contracting officer shall obtain the type and depth of financial and other information that is required to establish a contractor's financial capability or disclose a contractor's financial condition. While the contracting officer should not request information that is not necessary for protection of the Government's interests, the contracting officer must insist upon obtaining the information that is necessary. The unwillingness or inability of a contractor to present reasonably requested information in a timely manner, especially information that a prudent business person would be expected to have and to use in the professional management of a business, may be a

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material fact in the determination of the contractor's responsibility and prospects for contract completion.

(b) The contracting officer shall obtain the following information to the extent required to protect the Government's interest. In addition, if the contracting officer concludes that information not listed in paragraphs (b)(1) through (b)(10) of this subsection is required to comply with 232.072-1, that information should be requested. The information must be for the person(s) who are legally liable for contract performance. If the contractor is not a corporation, the contracting officer shall obtain the required information for each individual/joint venturer/partner:

(1) Balance sheet and income statement—

(i) For the current fiscal year (interim);

(ii) For the most recent fiscal year and, preferably, for the 2 preceding fiscal years. These should be certified by an independent public accountant or by an appropriate officer of the firm; and

(iii) Forecasted for each fiscal year for the remainder of the period of contract performance.

(2) Summary history of the contractor and its principal managers, disclosing any previous insolvencies--corporate or personal, and describing its products or services.

(3) Statement of all affiliations disclosing—

(i) Material financial interests of the contractor;

(ii) Material financial interests in the contractor;

(iii) Material affiliations of owners, officers, directors, major stockholders; and

(iv) The major stockholders if the contractor is not a widely-traded, publicly-held corporation.

(4) Statement of all forms of compensation to each officer, manager, partner, joint venturer, or proprietor, as appropriate—

(i) Planned for the current year;

(ii) Paid during the past 2 years; and

(iii) Deferred to future periods.

(5) Business base and forecast that—

(i) Shows, by significant markets, existing contracts and outstanding offers, including those under negotiation; and

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- (ii) Is reconcilable to indirect cost rate projections.
- (6) Cash forecast for the duration of the contract (see 232.072-3).
- (7) Financing arrangement information that discloses—
 - (i) Availability of cash to finance contract performance;
 - (ii) Contractor's exposure to financial crisis from creditor's demands;
 - (iii) Degree to which credit security provisions could conflict with Government title terms under contract financing;
 - (iv) Clearly stated confirmations of credit with no unacceptable qualifications; and
 - (v) Unambiguous written agreement by a creditor if credit arrangements include deferred trade payments or creditor subordinations/repayment suspensions.
- (8) Statement of all state, local, and Federal tax accounts, including special mandatory contributions, e.g., environmental superfund.
- (9) Description and explanation of the financial effect of issues such as—
 - (i) Leases, deferred purchase arrangements, or patent or royalty arrangements;
 - (ii) Insurance, when relevant to the contract;
 - (iii) Contemplated capital expenditures, changes in equity, or contractor debt load;
 - (iv) Pending claims either by or against the contractor;
 - (v) Contingent liabilities such as guarantees, litigation, environmental, or product liabilities;
 - (vi) Validity of accounts receivable and actual value of inventory, as assets; and
 - (vii) Status and aging of accounts payable.
- (10) Significant ratios such as—
 - (i) Inventory to annual sales;
 - (ii) Inventory to current assets;
 - (iii) Liquid assets to current assets;
 - (iv) Liquid assets to current liabilities;

- (v) Current assets to current liabilities; and
- (vi) Net worth to net debt.

232.072-3 Cash flow forecasts.

(a) A contractor must be able to sustain a sufficient cash flow to perform the contract. When there is doubt regarding the sufficiency of a contractor's cash flow, the contracting officer should require the contractor to submit a cash flow forecast covering the duration of the contract.

(b) A contractor's inability or refusal to prepare and provide cash flow forecasts or to reconcile actual cash flow with previous forecasts is a strong indicator of serious managerial deficiencies or potential contract cost or performance problems.

(c) Single or one-time cash flow forecasts are of limited forecasting power. As such, they should be limited to preaward survey situations. Reliability of cash flow forecasts can be established only by comparing a series of previous actual cash flows with the corresponding forecasts and examining the causes of any differences.

(d) Cash flow forecasts must—

(1) Show the origin and use of all material amounts of cash within the entire business unit responsible for contract performance, period by period, for the length of the contract (or until the risk of a cash crisis ends); and

(2) Provide an audit trail to the data and assumptions used to prepare it.

(e) Cash flow forecasts can be no more reliable than the assumptions on which they are based. Most important of these assumptions are—

(1) Estimated amounts and timing of purchases and payments for materials, parts, components, subassemblies, and services;

(2) Estimated amounts and timing of payments for purchase or production of capital assets, test facilities, and tooling;

(3) Amounts and timing of fixed cash charges such as debt installments, interest, rentals, taxes, and indirect costs;

(4) Estimated amounts and timing of payments for projected labor, both direct and indirect;

(5) Reasonableness of projected manufacturing and production schedules;

(6) Estimated amounts and timing of billings to customers (including progress payments), and customer payments;

(7) Estimated amounts and timing of cash receipts from lenders or other credit sources, and liquidation of loans; and

(8) Estimated amounts and timing of cash receipts from other sources.

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(f) The contracting officer should review the assumptions underlying the cash flow forecasts. In determining whether the assumptions are reasonable and realistic, the contracting officer should consult with—

- (1) The contractor;
- (2) Government personnel in the areas of finance, engineering, production, cost, and price analysis; or
- (3) Prospective supply, subcontract, and loan or credit sources.

SUBPART 232.7—CONTRACT FUNDING

(Revised April 12, 2006)

232.702 Policy.

Fixed-price contracts shall be fully funded except as permitted by 232.703-1.

232.703 Contract funding requirements.

232.703-1 General.

(1) A fixed-price contract may be incrementally funded only if—

(i) The contract (excluding any options) or any exercised option—

(A) Is for severable services;

(B) Does not exceed one year in length; and

(C) Is incrementally funded using funds available (unexpired) as of the date the funds are obligated; or

(ii) The contract uses funds available from multiple (two or more) fiscal years and—

(A) The contract is funded with research and development appropriations; or

(B) Congress has otherwise authorized incremental funding.

(2) An incrementally funded fixed-price contract shall be fully funded as soon as funds are available.

232.703-3 Contracts crossing fiscal years.

(b) The contracting officer may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed 1 year (10 U.S.C. 2410a).

232.703-70 Military construction appropriations act restriction.

Annual military construction appropriations acts restrict the use of funds appropriated by the acts for payments under cost-plus-fixed-fee contracts (see 216.306(c)).

232.704 Limitation of cost or funds.

232.704-70 Incrementally funded fixed-price contracts.

(a) Upon receipt of the contractor's notice under paragraph (c) of the clause at 252.232-7007, Limitation of Government's Obligation, the contracting officer shall promptly provide written notice to the contractor that the Government is—

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(1) Allotting additional funds for continued performance and increasing the Government's limitation of obligation in a specified amount;

(2) Terminating the contract; or

(3) Considering whether to allot additional funds; and

(i) The contractor is entitled by the contract terms to stop work when the Government's limitation of obligation is reached; and

(ii) Any costs expended beyond the Government's limitation of obligation are at the contractor's risk.

(b) Upon learning that the contract will receive no further funds, the contracting officer shall promptly give the contractor written notice of the Government's decision and terminate for the convenience of the Government.

(c) The contracting officer shall ensure that, in accordance with paragraph (b) of the clause at 252.232-7007, Limitation of Government's Obligation, sufficient funds are allotted to the contract to cover the total amount payable to the contractor in the event of termination for the convenience of the Government.

232.705 Contract clauses.

232.705-70 Clause for limitation of Government's obligation.

Use the clause at 252.232-7007, Limitation of Government's Obligation, in solicitations and resultant incrementally funded fixed-price contracts. The contracting officer may revise the contractor's notification period, in paragraph (c) of the clause, from "ninety" to "thirty" or "sixty" days, as appropriate.

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(Revised April 12, 2006)

252.232-7000 Advance Payment Pool.

As prescribed in 232.412-70(a), use the following clause:

ADVANCE PAYMENT POOL (DEC 1991)

(a) Notwithstanding any other provision of this contract, advance payments will be made for contract performance in accordance with the Determinations, Findings, and Authorization for Advance payment dated _____.

(b) Payments made in accordance with this clause shall be governed by the terms and conditions of the Advance Payment Pool Agreement between the United States of America and (insert the name of the contractor). The Agreement is incorporated in the contract by reference.

(End of clause)

252.232-7001 Disposition of Payments.

As prescribed in 232.412-70(b), use the following clause:

DISPOSITION OF PAYMENTS (DEC 1991)

Payment will be by a dual payee Treasury check made payable to the contractor or the (insert the name of the disbursing office in the advance payment pool agreement), and will be forwarded to that disbursing office for appropriate disposition.

(End of clause)

252.232-7002 Progress Payments for Foreign Military Sales Acquisitions.

As prescribed in 232.502-4-70(a), use the following clause:

PROGRESS PAYMENTS FOR FOREIGN MILITARY SALES ACQUISITIONS
(DEC 1991)

If this contract includes foreign military sales (FMS) requirements, the Contractor shall—

(a) Submit a separate progress payment request for each progress payment rate; and

(b) Submit a supporting schedule showing—

(1) The amount of each request distributed to each country's requirements; and

(2) Total price per contract line item applicable to each separate progress payment rate.

(c) Identify in each progress payment request the contract requirements to which it applies (i.e., FMS or U.S.);

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(d) Calculate each request on the basis of the prices, costs (including costs to complete), subcontractor progress payments, and progress payment liquidations of the contract requirements to which it applies; and

(e) Distribute costs among contract line items and countries in a manner acceptable to the Administrative Contracting Officer.

(End of clause)

252.232-7003 Electronic Submission of Payment Requests.

As prescribed in 232.7004, use the following clause:

ELECTRONIC SUBMISSION OF PAYMENT REQUESTS (JAN 2004)

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

(1) “Contract financing payment” and “invoice payment” have the meanings given in section 32.001 of the Federal Acquisition Regulation.

(2) “Electronic form” means any automated system that transmits information electronically from the initiating system to all affected systems. Facsimile, e-mail, and scanned documents are not acceptable electronic forms for submission of payment requests. However, scanned documents are acceptable when they are part of a submission of a payment request made using one of the electronic forms provided for in paragraph (b) of this clause.

(3) “Payment request” means any request for contract financing payment or invoice payment submitted by the Contractor under this contract.

(b) Except as provided in paragraph (c) of this clause, the Contractor shall submit payment requests using one of the following electronic forms:

(1) Wide Area WorkFlow-Receipt and Acceptance (WAWF-RA). Information regarding WAWF-RA is available on the Internet at <https://wawf.eb.mil>.

(2) Web Invoicing System (WInS). Information regarding WInS is available on the Internet at <https://ecweb.dfas.mil>.

(3) American National Standards Institute (ANSI) X.12 electronic data interchange (EDI) formats.

(i) Information regarding EDI formats is available on the Internet at <http://www.X12.org>.

(ii) EDI implementation guides are available on the Internet at <http://www.dfas.mil/ecedi>.

(4) Another electronic form authorized by the Contracting Officer.

(c) If the Contractor is unable to submit a payment request in electronic form, or DoD is unable to receive a payment request in electronic form, the Contractor shall submit the payment request using a method mutually agreed to by the Contractor, the

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Contracting Officer, the contract administration office, and the payment office.

(d) In addition to the requirements of this clause, the Contractor shall meet the requirements of the appropriate payment clauses in this contract when submitting payment requests.

(End of clause)

252.232-7004 DoD Progress Payment Rates.

As prescribed in 232.502-4-70(b), use the following clause:

DOD PROGRESS PAYMENT RATES (OCT 2001)

(a) If the contractor is a small business concern, the Progress Payments clause of this contract is modified to change each mention of the progress payment rate and liquidation rate (excepting paragraph (k), *Limitations on Unfinalized Contract Actions*) to 90 percent.

(b) If the contractor is a small disadvantaged business concern, the Progress Payments clause of this contract is modified to change each mention of the progress payment rate and liquidation rate (excepting paragraph (k), *Limitations on Unfinalized Contract Actions*) to 95 percent.

(End of clause)

252.232-7005 Reimbursement of Subcontractor Advance Payments—DoD Pilot Mentor-Protege Program.

As prescribed in 232.412-70(c), use the following clause:

REIMBURSEMENT OF SUBCONTRACTOR ADVANCE PAYMENTS--DOD PILOT MENTOR-PROTEGE PROGRAM (SEP 2001)

(a) The Government will reimburse the Contractor for any advance payments made by the Contractor, as a mentor firm, to a protege firm, pursuant to an approved mentor-protege agreement, provided—

(1) The Contractor's subcontract with the protege firm includes a provision substantially the same as FAR 52.232-12, Advance Payments;

(2) The Contractor has administered the advance payments in accordance with the policies of FAR Subpart 32.4; and

(3) The Contractor agrees that any financial loss resulting from the failure or inability of the protege firm to repay any unliquidated advance payments is the sole financial responsibility of the Contractor.

(b) For a fixed price type contract, advance payments made to a protege firm shall be paid and administered as if they were 100 percent progress payments. The Contractor shall include as a separate attachment with each Standard Form (SF) 1443, Contractor's Request for Progress Payment, a request for reimbursement of advance payments made to a protege firm. The attachment shall provide a separate calculation of lines 14a through 14e of SF 1443 for each protege, reflecting the status of advance

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payments made to that protege.

(c) For cost reimbursable contracts, reimbursement of advance payments shall be made via public voucher. The Contractor shall show the amounts of advance payments made to each protege on the public voucher, in the form and detail directed by the cognizant contracting officer or contract auditor.

(End of clause)

252.232-7006 Alternate A.

ALTERNATE A (DEC 2003)

As prescribed in 232.111(b), substitute the following paragraph (a)(2) for paragraph (a)(2) of the clause at FAR 52.232-7:

(a)(2) The Administrative Contracting Officer (ACO) may unilaterally issue a contract modification requiring the Contractor to withhold amounts from its billings until a reserve is set aside in an amount that the ACO considers necessary to protect the Government's interests. The ACO may withhold 5 percent of the amounts due under this paragraph (a), but the total amount withheld shall not exceed \$50,000. The amounts withheld shall be retained until the Contractor executes and delivers the release required by paragraph (f) of this clause.

252.232-7007 Limitation of Government's obligation.

As prescribed in 232.705-70, use the following clause:

LIMITATION OF GOVERNMENT'S OBLIGATION (APR 2006)

(a) Contract line item(s) * through * are incrementally funded. For these item(s), the sum of \$ * of the total price is presently available for payment and allotted to this contract. An allotment schedule is set forth in paragraph (i) of this clause.

(b) For item(s) identified in paragraph (a) of this clause, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including reimbursement in the event of termination of those item(s) for the Government's convenience, approximates the total amount currently allotted to the contract. The Contractor is not authorized to continue work on those item(s) beyond that point. The Government will not be obligated in any event to reimburse the Contractor in excess of the amount allotted to the contract for those item(s) regardless of anything to the contrary in the clause entitled "Termination for Convenience of the Government." As used in this clause, the total amount payable by the Government in the event of termination of applicable contract line item(s) for convenience includes costs, profit, and estimated termination settlement costs for those item(s).

(c) Notwithstanding the dates specified in the allotment schedule in paragraph (i) of this clause, the Contractor will notify the Contracting Officer in writing at least ninety days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the applicable item(s). The notification will state (1) the estimated date when that point will be reached and (2) an estimate of

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additional funding, if any, needed to continue performance of applicable line items up to the next scheduled date for allotment of funds identified in paragraph (i) of this clause, or to a mutually agreed upon substitute date. The notification will also advise the Contracting Officer of the estimated amount of additional funds that will be required for the timely performance of the item(s) funded pursuant to this clause, for a subsequent period as may be specified in the allotment schedule in paragraph (i) of this clause or otherwise agreed to by the parties. If after such notification additional funds are not allotted by the date identified in the Contractor’s notification, or by an agreed substitute date, the Contracting Officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the clause of this contract entitled “Termination for Convenience of the Government.”

(d) When additional funds are allotted for continued performance of the contract line item(s) identified in paragraph (a) of this clause, the parties will agree as to the period of contract performance which will be covered by the funds. The provisions of paragraphs (b) through (d) of this clause will apply in like manner to the additional allotted funds and agreed substitute date, and the contract will be modified accordingly.

(e) If, solely by reason of failure of the Government to allot additional funds, by the dates indicated below, in amounts sufficient for timely performance of the contract line item(s) identified in paragraph (a) of this clause, the Contractor incurs additional costs or is delayed in the performance of the work under this contract and if additional funds are allotted, an equitable adjustment will be made in the price or prices (including appropriate target, billing, and ceiling prices where applicable) of the item(s), or in the time of delivery, or both. Failure to agree to any such equitable adjustment hereunder will be a dispute concerning a question of fact within the meaning of the clause entitled “Disputes.”

(f) The Government may at any time prior to termination allot additional funds for the performance of the contract line item(s) identified in paragraph (a) of this clause.

(g) The termination provisions of this clause do not limit the rights of the Government under the clause entitled “Default.” The provisions of this clause are limited to the work and allotment of funds for the contract line item(s) set forth in paragraph (a) of this clause. This clause no longer applies once the contract is fully funded except with regard to the rights or obligations of the parties concerning equitable adjustments negotiated under paragraphs (d) and (e) of this clause.

(h) Nothing in this clause affects the right of the Government to terminate this contract pursuant to the clause of this contract entitled “Termination for Convenience of the Government.”

(i) Nothing in this clause shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342.

(j) The parties contemplate that the Government will allot funds to this contract in accordance with the following schedule:

On execution of contract	\$ _____
(month) (day), (year)	\$ _____
(month) (day), (year)	\$ _____
(month) (day), (year)	\$ _____

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(End of clause)

ALTERNATE I (AUG 1993).

If only one line item will be incrementally funded, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) Contract line item _____ is incrementally funded. The sum of \$ ____* is presently available for payment and allotted to this contract. An allotment schedule is contained in paragraph (i) of this clause.

* To be inserted after negotiation.

252.232-7008 Assignment of Claims (Overseas).

As prescribed in 232.806(a)(1), use the following clause:

ASSIGNMENT OF CLAIMS (OVERSEAS) (JUN 1997)

(a) No claims for monies due, or to become due, shall be assigned by the Contractor unless—

- (1) Approved in writing by the Contracting Officer;
- (2) Made in accordance with the laws and regulations of the United States of America; and
- (3) Permitted by the laws and regulations of the Contractor's country.

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret," "Secret," or "Confidential" be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive such documents. However, a copy of any part or all of this contract so marked may be furnished, or any information contained herein may be disclosed, to such assignee upon the Contracting Officer's prior written authorization.

(c) Any assignment under this contract shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment may be made to one party as agent or trustee for two or more parties participating in such financing. On each invoice or voucher submitted for payment under this contract to which any assignment applies, and for which direct payment thereof is to be made to an assignee, the Contractor shall—

- (1) Identify the assignee by name and complete address; and
- (2) Acknowledge the validity of the assignment and the right of the named assignee to receive payment in the amount invoiced or vouchered.

(End of clause)

252.232-7009 Mandatory Payment by Governmentwide Commercial Purchase Card.

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As prescribed in 232.1110, use the following clause:

MANDATORY PAYMENT BY GOVERNMENTWIDE COMMERCIAL PURCHASE CARD (JUL 2000)

The Contractor agrees to accept the Governmentwide commercial purchase card as the method of payment for orders or calls valued at or below \$2,500 under this contract or agreement.

(End of clause)

252.232-7010 Levies on Contract Payments.

As prescribed in 232.7102, use the following clause:

LEVIES ON CONTRACT PAYMENTS (SEP 2005)

(a) 26 U.S.C. 6331(h) authorizes the Internal Revenue Service (IRS) to continuously levy up to 100 percent of contract payments, up to the amount of tax debt.

(b) When a levy is imposed on a payment under this contract and the levy will jeopardize contract performance, the Contractor shall promptly notify the Procuring Contracting Officer and provide—

(1) The total dollar amount of the levy;

(2) A statement that the levy will jeopardize contract performance, including rationale and adequate supporting documentation; and

(3) Advice as to whether the inability to perform may adversely affect national security, including rationale and adequate supporting documentation.

(c) DoD shall promptly review the Contractor's assessment and provide a notification to the Contractor including—

(1) A statement as to whether DoD agrees that the levy jeopardizes contract performance; and

(2) If the levy jeopardizes contract performance and the lack of performance will adversely affect national security, the total amount of the monies collected that should be returned to the Contractor; or

(3) If the levy jeopardizes contract performance but will not impact national security, a recommendation that the Contractor promptly notify the IRS to attempt to resolve the tax situation.

(d) Any DoD determination under this clause is not subject to appeal under the Contract Disputes Act.

(End of clause)