

Defense Federal Acquisition Regulation Supplement

Part 226—Other Socioeconomic Programs

TABLE OF CONTENTS (Revised October 14, 2014)

SUBPART 226.1—INDIAN INCENTIVE PROGRAM

- 226.103 Procedures.
- 226.104 Contract clause.

SUBPART 226.70—RESERVED

SUBPART 226.71—PREFERENCE FOR LOCAL AND SMALL BUSINESS

- 226.7100 Scope of subpart.
- 226.7101 Definition.
- 226.7102 Policy.
- 226.7103 Procedure.
- 226.7104 Other considerations.

Defense Federal Acquisition Regulation Supplement

Part 226—Other Socioeconomic Programs

SUBPART 226.1—INDIAN INCENTIVE PROGRAM

(Revised June 25, 2013)

226.103 Procedures.

Follow the procedures at [PGI 226.103](#) when submitting a request for funding of an Indian incentive.

226.104 Contract clause.

Use the clause at [252.226-7001](#), Utilization of Indian Organizations, Indian-Owned Economic Enterprises, and Native Hawaiian Small Business Concerns, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that are for supplies or services exceeding \$500,000 in value.

Defense Federal Acquisition Regulation Supplement

Part 226—Other Socioeconomic Programs

SUBPART 226.3
(Removed October 14, 2014)

Defense Federal Acquisition Regulation Supplement

Part 226—Other Socioeconomic Programs

SUBPART 226.70—RESERVED
(December 9, 2005)

SUBPART 226.71—PREFERENCE FOR LOCAL AND SMALL BUSINESSES
(Revised March 14, 2002)

226.7100 Scope of subpart.

This subpart implements Section 2912 of the Fiscal Year 1994 Defense Authorization Act (Pub. L. 103-160) and Section 817 of the Fiscal Year 1995 Defense Authorization Act (Pub. L. 103-337).

226.7101 Definition.

“Vicinity,” as used in this subpart, means the county or counties in which the military installation to be closed or realigned is located and all adjacent counties, unless otherwise defined by the agency head.

226.7102 Policy.

Businesses located in the vicinity of a military installation that is being closed or realigned under a base closure law, including 10 U.S.C. 2687, and small and small disadvantaged businesses shall be provided maximum practicable opportunity to participate in acquisitions that support the closure or realignment, including acquisitions for environmental restoration and mitigation.

226.7103 Procedure.

In considering acquisitions for award through the section 8(a) program (Subpart 219.8 and FAR Subpart 19.8) or in making set-aside decisions under Subpart 219.5 and FAR Subpart 19.5 for acquisitions in support of a base closure or realignment, the contracting officer shall—

(a) Determine whether there is a reasonable expectation that offers will be received from responsible business concerns located in the vicinity of the military installation that is being closed or realigned.

(b) If offers can not be expected from business concerns in the vicinity, proceed with section 8(a) or set-aside consideration as otherwise indicated in Part 219 and FAR Part 19.

(c) If offers can be expected from business concerns in the vicinity—

(1) Consider section 8(a) only if at least one eligible 8(a) contractor is located in the vicinity.

(2) Set aside the acquisition for small business only if at least one of the expected offers is from a small business located in the vicinity.

226.7104 Other considerations.

When planning for contracts for services related to base closure activities at a military installation affected by a closure or realignment under a base closure law, contracting officers shall consider including, as a factor in source selection, the extent to which offerors specifically identify and commit, in their proposals, to a plan to hire residents of the vicinity of the military installation that is being closed or realigned.

Defense Federal Acquisition Regulation Supplement

Part 226—Other Socioeconomic Programs

SUBPART 226.72
(Removed December 9, 2005)

TABLE OF CONTENTS
(Revised September 23, 2016)

SUBPART 227.3—PATENT RIGHTS UNDER GOVERNMENT CONTRACTS

- 227.303 Contract clauses.
- 227.304 Procedures.
- 227.304-1 General.

SUBPART 227.4—RIGHTS IN DATA AND COPYRIGHTS

- 227.400 Scope of subpart.

**SUBPART 227.6—FOREIGN LICENSE AND TECHNICAL ASSISTANCE
AGREEMENTS**

- 227.670 Scope.
- 227.671 General.
- 227.672 Policy.
- 227.673 Foreign license and technical assistance agreements between the Government and domestic concerns.
- 227.674 Supply contracts between the Government and a foreign government or concern.
- 227.675 Foreign license and technical assistance agreements between a domestic concern and a foreign government or concern.
- 227.675-1 International Traffic in Arms Regulations.
- 227.675-2 Review of agreements.
- 227.676 Foreign patent interchange agreements.

**SUBPART 227.70—INFRINGEMENT CLAIMS, LICENSES, AND
ASSIGNMENTS**

- 227.7000 Scope.
- 227.7001 Policy.
- 227.7002 Statutes pertaining to administrative claims of infringement.
- 227.7003 Claims for copyright infringement.
- 227.7004 Requirements for filing an administrative claim for patent infringement.
- 227.7005 Indirect notice of patent infringement claims.
- 227.7006 Investigation and administrative disposition of claims.
- 227.7007 Notification and disclosure to claimants.
- 227.7008 Settlement of indemnified claims.
- 227.7009 Patent releases, license agreements, and assignments.
- 227.7009-1 Required clauses.
- 227.7009-2 Clauses to be used when applicable.
- 227.7009-3 Additional clauses—contracts except running royalty contracts.
- 227.7009-4 Additional clauses—contracts providing for payment of a running royalty.
- 227.7010 Assignments.
- 227.7011 Procurement of rights in inventions, patents, and copyrights.
- 227.7012 Contract format.
- 227.7013 Recordation.

SUBPART 227.71—RIGHTS IN TECHNICAL DATA

- 227.7100 Scope of subpart.
- 227.7101 Definitions.

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

227.7102	Commercial items, components, or processes.
227.7102-1	Policy.
227.7102-2	Rights in technical data.
227.7102-3	Government right to review, verify, challenge and validate asserted restrictions.
227.7102-4	Contract clauses.
227.7103	Noncommercial items or processes.
227.7103-1	Policy.
227.7103-2	Acquisition of technical data.
227.7103-3	Early identification of technical data to be furnished to the Government with restrictions on use, reproduction or disclosure.
227.7103-4	License rights.
227.7103-5	Government rights.
227.7103-6	Contract clauses.
227.7103-7	Use and non-disclosure agreement.
227.7103-8	Deferred delivery and deferred ordering of technical data.
227.7103-9	Copyright.
227.7103-10	Contractor identification and marking of technical data to be furnished with restrictive markings.
227.7103-11	Contractor procedures and records.
227.7103-12	Government right to establish conformity of markings.
227.7103-13	Government right to review, verify, challenge, and validate asserted restrictions.
227.7103-14	Conformity, acceptance, and warranty of technical data.
227.7103-15	Subcontractor rights in technical data.
227.7103-16	Providing technical data to foreign governments, foreign contractors, or international organizations.
227.7103-17	Overseas contracts with foreign sources.
227.7104	Contracts under the Small Business Innovation Research (SBIR) Program.
227.7105	Contracts for the acquisition of existing works.
227.7105-1	General.
227.7105-2	Acquisition of existing works without modification.
227.7105-3	Acquisition of modified existing works.
227.7106	Contracts for special works.
227.7107	Contracts for architect-engineer services.
227.7107-1	Architectural designs and data clauses for architect-engineer or construction contracts.
227.7107-2	Contracts for construction supplies and research and development work.
227.7107-3	Approval of restricted designs.
227.7108	Contractor data repositories.

SUBPART 227.72—RIGHTS IN COMPUTER SOFTWARE AND COMPUTER SOFTWARE DOCUMENTATION

227.7200	Scope of subpart.
227.7201	Definitions.
227.7202	Reserved.
227.7202-1	Policy.
227.7202-2	Obtaining commercial computer software or commercial computer software documentation.
227.7202-3	Rights in commercial computer software or commercial computer

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

- software documentation.
- 227.7202-4 Contract clause.
- 227.7203 Noncommercial computer software and noncommercial computer software documentation.
- 227.7203-1 Policy.
- 227.7203-2 Acquisition of noncommercial computer software and computer software.
- 227.7203-3 Early identification of computer software or computer software documentation to be furnished to the Government with restrictions on use, reproduction or disclosure.
- 227.7203-4 License rights.
- 227.7203-5 Government rights.
- 227.7203-6 Contract clauses.
- 227.7203-8 Deferred delivery and deferred ordering of computer software and computer software documentation.
- 227.7203-9 Copyright.
- 227.7203-10 Contractor identification and marking of computer software or computer software documentation to be furnished with restrictive markings.
- 227.7203-11 Contractor procedures and records.
- 227.7203-12 Government right to establish conformity of markings.
- 227.7203-13 Government right to review, verify, challenge, and validate asserted restrictions.
- 227.7203-14 Conformity, acceptance, and warranty of computer software and computer software documentation.
- 227.7203-15 Subcontractor rights in computer software or computer software documentation.
- 227.7203-16 Providing computer software or computer software documentation to foreign governments, foreign contractors, or international organization.
- 227.7203-17 Overseas contracts with foreign sources.
- 227.7204 Contracts under the Small Business Innovation Research Program.
- 227.7205 Contracts for special works.
- 227.7206 Contracts for architect-engineer services.
- 227.7207 Contractor data repositories.

SUBPART 227.3—PATENT RIGHTS UNDER GOVERNMENT CONTRACTS
(Revised December 7, 2011)

227.303 Contract clauses.

(1) Use the clause at [252.227-7039](#), Patents—Reporting of Subject Inventions, in solicitations and contracts containing the clause at FAR 52.227-11, Patent Rights—Ownership by the Contractor.

(2)(i) Use the clause at [252.227-7038](#), Patent Rights—Ownership by the Contractor (Large Business), instead of the clause at FAR 52.227-11, in solicitations and contracts for experimental, developmental, or research work if—

(A) The contractor is other than a small business concern or nonprofit organization; and

(B) No alternative patent rights clause is used in accordance with FAR 27.303(c) or (e).

(ii) Use the clause with its Alternate I if—

(A) The acquisition of patent rights for the benefit of a foreign government is required under a treaty or executive agreement;

(B) The agency head determines at the time of award that it would be in the national interest to acquire the right to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement; or

(C) Other rights are necessary to effect a treaty or agreement, in which case Alternate I may be appropriately modified.

(iii) Use the clause with its Alternate II in long-term contracts if necessary to effect treaty or agreements to be entered into.

227.304 Procedures.

227.304-1 General.

Interim and final invention reports and notification of all subcontracts for experimental, developmental, or research work may be submitted on DD Form 882, Report of Inventions and Subcontracts.

SUBPART 227.4—RIGHTS IN DATA AND COPYRIGHTS

227.400 Scope of subpart.

DoD activities shall use the guidance in Subparts 227.71 and 227.72 instead of the guidance in FAR Subpart 27.4.

SUBPART 227.6—FOREIGN LICENSE AND TECHNICAL ASSISTANCE AGREEMENTS

227.670 Scope.

This subpart prescribes policy with respect to foreign license and technical assistance agreements.

227.671 General.

In furtherance of the Military Assistance Program or for other national defense purposes, the Government may undertake to develop or encourage the development of foreign additional sources of supply. The development of such sources may be accomplished by an agreement, often called a foreign licensing agreement or technical assistance agreement, wherein a domestic concern, referred to in this subpart as a “primary source,” agrees to furnish to a foreign concern or government, herein referred to as a “second source,” foreign patent rights; technical assistance in the form of data, know-how, trained personnel of the primary source, instruction and guidance of the personnel of the second source, jigs, dies, fixtures, or other manufacturing aids, or such other assistance, information, rights, or licenses as are needed to enable the second source to produce particular supplies or perform particular services. Agreements calling for one or more of the foregoing may be entered into between the primary source and the Government, a foreign government, or a foreign concern. The consideration for providing such foreign license and technical assistance may be in the form of a lump sum payment, payments for each item manufactured by the second source, an agreement to exchange data and patent rights on improvements made to the article or service, capital stock transactions, or any combination of these. The primary source's bases for computing such consideration may include actual costs; charges for the use of patents, data, or know-how reflecting the primary source's investment in developing and engineering and production techniques; and the primary source's “price” for setting up a second source. Such agreements often refer to the compensation to be paid as a royalty or license fee whether or not patent rights are involved.

227.672 Policy.

It is Government policy not to pay in connection with its contracts, and not to allow to be paid in connection with contracts made with funds derived through the Military Assistance Program or otherwise through the United States Government, charges for use of patents in which it holds a royalty-free license or charges for data which it has a right to use and disclose to others, or which is in the public domain, or which the Government has acquired without restriction upon its use and disclosure to others. This policy shall be applied by the Departments in negotiating contract prices for foreign license technical assistance contracts (227.675) or supply contracts with second sources (227.674); and in commenting on such agreements when they are referred to the Department of Defense by the Department of State pursuant to Section 414 of the Mutual Security Act of 1954 as amended (22 U.S.C. 1934) and the International Traffic in Arms Regulations (see 227.675).

227.673 Foreign license and technical assistance agreements between the Government and domestic concerns.

(a) Contracts between the Government and a primary source to provide technical assistance or patent rights to a second source for the manufacture of supplies or performance of services shall, to the extent practicable, specify the rights in patents and

data and any other rights to be supplied to the second source. Each contract shall provide, in connection with any separate agreement between the primary source and the second source for patent rights or technical assistance relating to the articles or services involved in the contract, that—

(1) The primary source and his subcontractors shall not make, on account of any purchases by the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government, any charge to the second source for royalties or amortization for patents or inventions in which the Government holds a royalty-free license; or data which the Government has the right to possess, use, and disclose to others; or any technical assistance provided to the second source for which the Government has paid under a contract between the Government and the primary source; and

(2) The separate agreement between the primary and second source shall include a statement referring to the contract between the Government and the primary source, and shall conform to the requirements of the International Traffic in Arms Regulations (see 227.675-1).

(b) The following factors, among others, shall be considered in negotiating the price to be paid the primary source under contracts within (a) of this section:

(1) The actual cost of providing data, personnel, manufacturing aids, samples, spare parts, and the like;

(2) The extent to which the Government has contributed to the development of the supplies or services, and to the methods of manufacture or performance, through past contracts for research and development or for manufacture of the supplies or performance of the services; and

(3) The Government's patent rights and rights in data relating to the supplies or services and to the methods of manufacture or of performance.

227.674 Supply contracts between the Government and a foreign government or concern.

In negotiating contract prices with a second source, including the redetermination of contract prices, or in determining the allowability of costs under a cost-reimbursement contract with a second source, the contracting officer:

(a) Shall obtain from the second source a detailed statement (see FAR 27.204-1(a)(2)) of royalties, license fees, and other compensation paid or to be paid to a primary source (or any of his subcontractors) for patent rights, rights in data, and other technical assistance provided to the second source, including identification and description of such patents, data, and technical assistance; and

(b) Shall not accept or allow charges which in effect are—

(1) For royalties or amortization for patents or inventions in which the Government holds a royalty-free license; or

(2) For data which the Government has a right to possess, use, and disclose to others; or

(3) For any technical assistance provided to the second source for which the Government has paid under a contract between the Government and a primary source.

227.675 Foreign license and technical assistance agreements between a domestic concern and a foreign government or concern.

227.675-1 International Traffic in Arms Regulations.

Pursuant to Section 414 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1934), the Department of State controls the exportation of data relating to articles designated in the United States Munitions List as arms, ammunition, or munitions of war. (The Munitions List and pertinent procedures are set forth in the International Traffic in Arms Regulations, 22 CFR, et seq.) Before authorizing such exportation, the Department of State generally requests comments from the Department of Defense. On request of the Office of the Assistant Secretary of Defense (International Security Affairs), each Department shall submit comments thereon as the basis for a Department of Defense reply to the Department of State.

227.675-2 Review of agreements.

(a) In reviewing foreign license and technical assistance agreements between primary and second sources, the Department concerned shall, insofar as its interests are involved, indicate whether the agreement meets the requirements of Sections 124.07-124.10 of the International Traffic in Arms Regulations or in what respects it is deficient. Paragraphs (b) through (g) of this subsection provide general guidance.

(b) When it is reasonably anticipated that the Government will purchase from the second source the supplies or services involved in the agreement, or that Military Assistance Program funds will be provided for the procurement of the supplies or services, the following guidance applies.

(1) If the agreement specifies a reduction in charges thereunder, with respect to purchases by or for the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government, in recognition of the Government's rights in patents and data, the Department concerned shall evaluate the amount of the reduction to determine whether it is fair and reasonable in the circumstances, before indicating its approval.

(2) If the agreement does not specify any reduction in charges or otherwise fails to give recognition to the Government's rights in the patents or data involved, approval shall be conditioned upon amendment of the agreement to reflect a reduction, evaluated by the Department concerned as acceptable to the Government, in any charge thereunder with respect to purchases made by or for the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government, in accordance with Section 124.10 of the International Traffic in Arms Regulations.

(3) If the agreement provides that no charge is to be made to the second source for data or patent rights to the extent of the Government's rights, the Department

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

concerned shall evaluate the acceptability of the provision before indicating its approval.

(4) If time or circumstances do not permit the evaluation called for in (b)(1), (2), or (3) of this subsection, the guidance in (c) of this subsection shall be followed.

(c) When it is not reasonably anticipated that the Government will purchase from the second source the supplies or services involved in the agreement nor that Military Assistance Program funds will be provided for the purchase of the supplies or services, then the following guidance applies.

(1) If the agreement provides for charges to the second source for data or patent rights, it may suffice to fulfill the requirements of Section 124.10 insofar as the Department of Defense is concerned if:

(i) The agreement requires the second source to advise the primary source when he has knowledge of any purchase made or to be made from him by or for the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government;

(ii) The primary source separately agrees with the Government that upon such advice to him from the second source or from the Government or otherwise as to any such a purchase or prospective purchase, he will negotiate with the Department concerned an appropriate reduction in his charges to the second source in recognition of any Government rights in patents or data; and

(iii) The agreement between the primary and second sources further provides that in the event of any such purchase and resulting reduction in charges, the second source shall pass on this reduction to the Government by giving the Government a corresponding reduction in the purchase price of the article or service.

(2) If the agreement provides that no charge is to be made to the second source for data or patent rights to the extent to which the Government has rights, the Department concerned shall:

(i) Evaluate the acceptability of the provision before indicating its approval;
or

(ii) Explicitly condition its approval on the right to evaluate the acceptability of the provision at a later time.

(d) When there is a technical assistance agreement between the primary source and the Government related to the agreement between the primary and second sources that is under review, the latter agreement shall reflect the arrangements contemplated with respect thereto by the Government's technical assistance agreement with the primary source.

(e) Every agreement shall provide that any license rights transferred under the agreement are subject to existing rights of the Government.

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

(f) In connection with every agreement referred to in (b) above, a request shall be made to the primary source—

(1) To identify the patents, data, and other technical assistance to be provided to the second source by the primary source or any of his subcontractors,

(2) To identify any such patents and data in which, to the knowledge of the primary source, the Government may have rights, and

(3) To segregate the charges made to the second source for each such category or item of patents, data, and other technical assistance.

Reviewing personnel shall verify this information or, where the primary source does not furnish it, obtain such information from Governmental sources so far as practicable.

(g) The Department concerned shall make it clear that its approval of any agreement does not necessarily recognize the propriety of the charges or the amounts thereof, or constitute approval of any of the business arrangements in the agreement, unless the Department expressly intends by its approval to commit itself to the fairness and reasonableness of a particular charge or charges. In any event, a disclaimer should be made to charges or business terms not affecting any purchase made by or for the Government or by others with funds derived through the Military Assistance Program or otherwise through the Government.

227.676 Foreign patent interchange agreements.

(a) Patent interchange agreements between the United States and foreign governments provide for the use of patent rights, compensation, free licenses, and the establishment of committees to review and make recommendations on these matters. The agreements also may exempt the United States from royalty and other payments. The contracting officer shall ensure that royalty payments are consistent with patent interchange agreements.

(b) Assistance with patent rights and royalty payments in the United States European Command (USEUCOM) area of responsibility is available from HQ USEUCOM, ATTN: ECLA, Unit 30400, Box 1000, APO AE 09128; Telephone: DSN 430-8001/7263, Commercial 49-0711-680-8001/7263; Telefax: 49-0711-680-5732.

**SUBPART 227.70—INFRINGEMENT CLAIMS, LICENSES, AND
ASSIGNMENTS**

(Revised January 20, 2011)

227.7000 Scope.

This subpart prescribes policy, procedures, and instructions for use of clauses with respect to processing licenses, assignments, and infringement claims.

227.7001 Policy.

Whenever a claim of infringement of privately owned rights in patented inventions or copyrighted works is asserted against any Department or Agency of the Department of Defense, all necessary steps shall be taken to investigate, and to settle administratively, deny, or otherwise dispose of such claim prior to suit against the United States. This subpart [227.70](#) does not apply to licenses or assignments acquired by the Department of Defense under the Patent Rights clauses.

227.7002 Statutes pertaining to administrative claims of infringement.

Statutes pertaining to administrative claims of infringement in the Department of Defense include the following: the Foreign Assistance Act of 1961, 22 U.S.C. 2356 (formerly the Mutual Security Acts of 1951 and 1954); the Invention Secrecy Act, 35 U.S.C. 181-188; 10 U.S.C. 2386; 28 U.S.C. 1498; and 35 U.S.C. 286.

227.7003 Claims for copyright infringement.

The procedures set forth herein will be followed, where applicable, in copyright infringement claims.

227.7004 Requirements for filing an administrative claim for patent infringement.

(a) A patent infringement claim for compensation, asserted against the United States under any of the applicable statutes cited in [227.7002](#), must be actually communicated to and received by a Department, agency, organization, office, or field establishment within the Department of Defense. Claims must be in writing and should include the following:

- (1) An allegation of infringement;
- (2) A request for compensation, either expressed or implied;
- (3) A citation of the patent or patents alleged to be infringed;
- (4) A sufficient designation of the alleged infringing item or process to permit identification, giving the military or commercial designation, if known, to the claimant;
- (5) A designation of at least one claim of each patent alleged to be infringed; or
- (6) As an alternative to (a)(4) and (5) of this section, a declaration that the claimant has made a bona fide attempt to determine the item or process which is alleged to infringe, but was unable to do so, giving reasons, and stating a reasonable basis for his belief that his patent or patents are being infringed.

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

(b) In addition to the information listed in (a) above, the following material and information is generally necessary in the course of processing a claim of patent infringement. Claimants are encouraged to furnish this information at the time of filing a claim to permit the most expeditious processing and settlement of the claim.

(1) A copy of the asserted patent(s) and identification of all claims of the patent alleged to be infringed.

(2) Identification of all procurements known to claimant which involve the alleged infringing item or process, including the identity of the vendor or contractor and the Government procuring activity.

(3) A detailed identification of the accused article or process, particularly where the article or process relates to a component or subcomponent of the item procured, an element by element comparison of the representative claims with the accused article or process. If available, this identification should include documentation and drawings to illustrate the accused article or process in suitable detail to enable verification of the infringement comparison.

(4) Names and addresses of all past and present licenses under the patent(s), and copies of all license agreements and releases involving the patent(s).

(5) A brief description of all litigation in which the patent(s) has been or is now involved, and the present status thereof.

(6) A list of all persons to whom notices of infringement have been sent, including all departments and agencies of the Government, and a statement of the ultimate disposition of each.

(7) A description of Government employment or military service, if any, by the inventor and/or patent owner.

(8) A list of all Government contracts under which the inventor, patent owner, or anyone in privity with him performed work relating to the patented subject matter.

(9) Evidence of title to the patent(s) alleged to be infringed or other right to make the claim.

(10) A copy of the Patent Office file of each patent if available to claimant.

(11) Pertinent prior art known to claimant, not contained in the Patent Office file, particularly publications and foreign art.

In addition in the foregoing, if claimant can provide a statement that the investigation may be limited to the specifically identified accused articles or processes, or to a specific procurement, it may materially expedite determination of the claim.

(c) Any department receiving an allegation of patent infringement which meets the requirements of this paragraph shall acknowledge the same and supply the other departments that may have an interest therein with a copy of such communication and the acknowledgement thereof.

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

(1) For the Department of the Army--Chief, Patents, Copyrights, and Trademarks Division, U.S. Army Legal Services Agency;

(2) For the Department of the Navy—the Patent Counsel for Navy, Office of Naval Research;

(3) For the Department of the Air Force—Chief, Patents Division, Office of the Judge Advocate General;

(4) For the Defense Logistics Agency—the Office of Counsel;

(5) For the National Security Agency—the General Counsel;

(6) For the Defense Information Systems Agency—the Counsel;

(7) For the Defense Threat Reduction Agency—the General Counsel; and

(8) For the National Geospatial-Intelligence Agency—the Counsel.

(d) If a communication alleging patent infringement is received which does not meet the requirements set forth in paragraph (c) of this section, the sender shall be advised in writing—

(1) That his claim for infringement has not been satisfactorily presented, and

(2) Of the elements considered necessary to establish a claim.

(e) A communication making a proffer of a license in which no infringement is alleged shall not be considered as a claim for infringement.

227.7005 Indirect notice of patent infringement claims.

(a) A communication by a patent owner to a Department of Defense contractor alleging that the contractor has committed acts of infringement in performance of a Government contract shall not be considered a claim within the meaning of [227.7004](#) until it meets the requirements specified therein.

(b) Any Department receiving an allegation of patent infringement which meets the requirements of [227.7004](#) shall acknowledge the same and supply the other Departments (see [227.7004\(c\)](#)) which may have an interest therein with a copy of such communication and the acknowledgement thereof.

(c) If a communication covering an infringement claim or notice which does not meet the requirements of [227.7004\(a\)](#) is received from a contractor, the patent owner shall be advised in writing as covered by the instructions of [227.7004\(d\)](#).

227.7006 Investigation and administrative disposition of claims.

An investigation and administrative determination (denial or settlement) of each claim shall be made in accordance with instructions and procedures established by each Department, subject to the following:

(a) When the procurement responsibility for the alleged infringing item or process is assigned to a single Department or only one Department is the purchaser of the alleged infringing item or process, and the funds of that Department only are to be charged in the settlement of the claim, that Department shall have the sole responsibility for the investigation and administrative determination of the claim and for the execution of any agreement in settlement of the claim. Where, however, funds of another Department are to be charged, in whole or in part, the approval of such Department shall be obtained as required by [208.7002](#). Any agreement in settlement of the claim, approved pursuant to [208.7002](#) shall be executed by each of the Departments concerned.

(b) When two or more Departments are the respective purchasers of alleged infringing items or processes and the funds of those Departments are to be charged in the settlement of the claim, the investigation and administrative determination shall be the responsibility of the Department having the predominant financial interest in the claim or of the Department or Departments as jointly agreed upon by the Departments concerned. The Department responsible for negotiation shall, throughout the negotiation, coordinate with the other Departments concerned and keep them advised of the status of the negotiation. Any agreement in the settlement of the claim shall be executed by each Department concerned.

227.7007 Notification and disclosure to claimants.

When a claim is denied, the Department responsible for the administrative determination of the claim shall so notify the claimant or his authorized representative and provide the claimant a reasonable rationale of the basis for denying the claim. Disclosure of information or the rationale referred to above shall be subject to applicable statutes, regulations, and directives pertaining to security, access to official records, and the rights of others.

227.7008 Settlement of indemnified claims.

Settlement of claims involving payment for past infringement shall not be made without the consent of, and equitable contribution by, each indemnifying contractor involved, unless such settlement is determined to be in the best interests of the Government and is coordinated with the Department of Justice with a view to preserving any rights of the Government against the contractors involved. If consent of and equitable contribution by the contractors are obtained, the settlement need not be coordinated with the Department of Justice.

227.7009 Patent releases, license agreements, and assignments.

This section contains clauses for use in patent release and settlement agreements, license agreements, and assignments, executed by the Government, under which the Government acquires rights. Minor modifications of language (e.g., pluralization of “Secretary” or “Contracting Officer”) in multidepartmental agreements may be made if necessary.

227.7009-1 Required clauses.

- (a) Covenant Against Contingent Fees. Insert the clause at FAR 52.203-5.
- (b) Gratuities. Insert the clause at FAR 52.203-3.
- (c) Assignment of Claims. Insert the clause at FAR 52.232-23.

(d) Disputes. Pursuant to FAR Subpart 33.2, insert the clause at FAR 52.233-1.

(e) Non-Estoppel. Insert the clause at [252.227-7000](#).

227.7009-2 Clauses to be used when applicable.

(a) *Release of past infringement.* The clause at [252.227-7001](#), Release of Past Infringement, is an example which may be modified or omitted as appropriate for particular circumstances, but only upon the advice of cognizant patent or legal counsel. (See footnotes at end of clause.)

(b) *Readjustment of payments.* The clause at [252.227-7002](#), Readjustment of Payments, shall be inserted in contracts providing for payment of a running royalty.

(c) *Termination.* The clause at [252.227-7003](#), Termination, is an example for use in contracts providing for the payment of a running royalty. This clause may be modified or omitted as appropriate for particular circumstances, but only upon the advice of cognizant patent or legal counsel (see [227.7004\(c\)](#)).

227.7009-3 Additional clauses—contracts except running royalty contracts.

The following clauses are examples for use in patent release and settlement agreements, and license agreements not providing for payment by the Government of a running royalty.

(a) License Grant. Insert the clause at [252.227-7004](#).

(b) License Term. Insert one of the clauses at [252.227-7005](#) Alternate I or Alternate II, as appropriate.

227.7009-4 Additional clauses—contracts providing for payment of a running royalty.

The clauses set forth below are examples which may be used in patent release and settlement agreements, and license agreements, when it is desired to cover the subject matter thereof and the contract provides for payment of a running royalty.

(a) *License grant--running royalty.* No Department shall be obligated to pay royalties unless the contract is signed on behalf of such Department. Accordingly, the License Grant clause at [252.227-7006](#) should be limited to the practice of the invention by or for the signatory Department or Departments.

(b) *License term—running royalty.* The clause at [252.227-7007](#) is a sample form for expressing the license term.

(c) *Computation of royalties.* The clause at [252.227-7008](#) providing for the computation of royalties, may be of varying scope depending upon the nature of the royalty bearing article, the volume of procurement, and the type of contract pursuant to which the procurement is to be accomplished.

(d) *Reporting and payment of royalties.*

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

(1) The contract should contain a provision specifying the office designated within the specific Department involved to make any necessary reports to the contractor of the extent of use of the licensed subject matter by the entire Department, and such office shall be charged with the responsibility of obtaining from all procuring offices of that Department the information necessary to make the required reports and corresponding vouchers necessary to make the required payments. The clause at [252.227-7009](#) is a sample for expressing reporting and payment of royalties requirements.

(2) Where more than one Department or Government Agency is licensed and there is a ceiling on the royalties payable in any reporting period, the licensing Departments or Agencies shall coordinate with respect to the pro rata share of royalties to be paid by each.

(e) *License to other government agencies.* When it is intended that a license on the same terms and conditions be available to other departments and agencies of the Government, the clause at [252.227-7010](#) is an example which may be used.

227.7010 Assignments.

(a) The clause at [252.227-7011](#) is an example which may be used in contracts of assignment of patent rights to the Government.

(b) To facilitate proof of contracts of assignments, the acknowledgement of the contractor should be executed before a notary public or other officer authorized to administer oaths (35 U.S.C. 261).

227.7011 Procurement of rights in inventions, patents, and copyrights.

Even though no infringement has occurred or been alleged, it is the policy of the Department of Defense to procure rights under patents, patent applications, and copyrights whenever it is in the Government's interest to do so and the desired rights can be obtained at a fair price. The required and suggested clauses at [252.227-7004](#) and [252.227-7010](#) shall be required and suggested clauses, respectively, for license agreements and assignments made under this paragraph. The instructions at [227.7009-3](#) and [227.7010](#) concerning the applicability and use of those clauses shall be followed insofar as they are pertinent.

227.7012 Contract format.

The format at [252.227-7012](#) appropriately modified where necessary, may be used for contracts of release, license, or assignment.

227.7013 Recordation.

Executive Order No. 9424 of 18 February 1944 requires all executive Departments and agencies of the Government to forward through appropriate channels to the Commissioner of Patents and Trademarks, for recording, all Government interests in patents or applications for patents.

SUBPART 227.71—RIGHTS IN TECHNICAL DATA

(Revised September 23, 2016)

227.7100 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures for the acquisition of technical data and the rights to use, modify, reproduce, release, perform, display, or disclose technical data. It implements requirements in the following laws and Executive Order:

- (1) 10 U.S.C. 2302(4).
- (2) 10 U.S.C. 2305 (subsection (d)(4)).
- (3) 10 U.S.C. 2320.
- (4) 10 U.S.C. 2321.
- (5) 10 U.S.C. 2325.
- (6) 10 U.S.C. 7317.
- (7) 17 U.S.C. 1301, *et seq.*
- (8) Pub. L. 103-355.
- (9) Executive Order 12591 (Subsection 1(b)(6)).

(b) Does not apply to—

(1) Computer software or technical data that is computer software documentation (see subpart [227.72](#)); or

(2) Releases of technical data to litigation support contractors (see subpart [204.74](#)).

227.7101 Definitions.

(a) As used in this subpart, unless otherwise specifically indicated, the terms “offeror” and “contractor” include an offeror's or contractor's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.

(b) Other terms used in this subpart are defined in the clause at [252.227-7013](#), Rights in Technical Data–Noncommercial Items.

227.7102 Commercial items, components, or processes.

227.7102-1 Policy.

(a) DoD shall acquire only the technical data customarily provided to the public with a commercial item or process, except technical data that—

- (1) Are form, fit, or function data;
 - (2) Are required for repair or maintenance of commercial items or processes, or for the proper installation, operating, or handling of a commercial item, either as a stand alone unit or as a part of a military system, when such data are not customarily provided to commercial users or the data provided to commercial users is not sufficient for military purposes; or
 - (3) Describe the modifications made at Government expense to a commercial item or process in order to meet the requirements of a Government solicitation.
- (b) To encourage offerors and contractors to offer or use commercial products to satisfy military requirements, offerors and contractors shall not be required, except for the technical data described in paragraph (a) of this subsection, to—
- (1) Furnish technical information related to commercial items or processes that is not customarily provided to the public; or
 - (2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose technical data pertaining to commercial items or processes except for a transfer of rights mutually agreed upon.
- (c) The Government's rights in a vessel design, and in any useful article embodying a vessel design, must be consistent with the Government's rights in technical data pertaining to the design (10 U.S.C. 7317; 17 U.S.C. 1301(a)(3)).

227.7102-2 Rights in technical data.

(a) The clause at [252.227-7015](#), Technical Data—Commercial Items, provides the Government specific license rights in technical data pertaining to commercial items or processes. DoD may use, modify, reproduce, release, perform, display, or disclose data only within the Government. The data may not be used to manufacture additional quantities of the commercial items and, except for emergency repair or overhaul and for covered Government support contractors, may not be released or disclosed to, or used by, third parties without the contractor's written permission. Those restrictions do not apply to the technical data described in [227.7102-1\(a\)](#).

(b) If additional rights are needed, contracting activities must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. The specific additional rights granted to the Government shall be enumerated in a license agreement made part of the contract.

227.7102-3 Government right to review, verify, challenge and validate asserted restrictions.

Follow the procedures at [227.7103-13](#) and the clause at [252.227-7037](#), Validation of Restrictive Markings on Technical Data, regarding the validation of asserted restrictions on technical data related to commercial items.

227.7102-4 Contract clauses.

- (a)(1) Except as provided in paragraph (b) of this subsection, use the clause at

[252.227-7015](#), Technical Data—Commercial Items, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when the contractor will be required to deliver technical data pertaining to commercial items, components, or processes.

(2) Use the clause at [252.227-7015](#) with its Alternate I in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, for the development or delivery of a vessel design or any useful article embodying a vessel design.

(b) In accordance with the clause prescription at [227.7103-6\(a\)](#), use the clause at [252.227-7013](#), Rights in Technical Data—Noncommercial Items, in addition to the clause at [252.227-7015](#), if the Government will have paid for any portion of the development costs of a commercial item. The clause at [252.227-7013](#) will govern the technical data pertaining to any portion of a commercial item that was developed in any part at Government expense, and the clause at [252.227-7015](#) will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense.

(c) Use the clause at [252.227-7037](#), Validation of Restrictive Markings on Technical Data, in solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items that include the clause at [252.227-7015](#) or the clause at [252.227-7013](#).

227.7103 Noncommercial items or processes.

227.7103-1 Policy.

(a) DoD policy is to acquire only the technical data, and the rights in that data, necessary to satisfy agency needs.

(b) Solicitations and contracts shall—

(1) Specify the technical data to be delivered under a contract and delivery schedules for the data;

(2) Establish or reference procedures for determining the acceptability of technical data;

(3) Establish separate contract line items, to the extent practicable, for the technical data to be delivered under a contract and require offerors and contractors to price separately each deliverable data item; and

(4) Require offerors to identify, to the extent practicable, technical data to be furnished with restrictions on the Government's rights and require contractors to identify technical data to be delivered with such restrictions prior to delivery.

(c) Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data related to items, components or processes developed at private expense except for the data identified at [227.7103-5\(a\)\(2\)](#) and (a)(4) through (9).

(d) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish items, components, or processes developed at private expense solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose technical data pertaining to those items may be restricted.

(e) As provided in 10 U.S.C. 2305, solicitations for major systems development contracts shall not require offerors to submit proposals that would permit the Government to acquire competitively items identical to items developed at private expense unless a determination is made at a level above the contracting officer that—

(1) The offeror will not be able to satisfy program schedule or delivery requirements; or

(2) The offeror's proposal to meet mobilization requirements does not satisfy mobilization needs.

(f) For acquisitions involving major weapon systems or subsystems of major weapon systems, the acquisition plan shall address acquisition strategies that provide for technical data and the associated license rights in accordance with [207.106\(S-70\)](#).

(g) The Government's rights in a vessel design, and in any useful article embodying a vessel design, must be consistent with the Government's rights in technical data pertaining to the design (10 U.S.C. 7317; 17 U.S.C. 1301(a)(3)).

227.7103-2 Acquisition of technical data.

(a) Contracting officers shall work closely with data managers and requirements personnel to assure that data requirements included in solicitations are consistent with the policy expressed in [227.7103-1](#).

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's minimum needs for technical data. Data needs must be established giving consideration to the contractor's economic interests in data pertaining to items, components, or processes that have been developed at private expense; the Government's costs to acquire, maintain, store, retrieve, and protect the data; procurement needs; repair, maintenance and overhaul philosophies; spare and repair part considerations; and whether procurement of the items, components, or processes can be accomplished on a form, fit, or function basis. When it is anticipated that the Government will obtain unlimited or government purpose rights in technical data that will be required for competitive spare or repair parts procurements, such data should be identified as deliverable data items. Procurement needs may not be a sufficient reason to acquire detailed manufacturing or process data when items or components can be acquired using performance specifications, form, fit and function data, or when there are a sufficient number of alternate sources which can reasonably be expected to provide such items on a performance specification or form, fit, or function basis.

(2) When reviewing offers received in response to a solicitation or other request for data, data managers must balance the original assessment of the Government's data needs with data prices contained in the offer.

(c) Contracting officers are responsible for ensuring that, wherever practicable, solicitations and contracts—

(1) Identify the type and quantity of the technical data to be delivered under the contract and the format and media in which the data will be delivered;

(2) Establish each deliverable data item as a separate contract line item (this requirement may be satisfied by listing each deliverable data item on an exhibit to the contract);

(3) Identify the prices established for each deliverable data item under a fixed-price type contract;

(4) Include delivery schedules and acceptance criteria for each deliverable data item; and

(5) Specifically identify the place of delivery for each deliverable item of technical data.

227.7103-3 Early identification of technical data to be furnished to the Government with restrictions on use, reproduction or disclosure.

(a) 10 U.S.C. 2320 requires, to the maximum extent practicable, an identification prior to delivery of any technical data to be delivered to the Government with restrictions on use.

(b) Use the provision at [252.227-7017](#), Identification and Assertion of Use, Release, or Disclosure Restrictions, in all solicitations that include the clause at [252.227-7013](#), Rights in Technical Data—Noncommercial Items. The provision requires offerors to identify any technical data for which restrictions, other than copyright, on use, release, or disclosure are asserted and to attach the identification and assertions to the offer.

(c) Subsequent to contract award, the clause at [252.227-7013](#) permits a contractor, under certain conditions, to make additional assertions of use, release, or disclosure restrictions. The prescription for the use of that clause and its alternate is at [227.7103-6\(a\)](#) and (b).

227.7103-4 License rights.

(a) *Grant of license.* The Government obtains rights in technical data, including a copyright license, under an irrevocable license granted or obtained for the Government by the contractor. The contractor or licensor retains all rights in the data not granted to the Government. For technical data that pertain to items, components, or processes, the scope of the license is generally determined by the source of funds used to develop the item, component, or process. When the technical data do not pertain to items, components, or processes, the scope of the license is determined by the source of funds used to create the data.

(1) *Technical data pertaining to items, components, or processes.* Contractors or licensors may, with some exceptions (see [227.7103-5\(a\)\(2\)](#) and (a)(4) through (9)), restrict the Government's rights to use, modify, release, reproduce, perform, display or disclose technical data pertaining to items, components, or processes developed

exclusively at private expense (limited rights). They may not restrict the Government's rights in items, components, or processes developed exclusively at Government expense (unlimited rights) without the Government's approval. When an item, component, or process is developed with mixed funding, the Government may use, modify, release, reproduce, perform, display or disclose the data pertaining to such items, components, or processes within the Government without restriction but may release or disclose the data outside the Government only for government purposes (government purpose rights).

(2) *Technical data that do not pertain to items, components, or processes.*

Technical data may be created during the performance of a contract for a conceptual design or similar effort that does not require the development, manufacture, construction, or production of items, components or processes. The Government generally obtains unlimited rights in such data when the data were created exclusively with Government funds, government purpose rights when the data were created with mixed funding, and limited rights when the data were created exclusively at private expense.

(b) *Source of funds determination.* The determination of the source of development funds for technical data pertaining to items, components, or processes should be made at any practical sub-item or sub-component level or for any segregable portion of a process. Contractors may assert limited rights in a segregable sub-item, sub-component, or portion of a process which otherwise qualifies for limited rights under the clause at [252.227-7013](#), Rights in Technical Data–Noncommercial Items.

227.7103-5 Government rights.

The standard license rights that a licensor grants to the Government are unlimited rights, government purpose rights, or limited rights. Those rights are defined in the clause at [252.227-7013](#), Rights in Technical Data–Noncommercial Items. In unusual situations, the standard rights may not satisfy the Government's needs or the Government may be willing to accept lesser rights in data in return for other consideration. In those cases, a special license may be negotiated. However, the licensor is not obligated to provide the Government greater rights and the contracting officer is not required to accept lesser rights than the rights provided in the standard grant of license. The situations under which a particular grant of license applies are enumerated in paragraphs (a) through (d) of this subsection.

(a) *Unlimited rights.* The Government obtains unlimited rights in technical data that are—

(1) Data pertaining to an item, component, or process which has been or will be developed exclusively with Government funds;

(2) Studies, analyses, test data, or similar data produced in the performance of a contract when the study, analysis, test, or similar work was specified as an element of performance;

(3) Created exclusively with Government funds in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes;

(4) Form, fit, and function data;

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

(5) Necessary for installation, operation, maintenance, or training purposes (other than detailed manufacturing or process data);

(6) Corrections or changes to technical data furnished to the contractor by the Government;

(7) Publicly available or have been released or disclosed by the contractor or subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another party;

(8) Data in which the Government has obtained unlimited rights under another Government contract or as a result of negotiations; or

(9) Data furnished to the Government, under a Government contract or subcontract thereunder, with—

(i) Government purpose license rights or limited rights and the restrictive condition(s) has/have expired; or

(ii) Government purpose rights and the contractor's exclusive right to use such data for commercial purposes has expired.

(b) *Government purpose rights.*

(1) The Government obtains government purpose rights in technical data—

(i) That pertain to items, components, or processes developed with mixed funding except when the Government is entitled to unlimited rights as provided in paragraphs (a)(2) and (a)(4) through (9) of this subsection; or

(ii) Created with mixed funding in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(2) The period during which government purpose rights are effective is negotiable. The clause at [252.227-7013](#) provides a nominal five-year period. Either party may request a different period. Changes to the government purpose rights period may be made at any time prior to delivery of the technical data without consideration from either party. Longer periods should be negotiated when a five-year period does not provide sufficient time to apply the data for commercial purposes or when necessary to recognize subcontractors' interests in the data.

(3) The government purpose rights period commences upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required the development. Upon expiration of the Government rights period, the Government has unlimited rights in the data including the right to authorize others to use the data for commercial purposes.

(4) During the government purpose rights period, the Government may not use, or authorize other persons to use, technical data marked with government purpose

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

rights legends for commercial purposes. The Government shall not release or disclose data in which it has government purpose rights to any person, or authorize others to do so, unless—

(i) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at [227.7103-7](#); or

(ii) The intended recipient is a Government contractor receiving access to the data for performance of a Government contract that contains the clause at [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(5) When technical data marked with government purpose rights legends will be released or disclosed to a Government contractor performing a contract that does not include the clause at [252.227-7025](#), the contract may be modified, prior to release or disclosure, to include that clause in lieu of requiring the contractor to complete a use and non-disclosure agreement.

(6) Contracting activities shall establish procedures to assure that technical data marked with government purpose rights legends are released or disclosed, including a release or disclosure through a Government solicitation, only to persons subject to the use and non-disclosure restrictions. Public announcements in the Commerce Business Daily or other publications must provide notice of the use and non-disclosure requirements. Class use and non-disclosure agreements (e.g., agreements covering all solicitations received by the XYZ company within a reasonable period) are authorized and may be obtained at any time prior to release or disclosure of the government purpose rights data. Documents transmitting government purpose rights data to persons under class agreements shall identify the technical data subject to government purpose rights and the class agreement under which such data are provided.

(c) *Limited rights.*

(1) The Government obtains limited rights in technical data—

(i) That pertain to items, components, or processes developed exclusively at private expense except when the Government is entitled to unlimited rights as provided in paragraphs (a)(2) and (a)(4) through (9) of this subsection; or

(ii) Created exclusively at private expense in the performance of a contract that does not require the development, manufacture, construction, or production of items, components, or processes.

(2) Data in which the Government has limited rights may not be used, released, or disclosed outside the Government without the permission of the contractor asserting the restriction except for a use, release, or disclosure that is—

(i) Necessary for emergency repair and overhaul;

(ii) To a covered Government support contractor; or

(iii) To a foreign government, other than detailed manufacturing or process data, when use, release, or disclosure is in the interest of the United States and is required for evaluational or informational purposes.

(3) The person asserting limited rights must be notified of the Government's intent to release, disclose, or authorize others to use such data prior to release or disclosure of the data except notification of an intended release, disclosure, or use for emergency repair or overhaul which shall be made as soon as practicable.

(4) When the person asserting limited rights permits the Government to release, disclose, or have others use the data subject to restrictions on further use, release, or disclosure, or for a release under paragraph (c)(2)(i), (ii), or (iii) of this subsection, the intended recipient must complete the use and non-disclosure agreement at [227.7103-7](#), or receive the data for performance of a Government contract that contains the clause at [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, prior to release or disclosure of the limited rights data.

(d) *Specifically negotiated license rights.*

(1) Negotiate specific licenses when the parties agree to modify the standard license rights granted to the Government or when the Government wants to obtain rights in data in which it does not have rights. When negotiating to obtain, relinquish, or increase the Government's rights in technical data, consider the acquisition strategy for the item, component, or process, including logistics support and other factors which may have relevance for a particular procurement. The Government may accept lesser rights when it has unlimited or government purpose rights in data but may not accept less than limited rights in such data. The negotiated license rights must stipulate what rights the Government has to release or disclose the data to other persons or to authorize others to use the data. Identify all negotiated rights in a license agreement made part of the contract.

(2) When the Government needs additional rights in data acquired with government purpose or limited rights, the contracting officer must negotiate with the contractor to determine whether there are acceptable terms for transferring such rights. Generally, such negotiations should be conducted only when there is a need to disclose the data outside the Government or if the additional rights are required for competitive procurement and the anticipated savings expected to be obtained through competition are estimated to exceed the acquisition cost of the additional rights. Prior to negotiating for additional rights in limited rights data, consider alternatives such as—

(i) Using performance specifications and form, fit, and function data to acquire or develop functionally equivalent items, components, or processes;

(ii) Obtaining a contractor's contractual commitment to qualify additional sources and maintain adequate competition among the sources; or

(iii) Reverse engineering, or providing items from Government inventories to contractors who request the items to facilitate the development of equivalent items through reverse engineering.

227.7103-6 Contract clauses.

(a) Use the clause at [252.227-7013](#), Rights in Technical Data–Noncommercial Items, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when the successful offeror(s) will be required to deliver to the Government technical data pertaining to noncommercial items, or pertaining to commercial items for which the Government will have paid for any portion of the development costs (in which case the clause at [252.227-7013](#) will govern the technical data pertaining to any portion of a commercial item that was developed in any part at Government expense, and the clause at [252.227-7015](#) will govern the technical data pertaining to any portion of a commercial item that was developed exclusively at private expense).. Do not use the clause when the only deliverable items are computer software or computer software documentation (see [227.72](#)), commercial items developed exclusively at private expense (see [227.7102-4](#)), existing works (see [227.7105](#)), special works (see [227.7106](#)), or when contracting under the Small Business Innovation Research Program (see [227.7104](#)). Except as provided in [227.7107-2](#), do not use the clause in architect-engineer and construction contracts.

(b)(1) Use the clause at [252.227-7013](#) with its Alternate I in research solicitations and contracts, including research solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would be—

(i) In the interest of the Government; and

(ii) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(2) Use the clause at [252.227-7013](#) with its Alternate II in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that are for the development or delivery of a vessel design or any useful article embodying a vessel design.

(c) Use the clause at [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, in solicitations and contracts when it is anticipated that the Government will provide the contractor (other than a litigation support contractor covered by [252.204-7014](#)), for performance of its contract, technical data marked with another contractor's restrictive legend(s).

(d) Use the provision at [252.227-7028](#), Technical Data or Computer Software Previously Delivered to the Government, in solicitations when the resulting contract will require the contractor to deliver technical data. The provision requires offerors to identify any technical data specified in the solicitation as deliverable data items that are the same or substantially the same as data items the offeror has delivered or is obligated to deliver, either as a contractor or subcontractor, under any other federal agency contract.

(e) Use the following clauses in solicitations and contracts that include the clause at [252.227-7013](#):

(1) [252.227-7016](#), Rights in Bid or Proposal Information;

(2) [252.227-7030](#), Technical Data—Withholding of Payment; and

(3) [252.227-7037](#), Validation of Restrictive Markings on Technical Data (paragraph (e) of the clause contains information that must be included in a challenge).

227.7103-7 Use and non-disclosure agreement.

(a) Except as provided in paragraph (b) of this subsection, technical data or computer software delivered to the Government with restrictions on use, modification, reproduction, release, performance, display, or disclosure may not be provided to third parties unless the intended recipient completes and signs the use and non-disclosure agreement at paragraph (c) of this subsection prior to release, or disclosure of the data.

(1) The specific conditions under which an intended recipient will be authorized to use, modify, reproduce, release, perform, display, or disclose technical data subject to limited rights or computer software subject to restricted rights must be stipulated in an attachment to the use and non-disclosure agreement.

(2) For an intended release, disclosure, or authorized use of technical data or computer software subject to special license rights, modify paragraph (1)(d) of the use and non-disclosure agreement to enter the conditions, consistent with the license requirements, governing the recipient's obligations regarding use, modification, reproduction, release, performance, display or disclosure of the data or software.

(b) The requirement for use and non-disclosure agreements does not apply to Government contractors which require access to a third party's data or software for the performance of a Government contract that contains the clause at [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(c) The prescribed use and non-disclosure agreement is:

Use and Non-Disclosure Agreement

The undersigned, _____ (Insert Name) _____, an authorized representative of the _____ (Insert Company Name) _____, (which is hereinafter referred to as the “Recipient”) requests the Government to provide the Recipient with technical data or computer software (hereinafter referred to as “Data”) in which the Government's use, modification, reproduction, release, performance, display or disclosure rights are restricted. Those Data are identified in an attachment to this Agreement. In consideration for receiving such Data, the Recipient agrees to use the Data strictly in accordance with this Agreement:

(1) The Recipient shall—

(a) Use, modify, reproduce, release, perform, display, or disclose Data marked with government purpose rights or SBIR data rights legends only for government purposes and shall not do so for any commercial purpose. The Recipient shall not release, perform, display, or disclose these Data, without the express written permission of the contractor whose name

appears in the restrictive legend (the “Contractor”), to any person other than its subcontractors or suppliers, or prospective subcontractors or suppliers, who require these Data to submit offers for, or perform, contracts with the Recipient. The Recipient shall require its subcontractors or suppliers, or prospective subcontractors or suppliers, to sign a use and non-disclosure agreement prior to disclosing or releasing these Data to such persons. Such agreement must be consistent with the terms of this agreement.

(b) Use, modify, reproduce, release, perform, display, or disclose technical data marked with limited rights legends only as specified in the attachment to this Agreement. Release, performance, display, or disclosure to other persons is not authorized unless specified in the attachment to this Agreement or expressly permitted in writing by the Contractor. The Recipient shall promptly notify the Contractor of the execution of this Agreement and identify the Contractor's Data that has been or will be provided to the Recipient, the date and place the Data were or will be received, and the name and address of the Government office that has provided or will provide the Data.

(c) Use computer software marked with restricted rights legends only in performance of Contract Number _____ (insert contract number(s)) _____. The recipient shall not, for example, enhance, decompile, disassemble, or reverse engineer the software; time share, or use a computer program with more than one computer at a time. The recipient may not release, perform, display, or disclose such software to others unless expressly permitted in writing by the licensor whose name appears in the restrictive legend. The Recipient shall promptly notify the software licensor of the execution of this Agreement and identify the software that has been or will be provided to the Recipient, the date and place the software were or will be received, and the name and address of the Government office that has provided or will provide the software.

(d) Use, modify, reproduce, release, perform, display, or disclose Data marked with special license rights legends (To be completed by the contracting officer. See [227.7103-7\(a\)\(2\)](#). Omit if none of the Data requested is marked with special license rights legends).

(2) The Recipient agrees to adopt or establish operating procedures and physical security measures designed to protect these Data from inadvertent release or disclosure to unauthorized third parties.

(3) The Recipient agrees to accept these Data “as is” without any Government representation as to suitability for intended use or warranty whatsoever. This disclaimer does not affect any obligation the Government may have regarding Data specified in a contract for the performance of that contract.

(4) The Recipient may enter into any agreement directly with the Contractor with respect to the use, modification, reproduction, release, performance, display, or disclosure of these Data.

(5) The Recipient agrees to indemnify and hold harmless the

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of Data received from the Government with restrictive legends by the Recipient or any person to whom the Recipient has released or disclosed the Data.

(6) The Recipient is executing this Agreement for the benefit of the Contractor. The Contractor is a third party beneficiary of this Agreement who, in addition to any other rights it may have, is intended to have the rights of direct action against the Recipient or any other person to whom the Recipient has released or disclosed the Data, to seek damages from any breach of this Agreement or to otherwise enforce this Agreement.

(7) The Recipient agrees to destroy these Data, and all copies of the Data in its possession, no later than 30 days after the date shown in paragraph (8) of this Agreement, to have all persons to whom it released the Data do so by that date, and to notify the Contractor that the Data have been destroyed.

(8) This Agreement shall be effective for the period commencing with the Recipient's execution of this Agreement and ending upon _____(Insert Date)_____. The obligations imposed by this Agreement shall survive the expiration or termination of the Agreement.

Recipient's Business Name	_____
By _____ Authorized Representative	_____ Date
Representative's Typed Name and Title	_____ _____

(End of use and non-disclosure agreement)

227.7103-8 Deferred delivery and deferred ordering of technical data.

(a) *Deferred delivery.* Use the clause at [252.227-7026](#), Deferred Delivery of Technical Data or Computer Software, when it is in the Government's interests to defer the delivery of technical data. The clause permits the contracting officer to require the delivery of technical data identified as “deferred delivery” data at any time until two years after acceptance by the Government of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors or suppliers to deliver such technical data expires two years after the date the prime contractor accepts the last item from the subcontractor or supplier for use in the performance of the contract. The contract must specify which technical data is subject to deferred delivery. The contracting officer shall notify the contractor sufficiently in advance of the desired delivery date for such data to permit timely delivery.

(b) *Deferred ordering.* Use the clause at [252.227-7027](#), Deferred Ordering of Technical Data or Computer Software, when a firm requirement for a particular data item(s) has not been established prior to contract award but there is a potential need for the data. Under this clause, the contracting officer may order any data that has been generated in the performance of the contract or any subcontract thereunder at any time until three years after acceptance of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such data expires three years after the date the contractor accepts the last item under the subcontract. When the data are ordered, the delivery dates shall be negotiated and the contractor compensated only for converting the data into the prescribed form, reproduction costs, and delivery costs.

227.7103-9 Copyright.

(a) *Copyright license.*

(1) The clause at [252.227-7013](#), Rights in Technical Data–Noncommercial Items, requires a contractor to grant or obtain for the Government license rights which permit the Government to reproduce data, distribute copies of the data, publicly perform or display the data or, through the right to modify data, prepare derivative works. The extent to which the Government, and others acting on its behalf, may exercise these rights varies for each of the standard data rights licenses obtained under the clause. When non-standard license rights in technical data will be negotiated, negotiate the extent of the copyright license concurrent with negotiations for the data rights license. Do not negotiate a copyright license that provides less rights than the standard limited rights license in technical data.

(2) The clause at [252.227-7013](#) does not permit a contractor to incorporate a third party's copyrighted data into a deliverable data item unless the contractor has obtained an appropriate license for the Government and, when applicable, others acting on the Government's behalf, or has obtained the contracting officer's written approval to do so. Grant approval to use third party copyrighted data in which the Government will not receive a copyright license only when the Government's requirements cannot be satisfied without the third party material or when the use of the third party material will result in cost savings to the Government which outweigh the lack of a copyright license.

(b) *Copyright considerations—acquisition of existing and special works.* See [227.7105](#) or [227.7106](#) for copyright considerations when acquiring existing or special works.

227.7103-10 Contractor identification and marking of technical data to be furnished with restrictive markings.

(a) *Identification requirements.*

(1) The solicitation provision at [252.227-7017](#), Identification and Assertion of Use, Release, or Disclosure Restrictions, requires offerors to identify to the contracting officer, prior to contract award, any technical data that the offeror asserts should be provided to the Government with restrictions on use, modification, reproduction, release or disclosure. This requirement does not apply to restrictions based solely on copyright. The notification and identification must be submitted as an attachment to the offer. If an offeror fails to submit the attachment or fails to complete the attachment in accordance with the requirements of the solicitation provision, such failure shall constitute a minor informality. Provide offerors an opportunity to remedy a minor informality in accordance with the procedures at FAR 14.405 or 15.607. An offeror's failure to correct the informality within the time prescribed by the contracting officer shall render the offer ineligible for award.

(2) The procedures for correcting minor informalities shall not be used to obtain information regarding asserted restrictions or an offeror's suggested asserted rights category. Questions regarding the justification for an asserted restriction or asserted rights category must be pursued in accordance with the procedures at [227.7103-13](#).

(3) The restrictions asserted by a successful offeror shall be attached to its contract unless, in accordance with the procedures at [227.7103-13](#), the parties have agreed that an asserted restriction is not justified. The contract attachment shall provide the same information regarding identification of the technical data, the asserted rights category, the basis for the assertion, and the name of the person asserting the restrictions as required by paragraph (d) of the solicitation provision at [252.227-7017](#). Subsequent to contract award, the clause at [252.227-7013](#), Rights in Technical Data—Noncommercial Items, permits the contractor to make additional assertions under certain conditions. The additional assertions must be made in accordance with the procedures and in the format prescribed by that clause.

(4) Neither the pre- or post-award assertions made by the contractor, nor the fact that certain assertions are identified in the attachment to the contract, determine the respective rights of the parties. As provided at [227.7103-13](#), the Government has the right to review, verify, challenge and validate restrictive markings.

(5) Information provided by offerors in response to the solicitation provision may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose technical data. However, offerors shall not be prohibited from offering products for which the offeror is entitled to provide the Government limited rights in the technical data pertaining to such products and offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or

Part 227—Patents, Data, and Copyrights

otherwise relinquish any greater rights in technical data when the offeror is entitled to provide the technical data with limited rights.

(b) *Contractor marking requirements.* The clause at [252.227-7013](#), Rights in Technical Data—Noncommercial Items—

(1) Requires a contractor that desires to restrict the Government's rights in technical data to place restrictive markings on the data, provides instructions for the placement of the restrictive markings, and authorizes the use of certain restrictive markings; and

(2) Requires a contractor to deliver, furnish, or otherwise provide to the Government any technical data in which the Government has previously obtained rights with the Government's pre-existing rights in that data unless the parties have agreed otherwise or restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose the data have expired. When restrictions are still applicable, the contractor is permitted to mark the data with the appropriate restrictive legend for which the data qualified.

(c) *Unmarked technical data.*

(1) Technical data delivered or otherwise provided under a contract without restrictive markings shall be presumed to have been delivered with unlimited rights and may be released or disclosed without restriction. To the extent practicable, if a contractor has requested permission (see paragraph (c)(2) of this subsection) to correct an inadvertent omission of markings, do not release or disclose the technical data pending evaluation of the request.

(2) A contractor may request permission to have appropriate legends placed on unmarked technical data at its expense. The request must be received by the contracting officer within six months following the furnishing or delivery of such data, or any extension of that time approved by the contracting officer. The person making the request must:

(i) Identify the technical data that should have been marked;

(ii) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and conforms with the requirements for the marking of technical data contained in the clause at [252.227-7013](#); and

(iii) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the technical data made prior to the addition of the marking or resulting from the omission of the marking.

(3) Contracting officers should grant permission to mark only if the technical data were not distributed outside the Government or were distributed outside the Government with restrictions on further use or disclosure.

227.7103-11 Contractor procedures and records.

(a) The clause at [252.227-7013](#), Rights in Technical Data—Noncommercial Items, requires a contractor, and its subcontractors or suppliers that will deliver technical

data with other than unlimited rights, to establish and follow written procedures to assure that restrictive markings are used only when authorized and to maintain records to justify the validity of asserted restrictions on delivered data.

(b) The clause at [252.227-7037](#), Validation of Restrictive Markings on Technical Data requires contractors and their subcontractors at any tier to maintain records sufficient to justify the validity of restrictive markings on technical data delivered or to be delivered under a Government contract.

227.7103-12 Government right to establish conformity of markings.

(a) *Nonconforming markings.*

(1) Authorized markings are identified in the clause at [252.227-7013](#), Rights in Technical Data–Noncommercial Items. All other markings are nonconforming markings. An authorized marking that is not in the form, or differs in substance, from the marking requirements in the clause at [252.227-7013](#) is also a nonconforming marking.

(2) The correction of nonconforming markings on technical data is not subject to [252.227-7037](#), Validation of Restrictive Markings on Technical Data. To the extent practicable, the contracting officer should return technical data bearing nonconforming markings to the person who has placed the nonconforming markings on such data to provide that person an opportunity to correct or strike the nonconforming marking at that person's expense. If that person fails to correct the nonconformity and return the corrected data within 60 days following the person's receipt of the data, the contracting officer may correct or strike the nonconformity at that person's expense. When it is impracticable to return technical data for correction, contracting officers may unilaterally correct any nonconforming markings at Government expense. Prior to correction, the data may be used in accordance with the proper restrictive marking.

(b) *Unjustified markings.*

(1) An unjustified marking is an authorized marking that does not depict accurately restrictions applicable to the Government's use, modification, reproduction, release, performance, display, or disclosure of the marked technical data. For example, a limited rights legend placed on technical data pertaining to items, components, or processes that were developed under a Government contract either exclusively at Government expense or with mixed funding (situations under which the Government obtains unlimited or government purpose rights) is an unjustified marking.

(2) Contracting officers have the right to review and challenge the validity of unjustified markings. However, at any time during performance of a contract and notwithstanding existence of a challenge, the contracting officer and the person who has asserted a restrictive marking may agree that the restrictive marking is not justified. Upon such agreement, the contracting officer may, at his or her election, either—

(i) Strike or correct the unjustified marking at that person's expense; or

(ii) Return the technical data to the person asserting the restriction for correction at that person's expense. If the data are returned and that person fails to

correct or strike the unjustified restriction and return the corrected data to the contracting officer within 60 days following receipt of the data, the unjustified marking shall be corrected or stricken at that person's expense.

227.7103-13 Government right to review, verify, challenge, and validate asserted restrictions.

(a) *General.* An offeror's assertion(s) of restrictions on the Government's rights to use, modify, reproduce, release, or disclose technical data do not, by themselves, determine the extent of the Government's rights in the technical data. Under 10 U.S.C. 2321, the Government has the right to challenge asserted restrictions when there are reasonable grounds to question the validity of the assertion and continued adherence to the assertion would make it impractical to later procure competitively the item to which the data pertain.

(b) *Pre-award considerations.* The challenge procedures required by 10 U.S.C. 2321 could significantly delay awards under competitive procurements. Therefore, avoid challenging asserted restrictions prior to a competitive contract award unless resolution of the assertion is essential for successful completion of the procurement.

(c) *Challenge considerations and presumption.*

(1) *Requirements to initiate a challenge.* Contracting officers shall have reasonable grounds to challenge the validity of an asserted restriction. Before issuing a challenge to an asserted restriction, carefully consider all available information pertaining to the assertion. The contracting officer shall not challenge a contractor's assertion that a commercial item was developed exclusively at private expense unless the Government can demonstrate that it contributed to development of that item.

(2) *Presumption regarding development exclusively at private expense.* 10 U.S.C. 2320(b)(1) and 2321(f) establish a presumption and procedures regarding validation of asserted restrictions for technical data related to commercial items, and to major systems, on the basis of development exclusively at private expense.

(i) *Commercial items.* Except as provided in paragraph (c)(2)(ii) of this section, contracting officers shall presume that a commercial item was developed exclusively at private expense whether or not a contractor or subcontractor submits a justification in response to a challenge notice. When a challenge is warranted, a contractor's or subcontractor's failure to respond to the challenge notice cannot be the sole basis for issuing a final decision denying the validity of an asserted restriction.

(ii) *Major weapon systems.* When the contracting officer challenges an asserted restriction regarding technical data for a major weapon system or a subsystem or component thereof on the basis that the technology was not developed exclusively at private expense—

(A) The presumption in paragraph (c)(2)(i) of this section applies to—

(1) A commercial subsystem or component of a major weapon system, if the major weapon system was acquired as a commercial item in accordance with subpart [234.70](#) (10 U.S.C. 2379(a));

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

(2) A component of a subsystem, if the subsystem was acquired as a commercial item in accordance with subpart [234.70](#) (10 U.S.C. 2379(b)); and

(3) Any other component, if the component is a commercially available off-the-shelf item or a commercially available off-the-shelf item with modifications of a type customarily available in the commercial marketplace or minor modifications made to meet Federal Government requirements; and

(B) In all other cases, the contracting officer shall sustain the challenge unless information provided by the contractor or subcontractor demonstrates that the item was developed exclusively at private expense—

(d) *Challenge and validation.* All challenges must be made in accordance with the provisions of the clause at [252.227-7037](#), Validation of Restrictive Markings on Technical Data.

(1) *Challenge period.* Asserted restrictions should be reviewed before acceptance of technical data deliverable under the contract. Assertions must be challenged within three years after final payment under the contract or three years after delivery of the data, whichever is later. However, restrictive markings may be challenged at any time if the technical data—

(i) Are publicly available without restrictions;

(ii) Have been provided to the United States without restriction; or

(iii) Have been otherwise made available without restriction other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the technical data to another party or the sale or transfer of some or all of a business entity or its assets to another party.

(2) Pre-challenge requests for information.

(i) After consideration of the situations described in paragraph (d)(3) of this subsection, contracting officers may request the person asserting a restriction to furnish a written explanation of the facts and supporting documentation for the assertion in sufficient detail to enable the contracting officer to ascertain the basis of the restrictive markings. Additional supporting documentation may be requested when the explanation provided by the person making the assertion does not, in the contracting officer's opinion, establish the validity of the assertion.

(ii) If the person asserting the restriction fails to respond to the contracting officer's request for information or additional supporting documentation, or if the information submitted or any other available information pertaining to the validity of a restrictive marking does not justify the asserted restriction, a challenge should be considered.

(3) *Transacting matters directly with subcontractors.* The clause at [252.227-7037](#) obtains the contractor's agreement that the Government may transact matters under the clause directly with a subcontractor, at any tier, without creating or implying privity of contract. Contracting officers should permit a subcontractor or

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

supplier to transact challenge and validation matters directly with the Government when—

(i) A subcontractor's or supplier's business interests in its technical data would be compromised if the data were disclosed to a higher tier contractor;

(ii) There is reason to believe that the contractor will not respond in a timely manner to a challenge and an untimely response would jeopardize a subcontractor's or supplier's right to assert restrictions; or

(iii) Requested to do so by a subcontractor or supplier.

(4) *Challenge notice.* The contracting officer shall not issue a challenge notice unless there are reasonable grounds to question the validity of an assertion. The contracting officer may challenge an assertion whether or not supporting documentation was requested under paragraph (d)(2) of this subsection. Challenge notices must be in writing and issued to the contractor or, after consideration of the situations described in paragraph (d)(3) of this subsection, the person asserting the restriction. The challenge notice must include the information in paragraph (e) of the clause at [252.227-7037](#).

(5) *Extension of response time.* The contracting officer, at his or her discretion, may extend the time for response contained in a challenge notice, as appropriate, if the contractor submits a timely written request showing the need for additional time to prepare a response.

(6) *Contracting officer's final decision.* Contracting officers must issue a final decision for each challenged assertion, whether or not the assertion has been justified.

(i) A contracting officer's final decision that an assertion is not justified must be issued as soon as practicable following the failure of the person asserting the restriction to respond to the contracting officer's challenge within 60 days, or any extension to that time granted by the contracting officer.

(ii) A contracting officer who, following a challenge and response by the person asserting the restriction, determines that an asserted restriction is justified, shall issue a final decision sustaining the validity of the asserted restriction. If the asserted restriction was made subsequent to submission of the contractor's offer, add the asserted restriction to the contract attachment.

(iii) A contracting officer who determines that the validity of an asserted restriction has not been justified shall issue a contracting officer's final decision within the time frames prescribed in [252.227-7037](#). As provided in paragraph (g) of that clause, the Government is obligated to continue to respect the asserted restrictions through final disposition of any appeal unless the agency head notifies the person asserting the restriction that urgent or compelling circumstances do not permit the Government to continue to respect the asserted restriction.

(7) *Multiple challenges to an asserted restriction.* When more than one contracting officer challenges an asserted restriction, the contracting officer who made the earliest challenge is responsible for coordinating the Government challenges. That contracting officer shall consult with all other contracting officers making challenges,

verify that all challenges apply to the same asserted restriction and, after consulting with the contractor, subcontractor, or supplier asserting the restriction, issue a schedule that provides that person a reasonable opportunity to respond to each challenge.

(8) *Validation.* Only a contracting officer's final decision, or actions of an agency board of contract appeals or a court of competent jurisdiction, that sustain the validity of an asserted restriction constitute validation of the asserted restriction.

227.7103-14 Conformity, acceptance, and warranty of technical data.

(a) *Statutory requirements.* 10 U.S.C. 2320—

(1) Provides for the establishment of remedies applicable to technical data found to be incomplete, inadequate, or not to satisfy the requirements of the contract concerning such data; and

(2) Authorizes agency heads to withhold payments (or exercise such other remedies an agency head considers appropriate) during any period if the contractor does not meet the requirements of the contract pertaining to the delivery of technical data.

(b) *Conformity and acceptance.*

(1) Solicitations and contracts requiring the delivery of technical data shall specify the requirements the data must satisfy to be acceptable. Contracting officers, or their authorized representatives, are responsible for determining whether technical data tendered for acceptance conform to the contractual requirements.

(2) The clause at [252.227-7030](#), Technical Data—Withholding of Payment, provides for withholding up to 10 percent of the contract price pending correction or replacement of the nonconforming technical data or negotiation of an equitable reduction in contract price. The amount subject to withholding may be expressed as a fixed dollar amount or as a percentage of the contract price. In either case, the amount shall be determined giving consideration to the relative value and importance of the data. For example—

(i) When the sole purpose of a contract is to produce the data, the relative value of that data may be considerably higher than the value of data produced under a contract where the production of the data is a secondary objective; or

(ii) When the Government will maintain or repair items, repair and maintenance data may have a considerably higher relative value than data that merely describe the item or provide performance characteristics.

(3) Do not accept technical data that do not conform to the contractual requirements in all respects. Except for nonconforming restrictive markings (see paragraph (b)(4) of this subsection), correction or replacement of nonconforming data, or an equitable reduction in contract price when correction or replacement of the nonconforming data is not practicable or is not in the Government's interests, shall be accomplished in accordance with—

(i) The provisions of a contract clause providing for inspection and acceptance of deliverables and remedies for nonconforming deliverables; or

(ii) The procedures at FAR 46.407(c) through (g), if the contract does not contain an inspection clause providing remedies for nonconforming deliverables.

(4) Follow the procedures at [227.7103-12](#)(a)(2) if nonconforming markings are the sole reason technical data fail to conform to contractual requirements. The clause at [252.227-7030](#) may be used to withhold an amount from payment, consistent with the terms of the clause, pending correction of the nonconforming markings.

(c) *Warranty.*

(1) The intended use of the technical data and the cost, if any, to obtain the warranty should be considered before deciding to obtain a data warranty (see FAR 46.703). The fact that a particular item, component, or process is or is not warranted is not a consideration in determining whether or not to obtain a warranty for the technical data that pertain to the item, component, or process. For example, a data warranty should be considered if the Government intends to repair or maintain an item and defective repair or maintenance data would impair the Government's effective use of the item or result in increased costs to the Government.

(2) As prescribed in [246.710](#), use the clause at [252.246-7001](#), Warranty of Data, and its alternates, or a substantially similar clause when the Government needs a specific warranty of technical data.

227.7103-15 Subcontractor rights in technical data.

(a) 10 U.S.C. 2320 provides subcontractors at all tiers the same protection for their rights in data as is provided to prime contractors. The clauses at [252.227-7013](#), Rights in Technical Data–Noncommercial Items, and [252.227-7037](#), Validation of Restrictive Markings on Technical Data, implement the statutory requirements.

(b) 10 U.S.C. 2321 permits a subcontractor to transact directly with the Government matters relating to the validation of its asserted restrictions on the Government's rights to use or disclose technical data. The clause at [252.227-7037](#) obtains a contractor's agreement that the direct transaction of validation or challenge matters with subcontractors at any tier does not establish or imply privity of contract. When a subcontractor or supplier exercises its right to transact validation matters directly with the Government, contracting officers shall deal directly with such persons, as provided at [227.7103-13](#)(c)(3).

(c) Require prime contractors whose contracts include the following clauses to include those clauses, without modification except for appropriate identification of the parties, in contracts with subcontractors or suppliers, at all tiers, who will be furnishing technical data for non-commercial items in response to a Government requirement:

(1) [252.227-7013](#), Rights in Technical Data–Noncommercial Items;

(2) [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends;

(3) [252.227-7028](#), Technical Data or Computer Software Previously Delivered to the Government; and

(4) [252.227-7037](#), Validation of Restrictive Markings on Technical Data.

(d) Do not require contractors to have their subcontractors or suppliers at any tier relinquish rights in technical data to the contractor, a higher tier subcontractor, or to the Government, as a condition for award of any contract, subcontract, purchase order, or similar instrument except for the rights obtained by the Government under the Rights in Technical Data–Noncommercial Items clause contained in the contractor's contract with the Government.

227.7103-16 Providing technical data to foreign governments, foreign contractors, or international organizations.

Technical data may be released or disclosed to foreign governments, foreign contractors, or international organizations only if release or disclosure is otherwise permitted both by Federal export controls and other national security laws or regulations. Subject to such laws and regulations, the Department of Defense—

(a) May release or disclose technical data in which it has obtained unlimited rights to such foreign entities or authorize the use of such data by those entities; and

(b) Shall not release or disclose technical data for which restrictions on use, release, or disclosure have been asserted to foreign entities, or authorize the use of technical data by those entities, unless the intended recipient is subject to the same provisions as included in the use and non-disclosure agreement at [227.7103-7](#) and the requirements of the clause at [252.227-7013](#), Rights in Technical Data–Noncommercial Items, governing use, modification, reproduction, release, performance, display, or disclosure of such data have been satisfied.

227.7103-17 Overseas contracts with foreign sources.

(a) The clause at [252.227-7032](#), Rights in Technical Data and Computer Software (Foreign), may be used in contracts with foreign contractors to be performed overseas, except Canadian purchases (see paragraph (c) of this subsection), in lieu of the clause at [252.227-7013](#), Rights in Technical Data–Noncommercial Items, when the Government requires the unrestricted right to use, modify, reproduce, perform, display, release or disclose all technical data to be delivered under the contract. Do not use the clause in contracts for existing or special works.

(b) When the Government does not require unlimited rights, the clause at [252.227-7032](#) may be modified to accommodate the needs of a specific overseas procurement situation. The Government should obtain rights in the technical data that are not less than the rights the Government would have obtained under the data rights clause(s) prescribed in this part for a comparable procurement performed within the United States or its outlying areas.

(c) Contracts for Canadian purchases shall include the appropriate data rights clause prescribed in this part for a comparable procurement performed within the United States or its outlying areas.

227.7104 Contracts under the Small Business Innovation Research (SBIR) Program.

(a) Use the clause at [252.227-7018](#), Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program, when technical data or computer software will be generated during performance of contracts under the SBIR program.

(b) Under the clause at [252.227-7018](#), the Government obtains SBIR data rights in technical data and computer software generated under the contract and marked with the SBIR data rights legend. SBIR data rights provide the Government limited rights in such technical data and restricted rights in such computer software during the SBIR data protection period commencing with contract award and ending five years after completion of the project under which the data were generated. Upon expiration of the five-year restrictive license, the Government has unlimited rights in the SBIR technical data and computer software.

(c) During the SBIR data protection period, the Government may not release or disclose SBIR technical data or computer software to any person except as authorized for limited rights technical data or restricted rights computer software, respectively.

(d) Use the clause at [252.227-7018](#) with its Alternate I in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would be—

(1) In the interest of the Government; and

(2) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(e) Use the following provision and clauses in SBIR solicitations and contracts that include the clause at [252.227-7018](#):

(1) [252.227-7016](#), Rights in Bid or Proposal Information;

(2) [252.227-7017](#), Identification and Assertion of Use, Release, or Disclosure Restrictions;

(3) [252.227-7019](#), Validation of Asserted Restrictions—Computer Software;

(4) [252.227-7030](#), Technical Data—Withholding of Payment; and

(5) [252.227-7037](#), Validation of Restrictive Markings on Technical Data (paragraph (e) of the clause contains information that must be included in a challenge).

(f) Use the following clauses and provision in SBIR solicitations and contracts in accordance with the guidance at [227.7103-6](#)(c) and (d):

(1) [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends; and

(2) [252.227-7028](#), Technical Data or Computer Software Previously Delivered to the Government.

227.7105 Contracts for the acquisition of existing works.

227.7105-1 General.

(a) Existing works include motion pictures, television recordings, video recordings, and other audiovisual works in any medium; sound recordings in any medium; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. Usually, these or similar works were not first created, developed, generated, originated, prepared, or produced under a Government contract. Therefore, the Government must obtain a license in the work if it intends to reproduce the work, distribute copies of the work, prepare derivative works, or perform or display the work publicly. When the Government is not responsible for the content of an existing work, it should require the copyright owner to indemnify the Government for liabilities that may arise out of the content, performance, use, or disclosure of such data.

(b) Follow the procedures at [227.7106](#) for works which will be first created, developed, generated, originated, prepared, or produced under a Government contract and the Government needs to control distribution of the work or has a specific need to obtain indemnity for liabilities that may arise out of the creation, content, performance, use, or disclosure of the work or from libelous or other unlawful material contained in the work. Follow the procedures at [227.7103](#) when the Government does not need to control distribution of such works or obtain such indemnities.

227.7105-2 Acquisition of existing works without modification.

(a) Use the clause at [252.227-7021](#), Rights in Data—Existing Works, in lieu of the clause at [252.227-7013](#), Rights in Technical Data—Noncommercial Items, in solicitations and contracts exclusively for existing works when—

- (1) The existing works will be acquired without modification; and
- (2) The Government requires the right to reproduce, prepare derivative works, or publicly perform or display the existing works; or
- (3) The Government has a specific need to obtain indemnity for liabilities that may arise out of the content, performance, use, or disclosure of such data.

(b) The clause at [252.227-7021](#) provides the Government, and others acting on its behalf, a paid-up, non-exclusive, irrevocable, world-wide license to reproduce, prepare derivative works and publicly perform or display the works called for by a contract and to authorize others to do so for government purposes.

(c) A contract clause is not required to acquire existing works such as books, magazines and periodicals, in any storage or retrieval medium, when the Government will not reproduce the books, magazines or periodicals, or prepare derivative works.

227.7105-3 Acquisition of modified existing works.

Use the clause at [252.227-7020](#), Rights in Special Works, in solicitations and contracts for modified existing works in lieu of the clause at [252.227-7021](#), Rights in Data—Existing Works.

227.7106 Contracts for special works.

(a) Use the clause at [252.227-7020](#), Rights in Special Works, in solicitations and contracts where the Government has a specific need to control the distribution of works first produced, created, or generated in the performance of a contract and required to be delivered under that contract, including controlling distribution by obtaining an assignment of copyright, or a specific need to obtain indemnity for liabilities that may arise out of the creation, delivery, use, modification, reproduction, release, performance, display, or disclosure of such works. Use the clause—

(1) In lieu of the clause at [252.227-7013](#), Rights in Technical Data—Noncommercial Items, when the Government must own or control copyright in all works first produced, created, or generated and required to be delivered under a contract; or

(2) In addition to the clause at [252.227-7013](#) when the Government must own or control copyright in a portion of a work first produced, created, or generated and required to be delivered under a contract. The specific portion in which the Government must own or control copyright must be identified in a special contract requirement.

(b) Although the Government obtains an assignment of copyright and unlimited rights in a special work under the clause at [252.227-7020](#), the contractor retains use and disclosure rights in that work. If the Government needs to restrict a contractor's rights to use or disclose a special work, it must also negotiate a special license which specifically restricts the contractor's use or disclosure rights.

(c) The clause at [252.227-7020](#) does not permit a contractor to incorporate into a special work any works copyrighted by others unless the contractor obtains the contracting officer's permission to do so and obtains for the Government a non-exclusive, paid up, world-wide license to make and distribute copies of that work, to prepare derivative works, to perform or display publicly any portion of the work, and to permit others to do so for government purposes. Grant permission only when the Government's requirements cannot be satisfied unless the third party work is included in the deliverable work.

(d) Examples of works which may be procured under the Rights in Special Works clause include, but are not limited, to audiovisual works, computer data bases, computer software documentation, scripts, soundtracks, musical compositions, and adaptations; histories of departments, agencies, services or units thereof; surveys of Government establishments; instructional works or guidance to Government officers and employees on the discharge of their official duties; reports, books, studies, surveys or similar documents; collections of data containing information pertaining to individuals that, if disclosed, would violate the right of privacy or publicity of the individuals to whom the information relates; or investigative reports.

227.7107 Contracts for architect-engineer services.

This section sets forth policies and procedures, pertaining to data, copyrights, and restricted designs unique to the acquisition of construction and architect-engineer services.

227.7107-1 Architectural designs and data clauses for architect-engineer or construction contracts.

(a) Except as provided in paragraph (b) of this subsection and in [227.7107-2](#), use the clause at [252.227-7022](#), Government Rights (Unlimited), in solicitations and contracts for architect-engineer services and for construction involving architect-engineer services.

(b) When the purpose of a contract for architect-engineer services, or for construction involving architect-engineer services, is to obtain a unique architectural design of a building, a monument, or construction of similar nature, which for artistic, aesthetic or other special reasons the Government does not want duplicated, the Government may acquire exclusive control of the data pertaining to the design by including the clause at [252.227-7023](#), Drawings and Other Data to Become Property of Government, in solicitations and contracts.

(c) The Government shall obtain unlimited rights in shop drawings for construction. In solicitations and contracts calling for delivery of shop drawings, include the clause at [252.227-7033](#), Rights in Shop Drawings.

227.7107-2 Contracts for construction supplies and research and development work.

Use the provisions and clauses required by [227.7103-6](#) and [227.7203-6](#) when the acquisition is limited to—

(a) Construction supplies or materials;

(b) Experimental, developmental, or research work, or test and evaluation studies of structures, equipment, processes, or materials for use in construction; or

(c) Both.

227.7107-3 Approval of restricted designs.

The clause at [252.227-7024](#), Notice and Approval of Restricted Designs, may be included in architect-engineer contracts to permit the Government to make informed decisions concerning noncompetitive aspects of the design.

227.7108 Contractor data repositories.

(a) Contractor data repositories may be established when permitted by agency procedures. The contractual instrument establishing the data repository must require, as a minimum, the data repository management contractor to—

(1) Establish and maintain adequate procedures for protecting technical data delivered to or stored at the repository from unauthorized release or disclosure;

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

- (2) Establish and maintain adequate procedures for controlling the release or disclosure of technical data from the repository to third parties consistent with the Government's rights in such data;
 - (3) When required by the contracting officer, deliver data to the Government on paper or in other specified media;
 - (4) Be responsible for maintaining the currency of data delivered directly by Government contractors or subcontractors to the repository;
 - (5) Obtain use and non-disclosure agreements (see [227.7103-7](#)) from all persons to whom government purpose rights data is released or disclosed; and
 - (6) Indemnify the Government from any liability to data owners or licensors resulting from, or as a consequence of, a release or disclosure of technical data made by the data repository contractor or its officers, employees, agents, or representatives.
- (b) If the contractor is or will be the data repository manager, the contractor's data management and distribution responsibilities must be identified in the contract or the contract must reference the agreement between the Government and the contractor that establishes those responsibilities.
- (c) If the contractor is not and will not be the data repository manager, do not require a contractor or subcontractor to deliver technical data marked with limited rights legends to a data repository managed by another contractor unless the contractor or subcontractor who has asserted limited rights agrees to release the data to the repository or has authorized, in writing, the Government to do so.
- (d) Repository procedures may provide for the acceptance, delivery, and subsequent distribution of technical data in storage media other than paper, including direct electronic exchange of data between two computers. The procedures must provide for the identification of any portions of the data provided with restrictive legends, when appropriate. The acceptance criteria must be consistent with the authorized delivery format.

**SUBPART 227.72—RIGHTS IN COMPUTER SOFTWARE AND COMPUTER
SOFTWARE DOCUMENTATION**

(Revised September 23, 2016)

227.7200 Scope of subpart.

This subpart—

(a) Prescribes policies and procedures for the acquisition of computer software and computer software documentation, and the rights to use, modify, reproduce, release, perform, display, or disclose such software or documentation. It implements requirements in the following laws and Executive Order:

- (1) 10 U.S.C. 2302(4).
- (2) 10 U.S.C. 2305 (subsection (d)(4)).
- (3) 10 U.S.C. 2320.
- (4) 10 U.S.C. 2321.
- (5) 10 U.S.C. 2325.
- (6) Executive Order 12591 (subsection 1(b)(6)).

(b) Does not apply to—

(1) Computer software or computer software documentation acquired under GSA schedule contracts; or

(2) Releases of computer software or computer software documentation to litigation support contractors (see subpart [204.74](#)).

227.7201 Definitions.

(a) As used in this subpart, unless otherwise specifically indicated, the terms “offeror” and “contractor” include an offeror's or contractor's subcontractors, suppliers, or potential subcontractors or suppliers at any tier.

(b) Other terms used in this subpart are defined in the clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.

227.7202 Commercial computer software and commercial computer software documentation.

227.7202-1 Policy.

(a) Commercial computer software or commercial computer software documentation shall be acquired under the licenses customarily provided to the public unless such licenses are inconsistent with Federal procurement law or do not otherwise satisfy user needs.

(b) Commercial computer software and commercial computer software documentation shall be obtained competitively, to the maximum extent practicable, using firm-fixed-price contracts or firm-fixed-priced orders under available pricing schedules.

(c) Offerors and contractors shall not be required to—

(1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public except for information documenting the specific modifications made at Government expense to such software or documentation to meet the requirements of a Government solicitation; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial computer software or commercial computer software documentation except for a transfer of rights mutually agreed upon.

227.7202-2 Reserved.

227.7202-3 Rights in commercial computer software or commercial computer software documentation.

(a) The Government shall have only the rights specified in the license under which the commercial computer software or commercial computer software documentation was obtained.

(b) If the Government has a need for rights not conveyed under the license customarily provided to the public, the Government must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. The specific rights granted to the Government shall be enumerated in the contract license agreement or an addendum thereto.

227.7202-4 Contract clause.

A specific contract clause governing the Government's rights in commercial computer software or commercial computer software documentation is not prescribed. As required by [227.7202-3](#), the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software or computer software documentation shall be identified in a license agreement.

227.7203 Noncommercial computer software and noncommercial computer software documentation.

227.7203-1 Policy.

(a) DoD policy is to acquire only the computer software and computer software documentation, and the rights in such software or documentation, necessary to satisfy agency needs.

(b) Solicitations and contracts shall—

(1) Specify the computer software or computer software documentation to be delivered under a contract and the delivery schedules for the software or documentation;

(2) Establish or reference procedures for determining the acceptability of computer software or computer software documentation;

(3) Establish separate contract line items, to the extent practicable, for the computer software or computer software documentation to be delivered under a contract and require offerors and contractors to price separately each deliverable data item; and

(4) Require offerors to identify, to the extent practicable, computer software or computer software documentation to be furnished with restrictions on the Government's rights and require contractors to identify computer software or computer software documentation to be delivered with such restrictions prior to delivery.

(c) Offerors shall not be required, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in computer software developed exclusively at private expense except for the software identified at [227.7203-5\(a\)\(3\)](#) through (6).

(d) Offerors and contractors shall not be prohibited or discouraged from furnishing or offering to furnish computer software developed exclusively at private expense solely because the Government's rights to use, modify, release, reproduce, perform, display, or disclose the software may be restricted.

(e) For acquisitions involving major weapon systems or subsystems of major weapon systems, the acquisition plan shall address acquisition strategies that provide for computer software and computer software documentation, and the associated license rights, in accordance with [207.106\(S-70\)](#).

227.7203-2 Acquisition of noncommercial computer software and computer software documentation.

(a) Contracting officers shall work closely with data managers and requirements personnel to assure that computer software and computer software documentation requirements included in solicitations are consistent with the policy expressed in 227.7203-1.

(b)(1) Data managers or other requirements personnel are responsible for identifying the Government's minimum needs. In addition to desired software performance, compatibility, or other technical considerations, needs determinations should consider such factors as multiple site or shared use requirements, whether the Government's software maintenance philosophy will require the right to modify or have third parties modify the software, and any special computer software documentation requirements.

(2) When reviewing offers received in response to a solicitation or other request for computer software or computer software documentation, data managers must balance the original assessment of the Government's needs with prices offered.

(c) Contracting officers are responsible for ensuring that, wherever practicable, solicitations and contracts—

(1) Identify the types of computer software and the quantity of computer programs and computer software documentation to be delivered, any requirements for multiple users at one site or multiple site licenses, and the format and media in which the software or documentation will be delivered;

(2) Establish each type of computer software or computer software documentation to be delivered as a separate contract line item (this requirement may be satisfied by an exhibit to the contract);

(3) Identify the prices established for each separately priced deliverable item of computer software or computer software documentation under a fixed-price type contract;

(4) Include delivery schedules and acceptance criteria for each deliverable item; and

(5) Specifically identify the place of delivery for each deliverable item.

227.7203-3 Early identification of computer software or computer software documentation to be furnished to the Government with restrictions on use, reproduction or disclosure.

(a) Use the provision at [252.227-7017](#), Identification and Assertion of Use, Release, or Disclosure Restrictions, in all solicitations that include the clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation. The provision requires offerors to identify any computer software or computer software documentation for which restrictions, other than copyright, on use, modification, reproduction, release, performance, display, or disclosure are asserted and to attach the identification and assertion to the offer.

(b) Subsequent to contract award, the clause at [252.227-7014](#) permits a contractor, under certain conditions, to make additional assertions of restrictions. The prescriptions for the use of that clause and its alternates are at [227.7203-6\(a\)](#).

227.7203-4 License rights.

(a) *Grant of license.* The Government obtains rights in computer software or computer software documentation, including a copyright license, under an irrevocable license granted or obtained by the contractor which developed the software or documentation or the licensor of the software or documentation if the development contractor is not the licensor. The contractor or licensor retains all rights in the software or documentation not granted to the Government. The scope of a computer software license is generally determined by the source of funds used to develop the software. Contractors or licensors may, with some exceptions, restrict the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software developed exclusively or partially at private expense (see [227.7203-5\(b\)](#) and (c)). They may not, without the Government's agreement (see [227.7203-5\(d\)](#)), restrict the Government's rights in computer software developed exclusively with

Government funds or in computer software documentation required to be delivered under a contract.

(b) *Source of funds determination.* The determination of the source of funds used to develop computer software should be made at the lowest practicable segregable portion of the software or documentation (e.g., a software sub-routine that performs a specific function). Contractors may assert restricted rights in a segregable portion of computer software which otherwise qualifies for restricted rights under the clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation.

227.7203-5 Government rights.

The standard license rights in computer software that a licensor grants to the Government are unlimited rights, government purpose rights, or restricted rights. The standard license in computer software documentation conveys unlimited rights. Those rights are defined in the clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation. In unusual situations, the standard rights may not satisfy the Government's needs or the Government may be willing to accept lesser rights in return for other consideration. In those cases, a special license may be negotiated. However, the licensor is not obligated to provide the Government greater rights and the contracting officer is not required to accept lesser rights than the rights provided in the standard grant of license. The situations under which a particular grant of license applies are enumerated in paragraphs (a) through (d) of this subsection.

(a) *Unlimited rights.* The Government obtains an unlimited rights license in—

- (1) Computer software developed exclusively with Government funds;
- (2) Computer software documentation required to be delivered under a Government contract;
- (3) Corrections or changes to computer software or computer software documentation furnished to the contractor by the Government;
- (4) Computer software or computer software documentation that is otherwise publicly available or has been released or disclosed by the contractor or subcontractor without restrictions on further use, release or disclosure other than a release or disclosure resulting from the sale, transfer, or other assignment of interest in the software to another party or the sale or transfer of some or all of a business entity or its assets to another party;
- (5) Computer software or computer software documentation obtained with unlimited rights under another Government contract or as a result of negotiations; or
- (6) Computer software or computer software documentation furnished to the Government, under a Government contract or subcontract with—
 - (i) Restricted rights in computer software, limited rights in technical data, or government purpose license rights and the restrictive conditions have expired; or

(ii) Government purpose rights and the contractor's exclusive right to use such software or documentation for commercial purposes has expired.

(b) *Government purpose rights.*

(1) Except as provided in paragraph (a) of this subsection, the Government obtains government purpose rights in computer software developed with mixed funding.

(2) The period during which government purpose rights are effective is negotiable. The clause at [252.227-7014](#) provides a nominal five-year period. Either party may request a different period. Changes to the government purpose rights period may be made at any time prior to delivery of the software without consideration from either party. Longer periods should be negotiated when a five-year period does not provide sufficient time to commercialize the software or, for software developed by subcontractors, when necessary to recognize the subcontractors' interests in the software.

(3) The government purpose rights period commences upon execution of the contract, subcontract, letter contract (or similar contractual instrument), contract modification, or option exercise that required development of the computer software. Upon expiration of the government purpose rights period, the Government has unlimited rights in the software including the right to authorize others to use the data for commercial purposes.

(4) During the government purpose rights period, the Government may not use, or authorize other persons to use, computer software marked with government purpose rights legends for commercial purposes. The Government shall not release or disclose, or authorize others to release or disclose, computer software in which it has government purpose rights to any person unless—

(i) Prior to release or disclosure, the intended recipient is subject to the use and non-disclosure agreement at [227.7103-7](#); or

(ii) The intended recipient is a Government contractor receiving access to the software for performance of a Government contract that contains the clause at [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends.

(5) When computer software marked with government purpose rights legends will be released or disclosed to a Government contractor performing a contract that does not include the clause at [252.227-7025](#), the contract may be modified, prior to release or disclosure, to include such clause in lieu of requiring the contractor to complete a use and non-disclosure agreement.

(6) Contracting activities shall establish procedures to assure that computer software or computer software documentation marked with government purpose rights legends are released or disclosed, including a release or disclosure through a Government solicitation, only to persons subject to the use and non-disclosure restrictions. Public announcements in the Commerce Business Daily or other publications must provide notice of the use and non-disclosure requirements. Class use and non-disclosure agreements (e.g., agreements covering all solicitations received by the XYZ company within a reasonable period) are authorized and may be obtained at

any time prior to release or disclosure of the government purpose rights software or documentation. Documents transmitting government purpose rights software or documentation to persons under class agreements shall identify the specific software or documentation subject to government purpose rights and the class agreement under which such software or documentation are provided.

(c) *Restricted rights.*

(1) The Government obtains restricted rights in noncommercial computer software, required to be delivered or otherwise provided to the Government under a contract, that was developed exclusively at private expense.

(2) Contractors are not required to provide the Government additional rights in computer software delivered or otherwise provided to the Government with restricted rights. When the Government has a need for additional rights, the Government must negotiate with the contractor to determine if there are acceptable terms for transferring such rights. List or describe all software in which the contractor has granted the Government additional rights in a license agreement made part of the contract (see paragraph (d) of this subsection). The license shall enumerate the specific additional rights granted to the Government.

(d) *Specifically negotiated license rights.* Negotiate specific licenses when the parties agree to modify the standard license rights granted to the Government or when the Government wants to obtain rights in computer software in which it does not have rights. When negotiating to obtain, relinquish, or increase the Government's rights in computer software, consider the planned software maintenance philosophy, anticipated time or user sharing requirements, and other factors which may have relevance for a particular procurement. If negotiating to relinquish rights in computer software documentation, consider the administrative burden associated with protecting documentation subject to restrictions from unauthorized release or disclosure. The negotiated license rights must stipulate the rights granted the Government to use, modify, reproduce, release, perform, display, or disclose the software or documentation and the extent to which the Government may authorize others to do so. Identify all negotiated rights in a license agreement made part of the contract.

(e) *Rights in derivative computer software or computer software documentation.* The clause at [252.227-7014](#) protects the Government's rights in computer software, computer software documentation, or portions thereof that the contractor subsequently uses to prepare derivative software or subsequently embeds or includes in other software or documentation. The Government retains the rights it obtained under the development contract in the unmodified portions of the derivative software or documentation.

227.7203-6 Contract clauses.

(a)(1) Use the clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, in solicitations and contracts when the successful offeror(s) will be required to deliver computer software or computer software documentation. Do not use the clause when the only deliverable items are technical data (other than computer software documentation), commercial computer software or commercial computer software documentation, commercial items (see [227.7102-3](#)), special works (see [227.7205](#)), or contracts under the Small Business

Defense Federal Acquisition Regulation Supplement

Part 227—Patents, Data, and Copyrights

Innovation Research Program (see [227.7104](#)). Except as provided in [227.7107-2](#), do not use the clause in architect-engineer and construction contracts.

(2) Use the clause at [252.227-7014](#) with its Alternate I in research contracts when the contracting officer determines, in consultation with counsel, that public dissemination by the contractor would be—

(i) In the interest of the Government; and

(ii) Facilitated by the Government relinquishing its right to publish the work for sale, or to have others publish the work for sale on behalf of the Government.

(b) Use the clause at [252.227-7016](#), Rights in Bid or Proposal Information, in solicitations and contracts that include the clause at [252.227-7014](#).

(c) Use the clause at [252.227-7019](#), Validation of Asserted Restrictions--Computer Software, in solicitations and contracts that include the clause at [252.227-7014](#). The clause provides procedures for the validation of asserted restrictions on the Government's rights to use, release, or disclose computer software.

(d) Use the clause at [252.227-7025](#), Limitations on the Use or Disclosure of Government-Furnished Information Marked with Restrictive Legends, in solicitations and contracts when it is anticipated that the Government will provide the contractor (other than a litigation support contractor covered by [252.204-7014](#)), for performance of its contract, computer software or computer software documentation marked with another contractor's restrictive legend(s).

(e) Use the provision at [252.227-7028](#), Technical Data or Computer Software Previously Delivered to the Government, in solicitations when the resulting contract will require the contractor to deliver computer software or computer software documentation. The provision requires offerors to identify any software or documentation specified in the solicitation as deliverable items that are the same or substantially the same as software or documentation which the offeror has delivered or is obligated to deliver, either as a contractor or subcontractor, under any other federal agency contract.

(f) Use the clause at [252.227-7037](#), Validation of Restrictive Markings on Technical Data, in solicitations and contracts that include the clause at [252.227-7014](#) when the contractor will be required to deliver noncommercial computer software documentation (technical data). The clause implements statutory requirements under 10 U.S.C. 2321. Paragraph (e) of the clause contains information that must be included in a formal challenge.

227.7203-8 Deferred delivery and deferred ordering of computer software and computer software documentation.

(a) *Deferred delivery.* Use the clause at [252.227-7026](#), Deferred Delivery of Technical Data or Computer Software, when it is in the Government's interests to defer the delivery of computer software or computer software documentation. The clause permits the contracting officer to require the delivery of data identified as “deferred delivery” data or computer software at any time until two years after acceptance by the Government of all items (other than technical data or computer software) under the

contract or contract termination, whichever is later. The obligation of subcontractors or suppliers to deliver such data expires two years after the date the prime contractor accepts the last item from the subcontractor or supplier for use in the performance of the contract. The contract must specify the computer software or computer software documentation that is subject to deferred delivery. The contracting officer shall notify the contractor sufficiently in advance of the desired delivery date for such software or documentation to permit timely delivery.

(b) *Deferred ordering.* Use the clause at [252.227-7027](#), Deferred Ordering of Technical Data or Computer Software, when a firm requirement for software or documentation has not been established prior to contract award but there is a potential need for computer software or computer software documentation. Under this clause, the contracting officer may order any computer software or computer software documentation generated in the performance of the contract or any subcontract thereunder at any time until three years after acceptance of all items (other than technical data or computer software) under the contract or contract termination, whichever is later. The obligation of subcontractors to deliver such technical data or computer software expires three years after the date the contractor accepts the last item under the subcontract. When the software or documentation are ordered, the delivery dates shall be negotiated and the contractor compensated only for converting the software or documentation into the prescribed form, reproduction costs, and delivery costs.

227.7203-9 Copyright.

(a) *Copyright license.*

(1) The clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, requires a contractor to grant, or obtain for the Government license rights which permit the Government to reproduce the software or documentation, distribute copies, perform or display the software or documentation and, through the right to modify data, prepare derivative works. The extent to which the Government, and others acting on its behalf, may exercise these rights varies for each of the standard data rights licenses obtained under the clause. When non-standard license rights in computer software or computer software documentation will be negotiated, negotiate the extent of the copyright license concurrent with negotiations for the data rights license. Do not negotiate copyright licenses for computer software that provide less rights than the standard restricted rights in computer software license. For computer software documentation, do not negotiate a copyright license that provides less rights than the standard limited rights in technical data license.

(2) The clause at [252.227-7013](#), Rights in Technical Data--Noncommercial Items, does not permit a contractor to incorporate a third party's copyrighted software into a deliverable software item unless the contractor has obtained an appropriate license for the Government and, when applicable, others acting on the Government's behalf, or has obtained the contracting officer's written approval to do so. Grant approval to use third party copyrighted software in which the Government will not receive a copyright license only when the Government's requirements cannot be satisfied without the third party material or when the use of the third party material will result in cost savings to the Government which outweigh the lack of a copyright license.

(b) *Copyright considerations--special works.* See [227.7205](#) for copyright considerations when acquiring special works.

227.7203-10 Contractor identification and marking of computer software or computer software documentation to be furnished with restrictive markings.

(a) *Identification requirements.*

(1) The solicitation provision at [252.227-7017](#), Identification and Assertion of Use, Release, or Disclosure Restrictions, requires offerors to identify, prior to contract award, any computer software or computer software documentation that an offeror asserts should be provided to the Government with restrictions on use, modification, reproduction, release, or disclosure. This requirement does not apply to restrictions based solely on copyright. The notification and identification must be submitted as an attachment to the offer. If an offeror fails to submit the attachment or fails to complete the attachment in accordance with the requirements of the solicitation provision, such failure shall constitute a minor informality. Provide offerors an opportunity to remedy a minor informality in accordance with the procedures at FAR 14.405 or 15.306(a). An offeror's failure to correct an informality within the time prescribed by the contracting officer shall render the offer ineligible for award.

(2) The procedures for correcting minor informalities shall not be used to obtain information regarding asserted restrictions or an offeror's suggested asserted rights category. Questions regarding the justification for an asserted restriction or asserted rights category must be pursued in accordance with the procedures at [227.7203-13](#).

(3) The restrictions asserted by a successful offeror shall be attached to its contract unless, in accordance with the procedures at [227.7203-13](#), the parties have agreed that an asserted restriction is not justified. The contract attachment shall provide the same information regarding identification of the computer software or computer software documentation, the asserted rights category, the basis for the assertion, and the name of the person asserting the restrictions as required by paragraph (d) of the solicitation provision at [252.227-7017](#). Subsequent to contract award, the clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, permits a contractor to make additional assertions under certain conditions. The additional assertions must be made in accordance with the procedures and in the format prescribed by that clause.

(4) Neither the pre- or post-award assertions made by the contractor nor the fact that certain assertions are identified in the attachment to the contract, determine the respective rights of the parties. As provided at [227.7203-13](#), the Government has the right to review, verify, challenge and validate restrictive markings.

(5) Information provided by offerors in response to the solicitation provision at [252.227-7017](#) may be used in the source selection process to evaluate the impact on evaluation factors that may be created by restrictions on the Government's ability to use or disclose computer software or computer software documentation.

(b) *Contractor marking requirements.* The clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation—

(1) Requires a contractor who desires to restrict the Government's rights in computer software or computer software documentation to place restrictive markings on the software or documentation, provides instructions for the placement of the restrictive markings, and authorizes the use of certain restrictive markings. When it is anticipated that the software will or may be used in combat or situations which simulate combat conditions, do not permit contractors to insert instructions into computer programs that interfere with or delay operation of the software to display a restrictive rights legend or other license notice; and

(2) Requires a contractor to deliver, furnish, or otherwise provide to the Government any computer software or computer software documentation in which the Government has previously obtained rights with the Government's pre-existing rights in that software or documentation unless the parties have agreed otherwise or restrictions on the Government's rights to use, modify, reproduce, release, or disclose the software or documentation have expired. When restrictions are still applicable, the contractor is permitted to mark the software or documentation with the appropriate restrictive legend.

(c) Unmarked computer software or computer software documentation.

(1) Computer software or computer software documentation delivered or otherwise provided under a contract without restrictive markings shall be presumed to have been delivered with unlimited rights and may be released or disclosed without restriction. To the extent practicable, if a contractor has requested permission (see paragraph (c)(2) of this subsection) to correct an inadvertent omission of markings, do not release or disclose the software or documentation pending evaluation of the request.

(2) A contractor may request permission to have appropriate legends placed on unmarked computer software or computer software documentation at its expense. The request must be received by the contracting officer within six months following the furnishing or delivery of such software or documentation, or any extension of that time approved by the contracting officer. The person making the request must—

(i) Identify the software or documentation that should have been marked;

(ii) Demonstrate that the omission of the marking was inadvertent, the proposed marking is justified and conforms with the requirements for the marking of computer software or computer software documentation contained in the clause at [252.227-7014](#); and

(iii) Acknowledge, in writing, that the Government has no liability with respect to any disclosure, reproduction, or use of the software or documentation made prior to the addition of the marking or resulting from the omission of the marking.

(3) Contracting officers should grant permission to mark only if the software or documentation were not distributed outside the Government or were distributed outside the Government with restrictions on further use or disclosure.

227.7203-11 Contractor procedures and records.

(a) The clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, requires a contractor, and its subcontractors or suppliers that will deliver computer software or computer software documentation with other than unlimited rights, to establish and follow written procedures to assure that restrictive markings are used only when authorized and to maintain records to justify the validity of restrictive markings.

(b) The clause at [252.227-7019](#), Validation of Asserted Restrictions--Computer Software, requires contractors and their subcontractors or suppliers at any tier to maintain records sufficient to justify the validity of markings that assert restrictions on the use, modification, reproduction, release, performance, display, or disclosure of computer software.

227.7203-12 Government right to establish conformity of markings.

(a) *Nonconforming markings.*

(1) Authorized markings are identified in the clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation. All other markings are nonconforming markings. An authorized marking that is not in the form, or differs in substance, from the marking requirements in the clause at [252.227-7014](#) is also a nonconforming marking.

(2) The correction of nonconforming markings on computer software is not subject to [252.227-7019](#), Validation of Asserted Restrictions--Computer Software, and the correction of nonconforming markings on computer software documentation (technical data) is not subject to [252.227-7037](#), Validation of Restrictive Markings on Technical Data. To the extent practicable, the contracting officer should return computer software or computer software documentation bearing nonconforming markings to the person who has placed the nonconforming markings on the software or documentation to provide that person an opportunity to correct or strike the nonconforming markings at that person's expense. If that person fails to correct the nonconformity and return the corrected software or documentation within 60 days following the person's receipt of the software or documentation, the contracting officer may correct or strike the nonconformity at that person's expense. When it is impracticable to return computer software or computer software documentation for correction, contracting officers may unilaterally correct any nonconforming markings at Government expense. Prior to correction, the software or documentation may be used in accordance with the proper restrictive marking.

(b) *Unjustified markings.*

(1) An unjustified marking is an authorized marking that does not depict accurately restrictions applicable to the Government's use, modification, reproduction, release, or disclosure of the marked computer software or computer software documentation. For example, a restricted rights legend placed on computer software developed under a Government contract either exclusively at Government expense or with mixed funding (situations under which the Government obtains unlimited or government purpose rights) is an unjustified marking.

(2) Contracting officers have the right to review and challenge the validity of unjustified markings. However, at any time during performance of a contract and

notwithstanding existence of a challenge, the contracting officer and the person who has asserted a restrictive marking may agree that the restrictive marking is not justified. Upon such agreement, the contracting officer may, at his or her election, either—

- (i) Strike or correct the unjustified marking at that person's expense; or
- (ii) Return the computer software or computer software documentation to the person asserting the restriction for correction at that person's expense. If the software or documentation are returned and that person fails to correct or strike the unjustified restriction and return the corrected software or documentation to the contracting officer within 60 days following receipt of the software or documentation, the unjustified marking shall be corrected or stricken at that person's expense.

227.7203-13 Government right to review, verify, challenge, and validate asserted restrictions.

(a) *General.* An offeror's or contractor's assertion(s) of restrictions on the Government's rights to use, modify, reproduce, release, or disclose computer software or computer software documentation do not, by themselves, determine the extent of the Government's rights in such software or documentation. The Government may require an offeror or contractor to submit sufficient information to permit an evaluation of a particular asserted restriction and may challenge asserted restrictions when there are reasonable grounds to believe that an assertion is not valid.

(b) *Requests for information.* Contracting officers should have a reason to suspect that an asserted restriction might not be correct prior to requesting information. When requesting information, provide the offeror or contractor the reason(s) for suspecting that an asserted restriction might not be correct. A need for additional license rights is not, by itself, a sufficient basis for requesting information concerning an asserted restriction. Follow the procedures at [227.7203-5\(d\)](#) when additional license rights are needed but there is no basis to suspect that an asserted restriction might not be valid.

(c) *Transacting matters directly with subcontractors.* The clause at [252.227-7019](#), Validation of Asserted Restrictions--Computer Software, obtains the contractor's agreement that the Government may transact matters under the clause directly with a subcontractor or supplier, at any tier, without creating or implying privity of contract. Contracting officers should permit a subcontractor or supplier to transact challenge and validation matters directly with the Government when—

(1) A subcontractor's or supplier's business interests in its technical data would be compromised if the data were disclosed to a higher tier contractor;

(2) There is reason to believe that the contractor will not respond in a timely manner to a challenge and an untimely response would jeopardize a subcontractor's or supplier's right to assert restrictions; or

(3) Requested to do so by a subcontractor or supplier.

(d) *Challenging asserted restrictions.*

(1) *Pre-award considerations.* The challenge procedures in the clause at [252.227-7019](#) could significantly delay competitive procurements. Therefore, avoid

challenging asserted restrictions prior to a competitive contract award unless resolution of the assertion is essential for successful completion of the procurement.

(2) *Computer software documentation.* Computer software documentation is technical data. Challenges to asserted restrictions on the Government's rights to use, modify, reproduce, release, perform, display, or disclose computer software documentation must be made in accordance with the clause at [252.227-7037](#), Validation of Restrictive Markings on Technical Data, and the guidance at [227.7103-13](#). The procedures in the clause at [252.227-7037](#) implement requirements contained in 10 U.S.C. 2321. Resolution of questions regarding the validity of asserted restrictions using the process described at [227.7103-12](#)(b)(2) is strongly encouraged.

(3) Computer software.

(i) Asserted restrictions should be reviewed before acceptance of the computer software deliverable under a contract. The Government's right to challenge an assertion expires three years after final payment under the contract or three years after delivery of the software, whichever is later. Those limitations on the Government's challenge rights do not apply to software that is publicly available, has been furnished to the Government without restrictions, or has been otherwise made available without restrictions.

(ii) Contracting officers must have reasonable grounds to challenge the current validity of an asserted restriction. Before challenging an asserted restriction, carefully consider all available information pertaining to the asserted restrictions. Resolution of questions regarding the validity of asserted restrictions using the process described at [227.7203-12](#)(b)(2) is strongly encouraged. After consideration of the situations described in paragraph (c) of this subsection, contracting officers may request the person asserting a restriction to furnish a written explanation of the facts and supporting documentation for the assertion in sufficient detail to enable the contracting officer to determine the validity of the assertion. Additional supporting documentation may be requested when the explanation provided by that person does not, in the contracting officer's opinion, establish the validity of the assertion.

(iii) Assertions may be challenged whether or not supporting documentation was requested. Challenges must be in writing and issued to the person asserting the restriction.

(4) Extension of response time. The contracting officer, at his or her discretion, may extend the time for response contained in a challenge, as appropriate, if the contractor submits a timely written request showing the need for additional time to prepare a response.

(e) *Validating or denying asserted restrictions.*

(1) Contracting officers must promptly issue a final decision denying or sustaining the validity of each challenged assertion unless the parties have agreed on the disposition of the assertion. When a final decision denying the validity of an asserted restriction is made following a timely response to a challenge, the Government is obligated to continue to respect the asserted restrictions through final disposition of any appeal unless the agency head notifies the person asserting the restriction that urgent or compelling circumstances do not permit the Government to continue to

respect the asserted restriction. See [252.227-7019\(g\)](#) for restrictions applicable following a determination of urgent and compelling circumstances.

(2) Only a contracting officer's final decision, or actions of an agency Board of Contract Appeals or a court of competent jurisdiction, that sustain the validity of an asserted restriction constitute validation of the restriction.

(f) *Multiple challenges to an asserted restriction.* When more than one contracting officer challenges an asserted restriction, the contracting officer who made the earliest challenge is responsible for coordinating the Government challenges. That contracting officer shall consult with all other contracting officers making challenges, verify that all challenges apply to the same asserted restriction and, after consulting with the contractor, subcontractor, or supplier asserting the restriction, issue a schedule that provides that person a reasonable opportunity to respond to each challenge.

227.7203-14 Conformity, acceptance, and warranty of computer software and computer software documentation.

(a) *Computer software documentation.* Computer software documentation is technical data. See [227.7103-14](#) for appropriate guidance and statutory requirements.

(b) *Computer software.*

(1) *Conformity and acceptance.* Solicitations and contracts requiring the delivery of computer software shall specify the requirements the software must satisfy to be acceptable. Contracting officers, or their authorized representatives, are responsible for determining whether computer software tendered for acceptance conforms to the contractual requirements. Except for nonconforming restrictive markings (follow the procedures at [227.7203-12\(a\)](#) if nonconforming markings are the sole reason computer software tendered for acceptance fails to conform to contractual requirements), do not accept software that does not conform in all respects to applicable contractual requirements. Correction or replacement of nonconforming software, or an equitable reduction in contract price when correction or replacement of the nonconforming data is not practicable or is not in the Government's interests, shall be accomplished in accordance with—

(i) The provisions of a contract clause providing for inspection and acceptance of deliverables and remedies for nonconforming deliverables; or

(ii) The procedures at FAR 46.407(c) through (g), if the contract does not contain an inspection clause providing remedies for nonconforming deliverables.

(2) *Warranties.*

(i) *Weapon systems.* Computer software that is a component of a weapon system or major subsystem should be warranted as part of the weapon system warranty. Follow the procedures at [246.7](#).

(ii) *Non-weapon systems.* Approval of the chief of the contracting office must be obtained to use a computer software warranty other than a weapon system warranty. Consider the factors at FAR 46.703 in deciding whether to obtain a computer software warranty. When approval for a warranty has been obtained, the clause at

[252.246-7001](#), Warranty of Data, and its alternates, may be appropriately modified for use with computer software or a procurement specific clause may be developed.

227.7203-15 Subcontractor rights in computer software or computer software documentation.

(a) Subcontractors and suppliers at all tiers should be provided the same protection for their rights in computer software or computer software documentation as are provided to prime contractors.

(b) The clauses at [252.227-7019](#), Validation of Asserted Restrictions--Computer Software, and [252.227-7037](#), Validation of Restrictive Markings on Technical Data, obtain a contractor's agreement that the Government's transaction of validation or challenge matters directly with subcontractors at any tier does not establish or imply privity of contract. When a subcontractor or supplier exercises its right to transact validation matters directly with the Government, contracting officers shall deal directly with such persons, as provided at [227.7203-13](#)(c) for computer software and [227.7103-13](#)(c)(3) for computer software documentation (technical data).

(c) Require prime contractors whose contracts include the following clauses to include those clauses, without modification except for appropriate identification of the parties, in contracts with subcontractors or suppliers who will be furnishing computer software in response to a Government requirement (see [227.7103-15](#)(c) for clauses required when subcontractors or suppliers will be furnishing computer software documentation (technical data)):

(1) [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation;

(2) [252.227-7019](#), Validation of Asserted Restrictions--Computer Software;

(3) [252.227-7025](#), Limitations on the Use or Disclosure of Government Furnished Information Marked with Restrictive Legends; and

(4) [252.227-7028](#), Technical Data or Computer Software Previously Delivered to the Government.

(d) Do not require contractors to have their subcontractors or suppliers at any tier relinquish rights in technical data to the contractor, a higher tier subcontractor, or to the Government, as a condition for award of any contract, subcontract, purchase order, or similar instrument except for the rights obtained by the Government under the provisions of the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause contained in the contractor's contract with the Government.

227.7203-16 Providing computer software or computer software documentation to foreign governments, foreign contractors, or international organizations.

Computer software or computer software documentation may be released or disclosed to foreign governments, foreign contractors, or international organizations only if release or disclosure is otherwise permitted both by Federal export controls and other national

security laws or regulations. Subject to such laws and regulations, the Department of Defense—

(a) May release or disclose computer software or computer software documentation in which it has obtained unlimited rights to such foreign entities or authorize the use of such data by those entities; and

(b) Shall not release or disclose computer software or computer software documentation for which restrictions on use, release, or disclosure have been asserted to such foreign entities or authorize the use of such data by those entities, unless the intended recipient is subject to the same provisions as included in the use and non-disclosure agreement at [227.7103-7](#) and the requirements of the clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, governing use, modification, reproduction, release, performance, display, or disclosure of such data have been satisfied.

227.7203-17 Overseas contracts with foreign sources.

(a) The clause at [252.227-7032](#), Rights in Technical Data and Computer Software (Foreign), may be used in contracts with foreign contractors to be performed overseas, except Canadian purchases (see paragraph (c) of this subsection) in lieu of the clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, when the Government requires the unrestricted right to use, modify, reproduce, release, perform, display, or disclose all computer software or computer software documentation to be delivered under the contract. Do not use the clause in contracts for special works.

(b) When the Government does not require unlimited rights, the clause at [252.227-7032](#) may be modified to accommodate the needs of a specific overseas procurement situation. The Government should obtain rights to the computer software or computer software documentation that are not less than the rights the Government would have obtained under the software rights clause(s) prescribed in this part for a comparable procurement performed within the United States or its outlying areas.

(c) Contracts for Canadian purchases shall include the appropriate software rights clause prescribed in this part for a comparable procurement performed within the United States or its outlying areas.

227.7204 Contracts under the Small Business Innovation Research Program. When contracting under the Small Business Innovation Research Program, follow the procedures at [227.7104](#).

227.7205 Contracts for special works.

(a) Use the clause at [252.227-7020](#), Rights in Special Works, in solicitations and contracts where the Government has a specific need to control the distribution of computer software or computer software documentation first produced, created, or generated in the performance of a contract and required to be delivered under that contract, including controlling distribution by obtaining an assignment of copyright, or a specific need to obtain indemnity for liabilities that may arise out of the creation, delivery, use, modification, reproduction, release, performance, display, or disclosure of such software or documentation. Use the clause—

(1) In lieu of the clause at [252.227-7014](#), Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation, when the Government must own or control copyright in all computer software or computer software documentation first produced, created, or generated and required to be delivered under a contract; or

(2) In addition to the clause at [252.227-7014](#) when the Government must own or control copyright in some of the computer software or computer software documentation first produced, created, or generated and required to be delivered under a contract. The specific software or documentation in which the Government must own or control copyright must be identified in a special contract requirement.

(b) Although the Government obtains an assignment of copyright and unlimited rights in the computer software or computer software documentation delivered as a special work under the clause at [252.227-7020](#), the contractor retains use and disclosure rights in that software or documentation. If the Government needs to restrict a contractor's rights to use or disclose a special work, it must also negotiate a special license which specifically restricts the contractor's use or disclosure rights.

(c) The clause at [252.227-7020](#) does not permit a contractor to incorporate into a special work any work copyrighted by others unless the contractor obtains the contracting officer's permission to do so and obtains for the Government a non-exclusive, paid up, world-wide license to make and distribute copies of that work, to prepare derivative works, to perform or display any portion of that work, and to permit others to do so for government purposes. Grant permission only when the Government's requirements cannot be satisfied unless the third party work is included in the deliverable work.

(d) Examples of other works which may be procured under the clause at [252.227-7020](#) include, but are not limited to, audiovisual works, scripts, soundtracks, musical compositions, and adaptations; histories of departments, agencies, services or units thereof; surveys of Government establishments; instructional works or guidance to Government officers and employees on the discharge of their official duties; reports, books, studies, surveys or similar documents; collections of data containing information pertaining to individuals that, if disclosed, would violate the right of privacy or publicity of the individuals to whom the information relates; or investigative reports.

227.7206 Contracts for architect-engineer services.

Follow [227.7107](#) when contracting for architect-engineer services.

227.7207 Contractor data repositories.

Follow [227.7108](#) when it is in the Government's interests to have a data repository include computer software or to have a separate computer software repository. Contractual instruments establishing the repository requirements must appropriately reflect the repository manager's software responsibilities.

Defense Federal Acquisition Regulation Supplement

Part 228—Bonds and Insurance

TABLE OF CONTENTS

(Revised June 20, 2003)

SUBPART 228.1—BONDS

- 228.102 Performance and payment bonds for construction contracts.
- 228.102-1 General.
- 228.102-70 Defense Environmental Restoration Program construction contracts.
- 228.105 Other types of bonds.
- 228.106 Administration.
- 228.106-7 Withholding contract payments.
- 228.170 Solicitation provision.

SUBPART 228.3—INSURANCE

- 228.304 Risk-pooling arrangements.
- 228.305 Overseas workers' compensation and war-hazard insurance.
- 228.307 Insurance under cost-reimbursement contracts.
- 228.307-1 Group insurance plans.
- 228.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.
- 228.311-1 Contract clause.
- 228.370 Additional clauses.

SUBPART 228.1—BONDS
(Revised October 1, 2015)

228.102 Performance and payment bonds for construction contracts.

228.102-1 General.

The requirement for performance and payment bonds is waived for cost-reimbursement contracts. However, for cost-type contracts with fixed-price construction subcontracts over \$35,000, require the prime contractor to obtain from each of its construction subcontractors performance and payment protections in favor of the prime contractor as follows:

(1) For fixed-price construction subcontracts over \$35,000, but not exceeding \$150,000, payment protection sufficient to pay labor and material costs, using any of the alternatives listed at FAR 28.102-1(b)(1).

(2) For fixed-price construction subcontracts over \$150,000—

(i) A payment bond sufficient to pay labor and material costs; and

(ii) A performance bond in an equal amount if available at no additional cost.

228.102-70 Defense Environmental Restoration Program construction contracts.

For Defense Environmental Restoration Program construction contracts entered into pursuant to 10 U.S.C. 2701—

(a) Any rights of action under the performance bond shall only accrue to, and be for the exclusive use of, the obligee named in the bond;

(b) In the event of default, the surety's liability on the performance bond is limited to the cost of completion of the contract work, less the balance of unexpended funds. Under no circumstances shall the liability exceed the penal sum of the bond;

(c) The surety shall not be liable for indemnification or compensation of the obligee for loss or liability arising from personal injury or property damage, even if the injury or damage was caused by a breach of the bonded contract; and

(d) Once it has taken action to meet its obligations under the bond, the surety is entitled to any indemnification and identical standard of liability to which the contractor was entitled under the contract or applicable laws and regulations.

228.105 Other types of bonds.

Fidelity and forgery bonds generally are not required but are authorized for use when—

(1) Necessary for the protection of the Government or the contractor; or

(2) The investigative and claims services of a surety company are desired.

228.106 Administration.

228.106-7 Withholding contract payments.

(a) Withholding may be appropriate in other than construction contracts (see FAR 32.112-1(b)).

228.170 Solicitation provision.

When a requirement for a performance bond or other security is included in a solicitation for dismantling, demolition, or removal of improvements (see FAR 37.300), use the provision at 252.228-7004, Bonds or Other Security. Set a period of time (normally ten days) for return of executed bonds.

SUBPART 228.3—INSURANCE

(Revised June 8, 2010)

228.304 Risk-pooling arrangements.

DoD has established the National Defense Projects Rating Plan, also known as the Special Casualty Insurance Rating Plan, as a risk-pooling arrangement to minimize the cost to the Government of purchasing the liability insurance listed in FAR 28.307-2. Use the plan in accordance with the procedures at PGI 228.304 when it provides the necessary coverage more advantageously than commercially available coverage.

228.305 Overseas workers' compensation and war-hazard insurance.

(d) When submitting requests for waiver, follow the procedures at PGI 228.305(d).

228.307 Insurance under cost-reimbursement contracts.

228.307-1 Group insurance plans.

The Defense Department Group Term Insurance Plan is available for contractor use under cost-reimbursement type contracts when approved as provided in department or agency regulations. A contractor is eligible if—

(a) The number of covered employees is 500 or more; and

(b) The contractor has all cost-reimbursement contracts; or

(c) At least 90 percent of the payroll for contractor operations to be covered by the Plan is under cost-reimbursement contracts.

228.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

228.311-1 Contract clause.

Use the clause at FAR 52.228-7, Insurance--Liability to Third Persons, in solicitations and contracts, other than those for construction and those for architect-engineer services, when a cost-reimbursement contract is contemplated, unless the head of the contracting activity waives the requirement for use of the clause.

228.370 Additional clauses.

(a) Use the clause at 252.228-7000, Reimbursement for War-Hazard Losses, when—

(1) The clause at FAR 52.228-4, Worker's Compensation and War-Hazard Insurance Overseas, is used; and

(2) The head of the contracting activity decides not to allow the contractor to buy insurance for war-hazard losses.

(b)(1) Use the clause at 252.228-7001, Ground and Flight Risk, in all solicitations and contracts for the acquisition, development, production, modification, maintenance, repair, flight, or overhaul of aircraft, except those solicitations and contracts—

Defense Federal Acquisition Regulation Supplement

Part 228—Bonds and Insurance

(i) That are strictly for activities incidental to the normal operations of the aircraft (e.g., refueling operations, minor non-structural actions not requiring towing such as replacing aircraft tires due to wear and tear);

(ii) That are awarded under FAR Part 12 procedures and are for the acquisition, development, production, modification, maintenance, repair, flight, or overhaul of aircraft; or otherwise involving the furnishing of aircraft;

(iii) For which a non-DoD customer (including a foreign military sales customer) has not agreed to assume the risk for loss or destruction of, or damages to, the aircraft; or

(iv) For commercial derivative aircraft that are to be maintained to Federal Aviation Administration (FAA) airworthiness when the work will be performed at a licensed FAA repair station.

(2) The clause at 252.228-7001 may be modified only as follows:

(i) Include a modified definition of “aircraft” if the contract covers other than conventional types of winged aircraft, i.e., helicopters, vertical take-off or landing aircraft, lighter-than-air airships, unmanned aerial vehicles, or other nonconventional aircraft. The modified definition should describe a stage of manufacture comparable to the standard definition.

(ii) Modify “in the open” to include “hush houses,” test hangars and comparable structures, and other designated areas.

(iii) Expressly define the “contractor's premises” where the aircraft will be located during and for contract performance. These locations may include contract premises which are owned or leased by the contractor or subcontractor, or premises where the contractor or subcontractor is a permittee or licensee or has a right to use, including Government airfields.

(iv) Revise paragraph (e)(3) of the clause to provide Government assumption of risk for transportation by conveyance on streets or highways when transportation is—

(A) Limited to the vicinity of contractor premises; and

(B) Incidental to work performed under the contract.

(3) Follow the procedures at PGI 228.370(b) when using the clause at 252.228-7001.

(c) The clause at 252.228-7003, Capture and Detention, may be used when contractor employees are subject to capture and detention and may not be covered by the War Hazards Compensation Act (42 U.S.C. 1701 et seq.).

(d) The clause at 252.228-7005, Accident Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles, may be used in solicitations and contracts which involve the manufacture, modification, overhaul, or repair of these items.

Defense Federal Acquisition Regulation Supplement

Part 228—Bonds and Insurance

(e) Use the clause at 252.228-7006, Compliance with Spanish Laws and Insurance, in solicitations and contracts for services or construction to be performed in Spain, unless the Contractor is a Spanish concern. |

TABLE OF CONTENTS
(Revised June 25, 2013)

SUBPART 229.1—GENERAL

229.101	Resolving tax problems.
229.170	Reporting of foreign taxation on U.S. assistance programs.
229.170-1	Definition.
229.170-2	Policy.
229.170-3	Reports.
229.170-4	Contract clause.

SUBPART 229.4—CONTRACT CLAUSES

229.402	Foreign contracts.
229.402-1	Foreign fixed-price contracts.
229.402-70	Additional provisions and clauses.

SUBPART 229.70—SPECIAL PROCEDURES FOR OVERSEAS CONTRACTS

SUBPART 229.1—GENERAL
(Revised March 21, 2006)

229.101 Resolving tax problems.

(a) Within DoD, the agency-designated legal counsels are the defense agency General Counsels, the General Counsels of the Navy and Air Force, and for the Army, the Chief, Contract Law Division, Office of the Judge Advocate General. For additional information on the designated legal counsels, see PGI 229.101(a).

(b) For information on fuel excise taxes, see PGI 229.101(b).

(c) For guidance on directing a contractor to litigate the applicability of a particular tax, see PGI 229.101(c).

(d) For information on tax relief agreements between the United States and European foreign governments, see PGI 229.101(d).

229.170 Reporting of foreign taxation on U.S. assistance programs.

229.170-1 Definition.

“Commodities,” as used in this section, means any materials, articles, supplies, goods, or equipment.

229.170-2 Policy.

(a) By law, bilateral agreements with foreign governments must include a provision that commodities acquired under contracts funded by U.S. assistance programs shall be exempt from taxation by the foreign government. If taxes or customs duties nevertheless are imposed, the foreign government must reimburse the amount of such taxes to the U.S. Government (Section 579 of Division E of the Consolidated Appropriations Act, 2003 (Pub. L. 108-7), as amended by Section 506 of Division D of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199), and similar sections in subsequent acts).

(b) This foreign tax exemption—

(1) Applies to a contract or subcontract for commodities when—

(i) The funds are appropriated by the annual foreign operations appropriations act; and

(ii) The value of the contract or subcontract is \$500 or more;

(2) Does not apply to the acquisition of services;

(3) Generally is implemented through letters of offer and acceptance, other country-to-country agreements, or Federal interagency agreements; and

(4) Requires reporting of noncompliance for effective implementation.

Defense Federal Acquisition Regulation Supplement

Part 229—Taxes

229.170-3 Reports.

The contracting officer shall submit a report to the designated Security Assistance Office when a foreign government or entity imposes tax or customs duties on commodities acquired under contracts or subcontracts meeting the criteria of 229.170-2(b)(1). Follow the procedures at PGI 229.170-3 for submission of reports.

229.170-4 Contract clause.

Use the clause at 252.229-7011, Reporting of Foreign Taxes – U.S. Assistance Programs, in solicitations and contracts funded with U.S. assistance appropriations provided in the annual foreign operations appropriations act.

SUBPART 229.4—CONTRACT CLAUSES

(Revised December 30, 2015)

229.402 Foreign contracts.

229.402-1 Foreign fixed-price contracts.

Use the clause at [252.229-7000](#), Invoices Exclusive of Taxes or Duties, in solicitations and contracts when a fixed-price contract will be awarded to a foreign concern.

229.402-70 Additional provisions and clauses.

(a) Use the basic or the alternate of the clause at [252.229-7001](#), Tax Relief, in solicitations and contracts when a contract will be awarded to a foreign concern for performance in a foreign country.

(1) Use the basic clause in solicitations and contracts when the contract will be performed in a foreign country other than Germany.

(2) Use the alternate I clause in solicitations and contracts when the contract will be performed in Germany.

(b) Use the clause at [252.229-7002](#), Customs Exemptions (Germany), in solicitations and contracts requiring the import of U.S. manufactured products into Germany.

(c)(1) Use the clause at [252.229-7003](#), Tax Exemptions (Italy), in solicitations and contracts when contract performance will be in Italy.

(2) Use the provision at [252.229-7012](#), Tax Exemptions (Italy)—Representation, in solicitations that contain the clause at [252.229-7003](#), Tax Exemptions (Italy). If the solicitation includes the provision at FAR 52.204-7, do not separately list [252.229-7012](#) in the solicitation.

(d) Use the clause at [252.229-7004](#), Status of Contractor as a Direct Contractor (Spain), in solicitations and contracts requiring the import into Spain of supplies for construction, development, maintenance, or operation of Spanish-American installations and facilities.

(e) (1) Use the clause at [252.229-7005](#), Tax Exemptions (Spain), in solicitations and contracts when contract performance will be in Spain.

(2) Use the provision at [252.229-7013](#), Tax Exemptions (Spain)—Representation, in solicitations that contain the clause at [252.229-7005](#), Tax Exemptions (Spain). If the solicitation includes the provision at FAR 52.204-7, do not separately list [252.229-7013](#) in the solicitation.

(f) Use the clause at [252.229-7006](#), Value Added Tax Exclusion (United Kingdom), in solicitations and contracts when contract performance will be in the United Kingdom.

Defense Federal Acquisition Regulation Supplement

Part 229—Taxes

(g) Use the clause at [252.229-7007](#), Verification of United States Receipt of Goods, in solicitations and contracts when contract performance will be in the United Kingdom.

(h) Use the clause at [252.229-7008](#), Relief from Import Duty (United Kingdom), in solicitations issued and contracts awarded in the United Kingdom.

(i) Use the clause at [252.229-7009](#), Relief from Customs Duty and Value Added Tax on Fuel (Passenger Vehicles) (United Kingdom), in solicitations issued and contracts awarded in the United Kingdom for fuels (gasoline or diesel) and lubricants used in passenger vehicles (excluding taxis).

(j) Use the clause at [252.229-7010](#), Relief from Customs Duty on Fuel (United Kingdom), in solicitations issued and contracts awarded in the United Kingdom that require the use of fuels (gasoline or diesel) and lubricants in taxis or vehicles other than passenger vehicles.

(k) Use the clause at [252.229-7014](#), Taxes—Foreign Contracts in Afghanistan, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with performance in Afghanistan, unless the clause at [252.229-7015](#) is used.

(l) Use the clause at [252.229-7015](#), Taxes—Foreign Contracts in Afghanistan (North Atlantic Treaty Organization Status of Forces Agreement), instead of the clause at [252.229-7014](#), Taxes—Foreign Contracts in Afghanistan, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, with performance in Afghanistan awarded on behalf of the North Atlantic Treaty Organization (NATO), which are governed by the NATO Status of Forces Agreement (SOFA), if approval from the Director, Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics, has been obtained prior to each use.

Defense Federal Acquisition Regulation Supplement

Part 229—Taxes

SUBPART 229.70—SPECIAL PROCEDURES FOR OVERSEAS CONTRACTS *(Revised February 7, 2005)*

To obtain tax relief for overseas contracts, follow the procedures at PGI 229.70.

Defense Federal Acquisition Regulation Supplement

Part 230—Cost Accounting Standards Administration

TABLE OF CONTENTS *(Revised December 1, 2006)*

SUBPART 230.2—CAS PROGRAM REQUIREMENTS 230.201-5 Waiver.

SUBPART 230.2—CAS PROGRAM REQUIREMENTS
(Revised August 29, 2012)

230.201-5 Waiver.

(a)(1)(A) The military departments and the Director, Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics)—

(1) May grant CAS waivers that meet the conditions in FAR 30.201-5(b)(1); and

(2) May grant CAS waivers that meet the conditions in FAR 30.201-5(b)(2), provided the cognizant Federal agency official granting the waiver determines that—

(i) The property or services cannot reasonably be obtained under the contract, subcontract, or modification, as applicable, without granting the waiver;

(ii) The price can be determined to be fair and reasonable without the application of the Cost Accounting Standards; and

(iii) There are demonstrated benefits to granting the waiver.

(B) Follow the procedures at [PGI 230.201-5\(a\)\(1\)](#) for submitting waiver requests to the Director, Defense Procurement and Acquisition Policy.

(2) The military departments shall not delegate CAS waiver authority below the individual responsible for issuing contracting policy for the department.

(e) By November 30th of each year, the military departments shall provide a report to the Director, Defense Procurement and Acquisition Policy, ATTN: DPAP/CPIC, of all waivers granted under FAR 30.201-5(a), during the previous fiscal year, for any contract, subcontract, or modification expected to have a value of \$15,000,000 or more. See [PGI 230.201-5\(e\)](#) for format and guidance for the report. The Director, Defense Procurement and Acquisition Policy, will submit a consolidated report to the CAS Board and the congressional defense committees.

Defense Federal Acquisition Regulation Supplement

Part 230—Cost Accounting Standards Administration

SUBPART 230.70
(Removed December 1, 2006)

Defense Federal Acquisition Regulation Supplement

Part 230—Cost Accounting Standards Administration

SUBPART 230.71
(Removed December 1, 2006)

TABLE OF CONTENTS
(Revised August 30, 2016)

SUBPART 231.1—APPLICABILITY

- 231.100 Scope of subpart.
- 231.100-70 Contract clause.

SUBPART 231.2—CONTRACTS WITH COMMERCIAL ORGANIZATIONS

- 231.205 Selected costs.
- 231.205-1 Public relations and advertising costs.
- 231.205-6 Compensation for personal services.
- 231.205-18 Independent research and development and bid and proposal costs.
- 231.205-19 Insurance and indemnification.
- 231.205-22 Legislative lobbying costs.
- 231.205-70 External restructuring costs.
- 231.205-71 Costs related to counterfeit electronic parts and suspect counterfeit electronic parts.

SUBPART 231.3—CONTRACTS WITH EDUCATIONAL INSTITUTIONS

- 231.303 Requirements.

**SUBPART 231.6—CONTRACTS WITH STATE, LOCAL, AND FEDERALLY
RECOGNIZED INDIAN TRIBAL GOVERNMENTS**

- 231.603 Requirements.

SUBPART 231.7—CONTRACTS WITH NONPROFIT ORGANIZATIONS

- 231.703 Requirements.

SUBPART 231.1—APPLICABILITY

231.100 Scope of subpart.

231.100-70 Contract clause.

Use the clause at 252.231-7000, Supplemental Cost Principles, in all solicitations and contracts, which are subject to the principles and procedures described in FAR Subparts 31.1, 31.2, 31.6, and 31.7.

When awarding qualified contracts in conjunction with the conveyance of a utility system under 10 U.S.C. 2688, "Utility Systems: Conveyance Authority," see DoD Class Deviation [2011-O0006](#), Utilities Privatization –Class Deviation from FAR Part 31, dated March 31, 2011. This deviation is effective until incorporated into the DFARS or rescinded.

SUBPART 231.2—CONTRACTS WITH COMMERCIAL ORGANIZATIONS
(Revised August 30, 2016)

231.205 Selected costs.

231.205-1 Public relations and advertising costs.

(e) See [225.7303-2](#)(e) for allowability provisions affecting foreign military sales contracts.

(f) Unallowable public relations and advertising costs include the following:

(1) Monies paid to the Government associated with the leasing of Government equipment, including lease payments and reimbursements for support services, except for foreign military sales contracts as provided for at [225.7303-2](#).

231.205-6 Compensation for personal services.

(f)(1) In accordance with Section 8122 of Pub. L. 104-61, and similar sections in subsequent Defense appropriations acts, costs for bonuses or other payments in excess of the normal salary paid by the contractor to an employee, that are part of restructuring costs associated with a business combination, are unallowable under DoD contracts funded by fiscal year 1996 or subsequent appropriations. This limitation does not apply to severance payments or early retirement incentive payments. (See [231.205-70](#)(b) for the definitions of “business combination” and “restructuring costs.”)

(m)(1) Fringe benefit costs that are contrary to law, employer-employee agreement, or an established policy of the contractor are unallowable.

231.205-18 Independent research and development and bid and proposal costs.

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

(i) “Covered contract” means a DoD prime contract for an amount exceeding the simplified acquisition threshold, except for a fixed-price contract without cost incentives. The term also includes a subcontract for an amount exceeding the simplified acquisition threshold, except for a fixed-price subcontract without cost incentives under such a prime contract.

(ii) “Covered segment” means a product division of the contractor that allocated more than \$1,100,000 in independent research and development and bid and proposal (IR&D/B&P) costs to covered contracts during the preceding fiscal year. In the case of a contractor that has no product divisions, the term means that contractor as a whole. A product division of the contractor that allocated less than \$1,100,000 in IR&D/B&P costs to covered contracts during the preceding fiscal year is not subject to the limitations in paragraph (c) of this subsection.

(iii) “Major contractor” means any contractor whose covered segments allocated a total of more than \$11,000,000 in IR&D/B&P costs to covered contracts during the

Defense Federal Acquisition Regulation Supplement

Part 231—Contract Cost Principles and Procedures

preceding fiscal year. For purposes of calculating the dollar threshold amounts to determine whether a contractor meets the definition of “major contractor,” do not include contractor segments allocating less than \$1,100,000 of IR&D/B&P costs to covered contracts during the preceding fiscal year.

(c) *Allowability.*

(i) Departments/agencies shall not supplement this regulation in any way that limits IR&D/B&P cost allowability.

(ii) See [225.7303-2\(c\)](#) for allowability provisions affecting foreign military sale contracts.

(iii) For major contractors, the following limitations apply:

(A) The amount of IR&D/B&P costs allowable under DoD contracts shall not exceed the lesser of—

(1) Such contracts’ allocable share of total incurred IR&D/B&P costs; or

(2) The amount of incurred IR&D/B&P costs for projects having potential interest to DoD.

(B) Allowable IR&D/B&P costs are limited to those for projects that are of potential interest to DoD, including activities intended to accomplish any of the following:

(1) Enable superior performance of future U.S. weapon systems and components.

(2) Reduce acquisition costs and life-cycle costs of military systems.

(3) Strengthen the defense industrial and technology base of the United States.

(4) Enhance the industrial competitiveness of the United States.

(5) Promote the development of technologies identified as critical under 10 U.S.C. 2522.

(6) Increase the development and promotion of efficient and effective applications of dual-use technologies.

(7) Provide efficient and effective technologies for achieving such environmental benefits as: improved environmental data gathering, environmental cleanup and restoration, pollution reduction in manufacturing, environmental conservation, and environmentally safe management of facilities.

(C) For a contractor's annual IR&D costs to be allowable, the IR&D projects generating the costs must be reported to the Defense Technical Information Center (DTIC) using the DTIC's on-line input form and instructions at <http://www.dtic.mil/ird/dticdb/index.html>. The inputs must be updated at least

annually and when the project is completed. Copies of the input and updates must be made available for review by the cognizant administrative contracting officer (ACO) and the cognizant Defense Contract Audit Agency auditor to support the allowability of the costs. Contractors that do not meet the threshold as a major contractor are encouraged to use the DTIC on-line input form to report IR&D projects to provide DoD with visibility into the technical content of the contractors' IR&D activities.

(iv) For major contractors, the ACO or corporate ACO shall—

(A) Determine whether IR&D/B&P projects are of potential interest to DoD;
and

(B) Provide the results of the determination to the contractor.

(v) The cognizant contract administration office shall furnish contractors with guidance on financial information needed to support IR&D/B&P costs and on technical information needed from major contractors to support the potential interest to DoD determination (also see [242.771-3\(a\)](#)).

231.205-19 Insurance and indemnification.

(e) In addition to the cost limitations in FAR 31.205-19(e), self-insurance and purchased insurance costs are subject to the requirements of the clauses at [252.217-7012](#), Liability and Insurance, and [252.228-7001](#), Ground and Flight Risk.

231.205-22 Legislative lobbying costs.

(a) Costs associated with preparing any material, report, list, or analysis on the actual or projected economic or employment impact in a particular State or congressional district of an acquisition program for which all research, development, testing, and evaluation has not been completed also are unallowable (10 U.S.C. 2249).

231.205-70 External restructuring costs.

(a) *Scope.* This subsection—

(1) Prescribes policies and procedures for allowing contractor external restructuring costs when savings would result for DoD; and

(2) Implements 10 U.S.C. 2325.

(b) *Definitions.* As used in this subsection:

(1) “Business combination” means a transaction whereby assets or operations of two or more companies not previously under common ownership or control are combined, whether by merger, acquisition, or sale/purchase of assets.

(2) “External restructuring activities” means restructuring activities occurring after a business combination that affect the operations of companies not previously under common ownership or control. They do not include restructuring activities occurring after a business combination that affect the operations of only one of the companies not previously under common ownership or control, or, when there has been

Defense Federal Acquisition Regulation Supplement

Part 231—Contract Cost Principles and Procedures

no business combination, restructuring activities undertaken within one company. External restructuring activities are a direct outgrowth of a business combination. They normally will be initiated within 3 years of the business combination.

(3) “Restructuring activities” means nonroutine, nonrecurring, or extraordinary activities to combine facilities, operations, or workforce, in order to eliminate redundant capabilities, improve future operations, and reduce overall costs. Restructuring activities do not include routine or ongoing repositionings and redeployments of a contractor’s productive facilities or workforce (e.g., normal plant rearrangement or employee relocation), nor do they include other routine or ordinary activities charged as indirect costs that would otherwise have been incurred (e.g., planning and analysis, contract administration and oversight, or recurring financial and administrative support).

(4) “Restructuring costs” means the costs, including both direct and indirect, of restructuring activities. Restructuring costs that may be allowed include, but are not limited to, severance pay for employees, early retirement incentive payments for employees, employee retraining costs, relocation expense for retained employees, and relocation and rearrangement of plant and equipment. For purposes of this definition, if restructuring costs associated with external restructuring activities allocated to DoD contracts are less than \$2.5 million, the costs shall not be subject to the audit, review, and determination requirements of paragraph (c)(4) of this subsection; instead, the normal rules for determining cost allowability in accordance with FAR Part 31 shall apply.

(5) “Restructuring savings” means cost reductions, including both direct and indirect cost reductions, that result from restructuring activities. Reassignments of cost to future periods are not restructuring savings.

(c) *Limitations on cost allowability.* Restructuring costs associated with external restructuring activities shall not be allowed unless—

(1) Such costs are allowable in accordance with FAR Part 31 and DFARS Part 231;

(2) An audit of projected restructuring costs and restructuring savings is performed;

(3) The cognizant administrative contracting officer (ACO) reviews the audit report and the projected costs and projected savings, and negotiates an advance agreement in accordance with paragraph (d) of this subsection; and

(4)(i) The official designated in paragraph (c)(4)(ii) of this subsection determines in writing that the audited projected savings, on a present value basis, for DoD resulting from the restructuring will exceed either—

(A) The costs allowed by a factor of at least two to one; or

(B) The costs allowed, and the business combination will result in the preservation of a critical capability that might otherwise be lost to DoD.

Defense Federal Acquisition Regulation Supplement

Part 231—Contract Cost Principles and Procedures

(ii)(A) If the amount of restructuring costs is expected to exceed \$25 million over a 5-year period, the designated official is the Under Secretary of Defense (Acquisition, Technology, and Logistics) or the Principal Deputy. This authority may not be delegated below the level of an Assistant Secretary of Defense.

(B) For all other cases, the designated official is the Director of the Defense Contract Management Agency. The Director may not delegate this authority.

(d) *Procedures and ACO responsibilities.* As soon as it is known that the contractor will incur restructuring costs for external restructuring activities, the cognizant ACO shall follow the procedures at [PGI 231.205-70\(d\)](#).

(e) *Information needed to obtain a determination.*

(1) The novation agreement (if one is required).

(2) The contractor's restructuring proposal.

(3) The proposed advance agreement.

(4) The audit report.

(5) Any other pertinent information.

(6) The cognizant ACO's recommendation for a determination. This recommendation must clearly indicate one of the following, consistent with paragraph (c)(4)(i) of this subsection:

(i) The audited projected savings for DoD will exceed the costs allowed by a factor of at least two to one on a present value basis.

(ii) The business combination will result in the preservation of a critical capability that might otherwise be lost to DoD, and the audited projected savings for DoD will exceed the costs allowed on a present value basis.

(f) *Contracting officer responsibilities.*

(1) The contracting officer, in consultation with the cognizant ACO, should consider including a repricing clause in noncompetitive fixed-price contracts that are negotiated during the period between—

(i) The time a business combination is announced; and

(ii) The time the contractor's forward pricing rates are adjusted to reflect the impact of restructuring.

(2) The decision to use a repricing clause will depend upon the particular circumstances involved, including—

(i) When the restructuring will take place;

(ii) When restructuring savings will begin to be realized;

- (iii) The contract performance period;
 - (iv) Whether the contracting parties are able to make a reasonable estimate of the impact of restructuring on the contract; and
 - (v) The size of the potential dollar impact of restructuring on the contract.
- (3) If the contracting officer decides to use a repricing clause, the clause must provide for a downward-only price adjustment to ensure that DoD receives its appropriate share of restructuring net savings.

231.205-71 Costs related to counterfeit electronic parts and suspect counterfeit electronic parts.

(a) *Scope.* This section implements the requirements of section 818(c)(2), National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81), as modified by section 833, National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), and section 885 of the National Defense Authorization Act for Fiscal Year 2016 (Pub. L. 114-92).

(b) The costs of counterfeit electronic parts and suspect counterfeit electronic parts and the costs of rework or corrective action that may be required to remedy the use or inclusion of such parts are unallowable, unless—

(1) The contractor has an operational system to detect and avoid counterfeit electronic parts and suspect counterfeit electronic parts that has been reviewed and approved by DoD pursuant to [244.303](#);

(2) The counterfeit electronic parts or suspect counterfeit electronic parts are Government-furnished property as defined in FAR 45.101 or were obtained by the contractor in accordance with the clause at [252.246-7008](#), Sources of Electronic Parts; and

(3) The contractor—

(i) Becomes aware of the counterfeit electronic parts or suspect counterfeit electronic parts through inspection, testing, and authentication efforts of the contractor or its subcontractors; through a Government Industry Data Exchange Program (GIDEP) alert; or by other means; and

(ii) Provides timely (i.e., within 60 days after the contractor becomes aware) written notice to—

(A) The cognizant contracting officer(s); and

(B) GIDEP (unless the contractor is a foreign corporation or partnership that does not have an office, place of business, or fiscal paying agent in the United States; or the counterfeit electronic part or suspect counterfeit electronic part is the subject of an on-going criminal investigation).

SUBPART 231.3—CONTRACTS WITH EDUCATIONAL INSTITUTIONS

231.303 Requirements.

(1) Pursuant to section 841 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103-160), no limitation may be placed on the reimbursement of otherwise allowable indirect costs incurred by an institution of higher education under a DoD contract awarded on or after November 30, 1993, unless that same limitation is applied uniformly to all other organizations performing similar work under DoD contracts. The 26 percent limitation imposed on administrative indirect costs by OMB Circular No. A-21 shall not be applied to DoD contracts awarded on or after November 30, 1993, to institutions of higher education because the same limitation is not applied to other organizations performing similar work.

(2) The cognizant administrative contracting officer may waive the prohibition in 231.303(1) if the governing body of the institution of higher education requests the waiver to simplify the institution's overall management of DoD cost reimbursements under DoD contracts.

(3) Under 10 U.S.C. 2249, the costs cited in 231.205-22(a) are unallowable.

Defense Federal Acquisition Regulation Supplement

Part 231—Contract Cost Principles and Procedures

SUBPART 231.6—CONTRACTS WITH STATE, LOCAL, AND FEDERALLY RECOGNIZED INDIAN TRIBAL GOVERNMENTS

231.603 Requirements.

Under 10 U.S.C. 2249, the costs cited in 231.205-22(a) are unallowable.

Defense Federal Acquisition Regulation Supplement

Part 231—Contract Cost Principles and Procedures

SUBPART 231.7—CONTRACTS WITH NONPROFIT ORGANIZATIONS

231.703 Requirements.

Under 10 U.S.C. 2249, the costs cited in 231.205-22(a) are unallowable.

Defense Federal Acquisition Regulation Supplement

Part 232—Contract Financing

TABLE OF CONTENTS (Revised February 26, 2016)

232.001	Definitions.
232.006	Reduction or suspension of contract payments upon finding of fraud.
232.006-5	Reporting.
232.007	Contract financing payments.
232.070	Responsibilities.
232.071	Reserved.
232.072	Financial responsibility of contractors.
232.072-1	Required financial reviews.
232.072-2	Appropriate information.
232.072-3	Cash flow forecasts.

SUBPART 232.1—NON-COMMERCIAL ITEM PURCHASE FINANCING

232.102	Description of contract financing methods.
232.102-70	Provisional delivery payments.

SUBPART 232.2—COMMERCIAL ITEM PURCHASE FINANCING

232.202-4	Security for Government financing.
232.206	Solicitation provisions and contract clauses.

SUBPART 232.3—LOAN GUARANTEES FOR DEFENSE PRODUCTION

232.302	Authority.
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SUBPART 232.4—ADVANCE PAYMENTS FOR NON-COMMERCIAL ITEMS

232.404	Exclusions.
232.409	Contracting officer action.
232.409-1	Recommendation for approval.
232.410	Findings, determination, and authorization.
232.412	Contract clause.
232.412-70	Additional clauses.
232.470	Advance payment pool.

SUBPART 232.5—PROGRESS PAYMENTS BASED ON COSTS

232.501	General.
232.501-1	Customary progress payment rates.
232.501-2	Unusual progress payments.
232.501-3	Contract price.
232.502	Preaward matters.
232.502-4	Contract clauses.
232.502-4-70	Additional clauses.
232.503	Postaward matters.
232.503-6	Suspension or reduction of payments.
232.503-15	Application of Government title terms.

SUBPART 232.6—CONTRACT DEBTS

232.602	Responsibilities.
232.603	Debt determination.
232.604	Demand for payment.
232.610	Compromising debts.

Defense Federal Acquisition Regulation Supplement

Part 232—Contract Financing

- 232.611 Contract clause.
- 232.670 Transfer of responsibility for debt collection.
- 232.671 Bankruptcy reporting.

SUBPART 232.7—CONTRACT FUNDING

- 232.702 Policy.
- 232.703 Contract funding requirements.
- 232.703-1 General.
- 232.703-3 Contracts crossing fiscal years.
- 232.703-70 Military construction appropriations act restriction.
- 232.704 Limitation of cost or funds.
- 232.704-70 Incrementally funded fixed-price contracts.
- 232.705 Contract clauses.
- 232.705-70 Clause for limitation of Government's obligation.

SUBPART 232.8—ASSIGNMENT OF CLAIMS

- 232.803 Policies.
- 232.805 Procedure.
- 232.806 Contract clause.

SUBPART 232.9—PROMPT PAYMENT

- 232.901 Applicability.
- 232.903 Responsibilities.
- 232.904 Determining payment due dates.
- 232.905 Payment documentation and process.
- 232.906 Making payments.
- 232.908 Contract clauses.

SUBPART 232.10—PERFORMANCE-BASED PAYMENTS

- 232.1001 Policy.
- 232.1003-70 Criteria for use.
- 232.1004 Procedures.
- 232.1005-70 Contract clauses.

SUBPART 232.11—ELECTRONIC FUNDS TRANSFER

- 232.1110 Solicitation provision and contract clauses.

SUBPART 232.70—ELECTRONIC SUBMISSION AND PROCESSING OF PAYMENT REQUESTS AND RECEIVING REPORTS

- 232.7000 Scope of subpart.
- 232.7001 Definitions.
- 232.7002 Policy.
- 232.7003 Procedures.
- 232.7004 Contract clause.

SUBPART 232.71—LEVIES ON CONTRACT PAYMENTS

- 232.7100 Scope of subpart.
- 232.7101 Policy and procedures.
- 232.7102 Contract clause.

Defense Federal Acquisition Regulation Supplement

Part 232—Contract Financing

SUBPART 232.72—PAYMENT IN LOCAL CURRENCY (AFGHANISTAN)

- 232.7200 Scope of subpart.
- 232.7201 Policy and procedures.
- 232.7202 Solicitation provision.

(Revised April 26, 2007)

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

Part 232—Contract Financing

department/agency Contract Finance Committee members (also see Subpart 201.4 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

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

Defense Federal Acquisition Regulation Supplement

Part 232—Contract Financing

- (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.

Defense Federal Acquisition Regulation Supplement

Part 232—Contract Financing

(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 232.1—NON-COMMERCIAL ITEM PURCHASE FINANCING

(Revised January 24, 2008)

232.102 Description of contract financing methods.

(e)(2) Progress payments based on percentage or stage of completion are authorized only for contracts for construction (as defined in FAR 36.102), shipbuilding, and ship conversion, alteration, or repair. However, percentage or stage of completion methods of measuring contractor performance may be used for performance-based payments in accordance with FAR Subpart 32.10.

232.102-70 Provisional delivery payments.

(a) The contracting officer may establish provisional delivery payments to pay contractors for the costs of supplies and services delivered to and accepted by the Government under the following contract actions, if undefinitized:

- (1) Letter contracts contemplating a fixed-price contract.
- (2) Orders under basic ordering agreements.
- (3) Spares provisioning documents annexed to contracts.
- (4) Unpriced equitable adjustments on fixed-price contracts.
- (5) Orders under indefinite-delivery contracts.

(b) Provisional delivery payments shall be—

- (1) Used sparingly;
- (2) Priced conservatively; and

(3) Reduced by liquidating previous progress payments in accordance with the Progress Payments clause.

(c) Provisional delivery payments shall not—

- (1) Include profit;
- (2) Exceed funds obligated for the undefinitized contract action; or
- (3) Influence the definitized contract price.

SUBPART 232.2—COMMERCIAL ITEM PURCHASE FINANCING

(Revised December 20, 2005)

232.202-4 Security for Government financing.

(a)(2) When determining whether an offeror's financial condition is adequate security, see 232.072-2 and 232.072-3 for guidance. It should be noted that an offeror's financial condition may be sufficient to make the contractor responsible for award purposes, but may not be adequate security for commercial contract financing.

232.206 Solicitation provisions and contract clauses.

(f) *Prompt payment for commercial purchase payments.* The contracting officer shall incorporate the following standard prompt payment terms for commercial item contract financing:

(i) *Commercial advance payments:* The contractor entitlement date specified in the contract, or 30 days after receipt by the designated billing office of a proper request for payment, whichever is later.

(ii) *Commercial interim payments:* The contractor entitlement date specified in the contract, or 14 days after receipt by the designated billing office of a proper request for payment, whichever is later. The prompt payment standards for commercial delivery payments shall be the same as specified in FAR Subpart 32.9 for invoice payments for the item delivered.

(g) *Installment payment financing for commercial items.* Installment payment financing shall not be used for DoD contracts, unless market research has established that this form of contract financing is both appropriate and customary in the commercial marketplace. When installment payment financing is used, the contracting officer shall use the ceiling percentage of contract price that is customary in the particular marketplace (not to exceed the maximum rate established in FAR 52.232-30).

SUBPART 232.3—LOAN GUARANTEES FOR DEFENSE PRODUCTION

232.302 Authority.

(a) The use of guaranteed loans as a contract financing mechanism requires the availability of certain congressional authority. The DoD has not requested such authority in recent years, and none is now available.

SUBPART 232.4—ADVANCE PAYMENTS FOR NON-COMMERCIAL ITEMS
(Revised October 1, 2010)

232.404 Exclusions.

(a)(9) The requirements of FAR Subpart 32.4 do not apply to advertisements in high school and college publications for military recruitment efforts under 10 U.S.C. 503 when the contract cost does not exceed the micro-purchase threshold.

232.409 Contracting officer action.

232.409-1 Recommendation for approval.

Follow the procedures at PGI 232.409-1 for preparation of the documents required by FAR 32.409-1(e) and (f).

232.410 Findings, determination, and authorization.

If an advance payment procedure is used without a special bank account, follow the procedures at PGI 232.410.

232.412 Contract clause.

232.412-70 Additional clauses.

(a) Use the clause at 252.232-7000, Advance Payment Pool, in any contract that will be subject to the terms of an advance payment pool agreement with a nonprofit organization or educational institution. Normally, use the clause in all cost reimbursement type contracts with the organization or institution.

(b) Use the clause at 252.232-7001, Disposition of Payments, in contracts when payments under the contract are to be made by a disbursing office not designated in the advance payment pool agreement.

(c) Use the clause at 252.232-7005, Reimbursement of Subcontractor Advance Payments--DoD Pilot Mentor-Protege Program, when advance payments will be provided by the contractor to a subcontractor pursuant to an approved mentor-protege agreement (See Subpart 219.71).

232.470 Advance payment pool.

(a) An advance payment pool agreement—

(1) Is a means of financing the performance of more than one contract held by a single contractor;

(2) Is especially convenient for the financing of cost-type contracts with nonprofit educational or research institutions for experimental or research and development work when several contracts require financing by advance payments. When appropriate, pooled advance payments may also be used to finance other types of contracts held by a single contractor; and

(3) May be established—

Defense Federal Acquisition Regulation Supplement

Part 232—Contract Financing

- (i) Without regard to the number of appropriations involved;
- (ii) To finance contracts for one or more department(s) or contracting activity(ies); or
- (iii) In addition to any other advance payment pool agreement at a single contractor location when it is more convenient or otherwise preferable to have more than one agreement.

SUBPART 232.5—PROGRESS PAYMENTS BASED ON COSTS

(Revised October 14, 2014)

232.501 General.

232.501-1 Customary progress payment rates.

(a) The customary progress payment rates for DoD contracts, including contracts that contain foreign military sales (FMS) requirements, are 80 percent for large business concerns and 90 percent for small business concerns.

232.501-2 Unusual progress payments.

Follow the procedures at [PGI 232.501-2](#) for approval of unusual progress payments.

232.501-3 Contract price.

(b) The contracting officer may approve progress payments when the contract price exceeds the funds obligated under the contract, provided the contract limits the Government's liability to the lesser of—

(i) The applicable rate (i.e., the lower of the progress payment rate, the liquidation rate, or the loss-ratio adjusted rate); or

(ii) 100 percent of the funds obligated.

232.502 Preaward matters.

232.502-4 Contract clauses.

232.502-4-70 Additional clauses.

(a) Use the clause at [252.232-7002](#), Progress Payments for Foreign Military Sales Acquisitions, in solicitations and contracts that—

(i) Contain FMS requirements; and

(ii) Provide for progress payments.

(b) Use the clause at [252.232-7004](#), DoD Progress Payment Rates, instead of Alternate I of the clause at FAR 52.232-16, if the contractor is a small business concern.

232.503 Postaward matters.

232.503-6 Suspension or reduction of payments.

(b) *Contractor noncompliance.* See also [242.7503](#).

(g) *Loss contracts.* Use the following loss ratio adjustment procedures for making adjustments required by FAR 32.503-6(f) and (g)—

(i) Except as provided in paragraph (g)(ii) of this subsection, the contracting officer must prepare a supplementary analysis of the contractor's request for progress

payments and calculate the loss ratio adjustment using the procedures in FAR 32.503-6(g).

(ii) The contracting officer may request the contractor to prepare the supplementary analysis as an attachment to the progress payment request when the contracting officer determines that the contractor's methods of estimating the “Costs to Complete” are reliable, accurate, and not susceptible to improper influences.

(iii) To maintain an audit trail and permit verification of calculations, do not make the loss ratio adjustments by altering or replacing data on the contractor's original request for progress payment (SF 1443, Contractor's Request for Progress Payment, or computer generated equivalent).

232.503-15 Application of Government title terms.

(d) An administrative contracting officer (ACO) determination that the contractor's material management and accounting system conforms to the system criteria at [252.242-7004](#)(d)(7) constitutes the contracting officer approval requirement of FAR 32.503-15(d). Prior to granting blanket approval of cost transfers between contracts, the ACO should determine that—

(i) The contractor retains records of the transfer activity that took place in the prior month;

(ii) The contractor prepares, at least monthly, a summary of the transfer activity that took place in the prior month; and

(iii) The summary report includes as a minimum, the total number and dollar value of transfers.

SUBPART 232.6—CONTRACT DEBTS

(Revised September 30, 2015)

232.602 Responsibilities.

(b) Disbursing officers are those officials designated to make payments under a contract or to receive payments of amounts due under a contract. The disbursing officer is responsible for determining the amount and collecting contract debts whenever overpayments or erroneous payments have been made. The disbursing officer also has primary responsibility when the amounts due and dates for payment are contained in the contract, and a copy of the contract has been furnished to the disbursing officer with notice to collect as amounts become due.

232.603 Debt determination.

When transferring a case to the contract financing office, follow the procedures at [PGI 232.603](#).

232.604 Demand for payment.

When issuing a demand for payment of a contract debt, follow the procedures at [PGI 232.604](#).

232.610 Compromising debts.

Only the department/agency contract financing offices (see [PGI 232.070\(c\)](#)) are authorized to compromise debts covered by this subpart.

232.611 Contract clause.

(a) The Director of Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics), may exempt the contracts in FAR 32.611(a)(2) through (5) and other contracts, in exceptional circumstances, from the administrative interest charges required by this subpart.

(7) Other exceptions are—

(A) Contracts for instructions of military or ROTC personnel at civilian schools, colleges, and universities;

(B) Basic agreements with telephone companies for communications services and facilities, and purchases under such agreements; and

(C) Transportation contracts with common carriers for common carrier services.

232.670 Transfer of responsibility for debt collection.

Follow the procedures at [PGI 232.670](#) for transferring responsibility for debt collection.

232.671 Bankruptcy reporting.

Follow the procedures at [PGI 232.671](#) for bankruptcy reporting.

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—

Defense Federal Acquisition Regulation Supplement

Part 232—Contract Financing

(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.

SUBPART 232.8—ASSIGNMENT OF CLAIMS

(Revised September 20, 2011)

232.803 Policies.

(b) Only contracts for personal services may prohibit the assignment of claims.

(d) Pursuant to 41 U.S.C. 6305, and in accordance with Presidential delegation dated October 3, 1995, Secretary of Defense delegation dated February 5, 1996, and Under Secretary of Defense (Acquisition, Technology, and Logistics) delegation dated February 23, 1996, the Director of Defense Procurement determined on May 10, 1996, that a need exists for DoD to agree not to reduce or set off any money due or to become due under the contract when the proceeds under the contract have been assigned in accordance with the Assignment of Claims provision of the contract. This determination was published in the Federal Register on June 11, 1996, as required by law. Nevertheless, if departments/agencies decide it is in the Government's interest, or if the contracting officer makes a determination in accordance with FAR 32.803(d) concerning a significantly indebted offeror, they may exclude the no-setoff commitment.

232.805 Procedure.

(b) The assignee shall forward—

(i) To the administrative contracting officer (ACO), a true copy of the instrument of assignment and an original and three copies of the notice of assignment. The ACO shall acknowledge receipt by signing and dating all copies of the notice of assignment and shall—

(A) File the true copy of the instrument of assignment and the original of the notice in the contract file;

(B) Forward two copies of the notice to the disbursing officer of the payment office cited in the contract;

(C) Return a copy of the notice to the assignee; and

(D) Advise the contracting officer of the assignment.

(ii) To the surety or sureties, if any, a true copy of the instrument of assignment and an original and three copies of the notice of assignment. The surety shall return three acknowledged copies of the notice to the assignee, who shall forward two copies to the disbursing officer designated in the contract.

(iii) To the disbursing officer of the payment office cited in the contract, a true copy of the instrument of assignment and an original and one copy of the notice of assignment. The disbursing officer shall acknowledge and return to the assignee the copy of the notice and shall file the true copy of the instrument and original notice.

Defense Federal Acquisition Regulation Supplement

Part 232—Contract Financing

232.806 Contract clause.

(a)(1) Use the clause at [252.232-7008](#), Assignment of Claims (Overseas), instead of the clause at FAR 52.232-23, Assignment of Claims, in solicitations and contracts when contract performance will be in a foreign country.

(2) Use Alternate I with the clause at FAR 52.232-23, Assignment of Claims, unless otherwise authorized under [232.803](#)(d).

SUBPART 232.9—PROMPT PAYMENT

(Revised February 26, 2016)

232.901 Applicability.

(1) Except for FAR 32.908, FAR subpart 32.9, Prompt Payment, does not apply when-

(i) There is-

(A) An emergency, as defined in the Disaster Relief Act of 1974;

(B) A contingency operation (see FAR 2.101(b)); or

(C) The release or threatened release of hazardous substances (as defined in 4 U.S.C. 9606, section 106);

(ii) The head of the contracting activity has made a determination, after consultation with the cognizant comptroller, that conditions exist that limit normal business operations; and

(iii) Payments will be made in the operational area or made contingent upon receiving supporting documentation (i.e., contract, invoice, and receiving report) from the operational area.

(2) Criteria limiting normal business operations during emergencies and contingency operations that restrict the use of FAR 32.9 may include such conditions as—

(i) Support infrastructure, hardware, communications capabilities, and bandwidth are not consistently available such that normal business operations can be carried out;

(ii) Support resources, facilities, and banking needs are not consistently available for use as necessary in carrying out normal business operations;

(iii) Military mission priorities override the availability of appropriately skilled personnel in support of back-office operations;

(iv) Mobility impairments and security concerns restrict free movement of personnel and documents necessary for timely processing;

(v) Foreign vendors are not familiar with or do not understand DoD contract requirements (i.e., proper invoice, receiving documentation, and contracting terms); or

(vi) Documents received in support of payment requests and shipments require language translations that cannot be performed and documented within normal business processing times.

(3) Subsequent Determinations. The head of the contracting activity shall make subsequent determinations, after consultation with the cognizant comptroller, as the operational area evolves into either a more stable or less stable environment.

(i) If the head of the contracting activity determines that the operational area has evolved into a more stable environment, the contracting officer shall notify, by issuance of a contract modification, each contractor performing in the operational area under review. The modification deactivates this clause [252.232-7011](#) and activates the applicable FAR Prompt Payment clause in the contract.

(ii) If after deactivation of this clause, the head of the contracting activity subsequently determines that the operational area has evolved into a less stable environment, the head of the contracting activity will make a determination that conditions exist that limit normal business operations. The contracting officer will then reactivate this clause [252.232-7011](#) by issuance of a contract modification.

232.903 Responsibilities.

DoD policy is to assist small business concerns by paying them as quickly as possible after invoices and all proper documentation, including acceptance, are received and before normal payment due dates established in the contract (see [232.906\(a\)](#)).

See DoD [Class Deviation 2014-O0015-Update to Accelerated Payments to Small Businesses](#), dated April 15, 2014. This deviation is effective until modification of all DoD entitlement and payment systems to accommodate accelerated payments is completed, or until superseded or rescinded.

232.904 Determining payment due dates.

(d) In most cases, Government acceptance or approval can occur within the 7-day constructive acceptance period specified in the FAR Prompt Payment clauses. Government payment of construction progress payments can, in most cases, be made within the 14-day period allowed by the Prompt Payment for Construction Contracts clause. While the contracting officer may specify a longer period because the period specified in the contract is not reasonable or practical, such change should be coordinated with the Government offices responsible for acceptance or approval and for payment. Reasons for specifying a longer period include but are not limited to: the nature of the work or supplies or services, inspection or testing requirements, shipping and acceptance terms, and resources available at the acceptance activity. A constructive acceptance period of less than the cited 7 or 14 days is not authorized.

232.905 Payment documentation and process.

(b)(1)(iii) For task and delivery orders numbered in accordance with FAR 4.1603 and [204.1603](#), the 13-character order number may serve as the contract number on invoices and receiving reports. The contract or agreement number under which the order was placed may be omitted from invoices and receiving reports. The contractor may choose to identify both the contract number and the 13-character order number on invoices and receiving reports. Task and delivery orders numbered with a four-position alpha-numeric call or order serial number shall include both the 13-position basic contract Procurement Instrument Identifier and the four-position order number.

232.906 Making payments.

(a)(i) Generally, the contracting officer shall insert the standard due date of 14 days for interim payments on cost-reimbursement contracts for services in the clause at FAR 52.232-25, Prompt Payment, when using the clause with its Alternate I.

(ii) The restrictions of FAR 32.906 prohibiting early payment do not apply to invoice payments made to small business concerns. However, contractors shall not be entitled to interest penalties if the Government fails to make early payment.

232.908 Contract clauses.

Use the clause at [252.232-7011](#), Payments in Support of Emergencies and Contingency Operations, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, in acquisitions that meet the applicability criteria at [232.901](#)(1). Use of this clause is in addition to use of either the approved Payment clause prescribed in FAR 32.908 or the clause at FAR 52.212-4, Contract Terms and Conditions—Commercial Items.

SUBPART 232.11—ELECTRONIC FUNDS TRANSFER

(Revised June 25, 2013)

232.1110 Solicitation provision and contract clauses.

Use the clause at [252.232-7009](#), Mandatory Payment by Governmentwide Commercial Purchase Card, in solicitations, contracts, and agreements, including solicitations, contracts, and agreements using FAR part 12 procedures for the acquisition of commercial items, when—

(1) Placement of orders or calls valued at or below the micro-purchase threshold is anticipated; and

(2) Payment by Governmentwide commercial purchase card is required for orders or calls valued at or below the micro-purchase threshold under the contract or agreement.

See DoD [Class Deviation 2013-O0011](#)-Notification of Payment in Local Currency (Afghanistan), dated April 24, 2013. This provision shall be inserted in all solicitations for performance in Afghanistan. The class deviation remains in effect until it is incorporated in the DFARS or is otherwise rescinded.

SUBPART 232.10—PERFORMANCE-BASED PAYMENTS

(Revised April 21, 2014)

232.1001 Policy.

(a) As with all contract financing, the purpose of performance-based payments is to assist the contractor in the payment of costs incurred during the performance of the contract. Therefore, performance-based payments should never exceed total cost incurred at any point during the contract. See [PGI 232.1001\(a\)](#) for additional information on use of performance-based payments.

(d) The contracting officer shall use the following standard payment terms for performance-based payments: The contractor entitlement date, if any, specified in the contract, or 14 days after receipt by the designated billing office of a proper request for payment, whichever is later.

232.1003-70 Criteria for use.

The contracting officer will consider the adequacy of an offeror's or contractor's accounting system prior to agreeing to use performance-based payments.

232.1004 Procedures.

(b) Prior to using performance-based payments, the contracting officer shall—

(i) Agree with the offeror on price using customary progress payments before negotiation begins on the use of performance-based payments, except for modifications to contracts that already use performance-based payments;

(ii) Analyze the performance-based payment schedule using the performance-based payments (PBP) analysis tool. The PBP analysis tool is on the DPAP website in the Cost, Pricing & Finance section, Performance Based Payments - Guide Book & Analysis Tool tab, at

http://www.acq.osd.mil/dpap/cpic/cp/Performance_based_payments.html.

(A) When considering performance-based payments, obtain from the offeror/contractor a proposed performance-based payments schedule that includes all performance-based payments events, completion criteria and event values along with the projected expenditure profile in order to negotiate the value of the performance events. If performance-based payments are deemed practical, the Government will evaluate and negotiate the details of the performance-based payments schedule.

(B) For modifications to contracts that already use performance-based payments financing, the basis for negotiation must include performance-based payments. The PBP analysis tool will be used in the same manner to help determine the price for the modification. The only difference is that the baseline assuming customary progress payments will reflect an objective profit rate instead of a negotiated profit rate;

Defense Federal Acquisition Regulation Supplement

Part 232—Contract Financing

(iii) Negotiate the consideration to be received by the Government if the performance-based payments payment schedule will be more favorable to the contractor than customary progress payments;

(iv) Obtain the approval of the business clearance approving official, or one level above the contracting officer, whichever is higher, for the negotiated consideration; and

(v) Document in the contract file that the performance-based payment schedule provides a mutually beneficial settlement position that reflects adequate consideration to the Government for the improved contractor cash flow.

(c) *Instructions for multiple appropriations.* If the contract contains foreign military sales requirements, the contracting officer shall provide instructions for distribution of the contract financing payments to each country's account.

232.1005-70 Contract clauses.

The contracting officer shall include the following clauses with appropriate fill-ins in solicitations and contracts that include performance-based payments:

(a) For performance-based payments made on a whole-contract basis, use the clause at [252.232-7012](#), Performance-Based Payments—Whole-Contract Basis.

(b) For performance-based payments made on a deliverable-item basis, use the clause at [252.232-7013](#), Performance-Based Payments--Deliverable-Item Basis.

**SUBPART 232.70—ELECTRONIC SUBMISSION AND PROCESSING OF
PAYMENT REQUESTS AND RECEIVING REPORTS**

(Revised July 31, 2014)

232.7000 Scope of subpart.

This subpart prescribes policies and procedures for submitting and processing payment requests in electronic form to comply with 10 U.S.C. 2227.

232.7001 Definitions.

“Electronic form” and “payment request,” as used in this subpart, are defined in the clause at [252.232-7003](#), Electronic Submission of Payment Requests.

232.7002 Policy.

(a)(1) Contractors shall submit payment requests and receiving reports in electronic form, except for—

(i) Classified contracts or purchases when electronic submission and processing of payment requests could compromise the safeguarding of classified information or national security;

(ii) Contracts awarded by deployed contracting officers in the course of military operations, including, but not limited to, contingency operations as defined in 10 U.S.C. 101(a)(13) or humanitarian or peacekeeping operations as defined in 10 U.S.C. 2302(8), or contracts awarded by contracting officers in the conduct of emergency operations, such as responses to natural disasters or national or civil emergencies, when access to the Wide Area WorkFlow by those contractors is not feasible;

(iii) Purchases to support unusual or compelling needs of the type described in FAR 6.302-2, when access to Wide Area WorkFlow by those contractors is not feasible;

(iv) Cases in which DoD is unable to receive payment requests or provide acceptance in electronic form;

(v) Cases in which the contracting officer administering the contract for payment has determined, in writing, that electronic submission would be unduly burdensome to the contractor. In those cases, the contracting officer administering the contract shall furnish a copy of the determination to their Senior Procurement Executive; and

(2) When the Governmentwide commercial purchase card is used as the method of payment, only submission of the receiving report in electronic form is required.

(b) DoD officials receiving payment requests in electronic form shall process the payment requests in electronic form. Any supporting documentation necessary for payment, such as receiving reports, contracts, contract modifications, and required certifications, also shall be processed in electronic form. Scanned documents are acceptable for processing supporting documentation other than receiving reports and other forms of acceptance.

(c) When payment requests and receiving reports will not be submitted in electronic

Defense Federal Acquisition Regulation Supplement

Part 232—Contract Financing

form—

(1) Payment requests and receiving reports shall be submitted by facsimile or conventional mail. The contracting officer shall consult with the payment office and the contract administration office regarding the method of payment request to be used; and

(2) Section G of the contract shall specify the method of payment request.

232.7003 Procedures.

(a) The accepted electronic form for submission of payment requests and receiving reports is Wide Area WorkFlow (see website – <https://wawf.eb.mil/>).

(b) For payment of commercial transportation services provided under a Government rate tender or a contract for transportation services, the use of a DoD-approved electronic third party payment system or other exempted vendor payment/invoicing system (e.g., PowerTrack, Transportation Financial Management System, and Cargo and Billing System) is permitted.

(c) For submitting and processing payment requests and receiving reports for rendered health care services, use of TRICARE Encounter Data System as the electronic format is permitted.

232.7004 Contract clauses.

(a) Except as provided in [232.7002\(a\)](#), use the clause at [252.232-7003](#), Electronic Submission of Payment Requests and Receiving Reports, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items.

(b) Use the clause at [252.232-7006](#), Wide Area WorkFlow Payment Instructions, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when [252.232-7003](#) is used and neither [232.7003\(b\)](#) nor (c) apply. See [PGI 232.7004](#) for instructions on completing the clause.

SUBPART 232.71—LEVIES ON CONTRACT PAYMENTS

(Revised June 25, 2013)

232.7100 Scope of subpart.

This subpart prescribes policies and procedures concerning the effect of levies pursuant to 26 U.S.C. 6331(h) on contract payments. The Internal Revenue Service (IRS) is authorized to levy up to 100 percent of all payments made under a DoD contract, up to the amount of the tax debt.

232.7101 Policy and procedures.

(a) The contracting officer shall require the contractor to—

(1) Promptly notify the contracting officer when a levy may result in an inability to perform the contract; and

(2) Advise the contracting officer whether the inability to perform may adversely affect national security.

(b) The contracting officer shall promptly notify the Director, Defense Procurement and Acquisition Policy (DPAP), when the contractor's inability to perform will adversely affect national security or will result in significant additional costs to the Government. Follow the procedures at [PGI 232.7101](#)(b) for reviewing the contractor's rationale and submitting the required notification.

(c) The Director, DPAP, will promptly evaluate the contractor's rationale and will notify the IRS, the contracting officer, and the payment office, as appropriate, in accordance with the procedures at [PGI 232.7101](#)(c).

(d) The contracting officer shall then notify the contractor in accordance with paragraph (c) of the clause at [252.232-7010](#) and in accordance with the procedures at [PGI 232.7101](#)(d).

232.7102 Contract clause.

Use the clause at [252.232-7010](#), Levies on Contract Payments, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items.

SUBPART 232.72—PAYMENT IN LOCAL CURRENCY (AFGHANISTAN)

(Added September 30, 2014)

232.7200 Scope of subpart.

This subpart prescribes policies and procedures concerning the payment of contracts for performance in Afghanistan.

232.7201 Policy and procedures.

Payment currency used for contracts performed in Afghanistan shall be dependent on the nationality of the vendor pursuant to the authority of USCENTCOM Fragmentary Orders (FRAGOs) 09-1567 and 10-143. If the contract is awarded to a host nation vendor (Afghan), the contractor will be paid in Afghani (local currency) via electronic funds transfer to a local (Afghan) banking institution. Contracts shall not be awarded to host nation vendors who do not bank locally. If awarded to other than a host nation vendor, the contract will be awarded in U.S. dollars.

232.7202 Solicitation provision.

Use the provision at [252.232-7014](#), Notification of Payment in Local Currency (Afghanistan), in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, for performance in Afghanistan.

Defense Federal Acquisition Regulation Supplement

Part 233—Protests, Disputes, and Appeals

TABLE OF CONTENTS *(Revised November 18, 2013)*

SUBPART 233.1—PROTESTS

- 233.102 General.
- 233.170 Briefing requirement for protested acquisitions valued at \$1 billion or more.

SUBPART 233.2—DISPUTES AND APPEALS

- 233.204-70 Limitations on payment.
- 233.210 Contracting officer's authority.
- 233.215 Contract clause.
- 233.215-70 Additional contract clause.

SUBPART 233.1—PROTESTS

(Revised November 18, 2013)

233.102 General.

If the Government exercises the authority provided in [239.7305](#)(d) to limit disclosure of information, no action undertaken by the Government under such authority shall be subject to review in a bid protest before the Government Accountability Office or in any Federal court (see subpart [239.73](#)).

233.170 Briefing requirement for protested acquisitions valued at \$1 billion or more.

Follow the procedures at [PGI 233.170](#) for briefing protested acquisitions valued at \$1 billion or more.

SUBPART 233.2—DISPUTES AND APPEALS

(Revised June 15, 2012)

233.204-70 Limitations on payment.

See 10 U.S.C. 2410(b) for limitations on Congressionally directed payment of a claim under 41 U.S.C. chapter 71 (Contract Disputes), a request for equitable adjustment to contract terms, or a request for relief under Pub. L. 85-804.

233.210 Contracting officer's authority.

See [PGI 233.210](#) for guidance on reviewing a contractor's claim.

233.215 Contract clause.

Use Alternate I of the clause at FAR 52.233-1, Disputes, when—

- (1) The acquisition is for—
 - (i) Aircraft
 - (ii) Spacecraft and launch vehicles
 - (iii) Naval vessels
 - (iv) Missile systems
 - (v) Tracked combat vehicles
 - (vi) Related electronic systems;
- (2) The contracting officer determines that continued performance is—
 - (i) Vital to the national security, or
 - (ii) Vital to the public health and welfare; or

(3) The head of the contracting activity determines that continued performance is necessary pending resolution of any claim that might arise under or be related to the contract.

233.215-70 Additional contract clause.

Use the clause at [252.233-7001](#), Choice of Law (Overseas), in solicitations and contracts when contract performance will be outside the United States and its outlying areas, unless otherwise provided for in a government-to-government agreement.

Defense Federal Acquisition Regulation Supplement

Part 234—Major System Acquisition

TABLE OF CONTENTS *(Revised January 29, 2014)*

234.001	Definition.
234.003	Responsibilities.
234.004	Acquisition strategy.
234.005	General requirements.
234.005-1	Competition.

SUBPART 234.2—EARNED VALUE MANAGEMENT SYSTEM

234.201	Policy.
234.203	Solicitation provisions and contract clause.

SUBPART 234.70—ACQUISITION OF MAJOR WEAPON SYSTEMS AS COMMERCIAL ITEMS

234.7000	Scope of subpart.
234.7001	Definition.
234.7002	Policy.

SUBPART 234.71—COST AND SOFTWARE DATA REPORTING

234.7100	Policy.
234.7101	Solicitation provision and contract clause.

(Revised March 25, 2016)

234.001 Definition.

As used in this subpart—

“Acceptable earned value management system” and “earned value management system” are defined in the clause at [252.234-7002](#), Earned Value Management System.

“Production of major defense acquisition program” means the production and deployment of a major system that is intended to achieve an operational capability that satisfies mission needs, or an activity otherwise defined as Milestone C under Department of Defense Instruction 5000.02 or related authorities.

“Significant deficiency” is defined in the clause at [252.234-7002](#), Earned Value Management System, and is synonymous with “noncompliance.”

234.003 Responsibilities.

DoDD 5000.01, The Defense Acquisition System, and DoDI 5000.02, Operation of the Defense Acquisition System, contain the DoD implementation of OMB Circular A-109 and OMB Circular A-11.

234.004 Acquisition strategy.

(1) See [209.570](#) for policy applicable to acquisition strategies that consider the use of lead system integrators.

(2) *Contract type.*

(i) In accordance with section 818 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364), for major defense acquisition programs at Milestone B—

(A) The Milestone Decision Authority shall select, with the advice of the contracting officer, the contract type for a development program at the time of Milestone B approval or, in the case of a space program, Key Decision Point B approval;

(B) The basis for the contract type selection shall be documented in the acquisition strategy. The documentation—

(1) Shall include an explanation of the level of program risk; and

(2) If program risk is determined to be high, shall outline the steps taken to reduce program risk and the reasons for proceeding with Milestone B approval despite the high level of program risk; and

(C) If a cost-reimbursement type contract is selected, the contract file shall include the Milestone Decision Authority’s written determination that—

(1) The program is so complex and technically challenging that it would not be practicable to reduce program risk to a level that would permit the use of a fixed-price type contract; and

Defense Federal Acquisition Regulation Supplement

Part 234—Major System Acquisition

(2) The complexity and technical challenge of the program is not the result of a failure to meet the requirements of 10 U.S.C. 2366a.

(ii) In accordance with section 811 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), for contracts entered into on or after October 1, 2014, the contracting officer shall—

(A) Not use cost-reimbursement line items for the acquisition of production of major defense acquisition programs, unless USD(AT&L) submits to the congressional defense committees—

(1) A written certification that the particular cost-reimbursement line items are needed to provide a required capability in a timely and cost effective manner; and

(2) An explanation of the steps taken to ensure that cost-reimbursement line items are used only when to achieve the purposes of the exception; and

(B) Include a copy of such congressional certification in the contract file.

234.005 General requirements.

234.005-1 Competition.

(1) A contract that is initially awarded from the competitive selection of a proposal resulting from a general solicitation may contain a contract line item or contract option for the provision of advanced component development, prototype, or initial production of technology developed under the contract or the delivery of initial or additional items if the item or a prototype thereof is created as the result of work performed under the contract only when it adheres to the following limitations:

(i) The contract line item or contract option shall be limited to the minimal amount of initial or additional prototype items that will allow for timely competitive solicitation and award of a follow-on development or production contract for those items.

(ii) The term of the contract line item or contract option shall be for not more than 12 months.

(iii) The dollar value of the work to be performed pursuant to the contract line item or contract option shall not exceed the lesser of—

(A) The amount that is three times the dollar value of the work previously performed under the contract; or

(B) \$20 million.

(2) A contract line item or contract option may not be exercised under this authority after September 30, 2019.

Defense Federal Acquisition Regulation Supplement

Part 234—Major System Acquisition

See DoD [Class Deviation 2015-O0014](#) Extension of Contract Authority for Advanced Component Development and Prototype Units, issued on March 27, 2015. The class deviation extends the authority for the provision of advanced component development or prototype of technology developed under a contract for new technology to September 30, 2019. This deviation is effective until incorporated in the DFARS or rescinded.

SUBPART 234.2—EARNED VALUE MANAGEMENT SYSTEM
(Revised December 7, 2011)

234.201 Policy.

(1) DoD applies the earned value management system requirement as follows:

(i) For cost or incentive contracts and subcontracts valued at \$20,000,000 or more, the earned value management system shall comply with the guidelines in the American National Standards Institute/Electronic Industries Alliance Standard 748, Earned Value Management Systems (ANSI/EIA-748).

(ii) For cost or incentive contracts and subcontracts valued at \$50,000,000 or more, the contractor shall have an earned value management system that has been determined by the cognizant Federal agency to be in compliance with the guidelines in ANSI/EIA-748.

(iii) For cost or incentive contracts and subcontracts valued at less than \$20,000,000—

(A) The application of earned value management is optional and is a risk-based decision;

(B) A decision to apply earned value management shall be documented in the contract file; and

(C) Follow the procedures at [PGI 234.201\(1\)\(iii\)](#) for conducting a cost-benefit analysis.

(iv) For firm-fixed-price contracts and subcontracts of any dollar value—

(A) The application of earned value management is discouraged; and

(B) Follow the procedures at [PGI 234.201\(1\)\(iv\)](#) for obtaining a waiver before applying earned value management.

(2) When an offeror proposes a plan for compliance with the earned value management system guidelines in ANSI/EIA-748, follow the review procedures at [PGI 234.201\(2\)](#).

(3) The Defense Contract Management Agency is responsible for determining earned value management system compliance when DoD is the cognizant Federal agency.

(4) See [PGI 234.201\(3\)](#) for additional guidance on earned value management.

(5) The cognizant contracting officer, in consultation with the functional specialist and auditor, shall—

(i) Determine the acceptability of the contractor's earned value management system and approve or disapprove the system; and

Defense Federal Acquisition Regulation Supplement

Part 234—Major System Acquisition

(ii) Pursue correction of any deficiencies.

(6) In evaluating the acceptability of a contractor's earned value management system, the contracting officer, in consultation with the functional specialist and auditor, shall determine whether the contractor's earned value management system complies with the system criteria for an acceptable earned value management system as prescribed in the clause at [252.234-7002](#), Earned Value Management System.

(7) *Disposition of findings*—

(i) *Reporting of findings*. The functional specialist or auditor shall document findings and recommendations in a report to the contracting officer. If the functional specialist or auditor identifies any significant deficiencies in the contractor's earned value management system, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies.

(ii) *Initial determination*. (A) The contracting officer shall review all findings and recommendations and, if there are no significant deficiencies, shall promptly notify the contractor, in writing, that the contractor's earned value management system is acceptable and approved; or

(B) If the contracting officer finds that there are one or more significant deficiencies (as defined in the clause at [252.234-7002](#), Earned Value Management System) due to the contractor's failure to meet one or more of the earned value management system criteria in the clause at [252.234-7002](#), the contracting officer shall—

(1) Promptly make an initial written determination of any significant deficiencies and notify the contractor, in writing, providing a description of each significant deficiency in sufficient detail to allow the contractor to understand the deficiencies;

(2) Request the contractor to respond, in writing, to the initial determination within 30 days; and

(3) Evaluate the contractor's response to the initial determination, in consultation with the auditor or functional specialist, and make a final determination.

(iii) *Final determination*. (A) The contracting officer shall make a final determination and notify the contractor, in writing, that—

(1) The contractor's earned value management system is acceptable and approved, and no significant deficiencies remain, or

(2) Significant deficiencies remain. The notice shall identify any remaining significant deficiencies, and indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(i) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(ii) Disapprove the system in accordance with the clause at [252.234-7002](#), Earned Value Management System, when initial validation is not successfully completed within the timeframe approved by the contracting officer, or the contracting officer determines that the existing earned value management system contains one or more significant deficiencies in high-risk guidelines in ANSI/EIA-748 standards (guidelines 1, 3, 6, 7, 8, 9, 10, 12, 16, 21, 23, 26, 27, 28, 30, or 32). When the contracting officer determines that the existing earned value management system contains one or more significant deficiencies in one or more of the remaining 16 guidelines in ANSI/EIA-748 standards, the contracting officer shall use discretion to disapprove the system based on input received from functional specialists and the auditor; and

(iii) Withhold payments in accordance with the clause at [252.242-7005](#), Contractor Business Systems, if the clause is included in the contract.

(B) Follow the procedures relating to monitoring a contractor's corrective action and the correction of significant deficiencies at [PGI 234.201](#)(7).

(8) *System approval.* The contracting officer shall promptly approve a previously disapproved earned value management system and notify the contractor when the contracting officer determines that there are no remaining significant deficiencies.

(9) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to approve a system, disapprove a system and withhold payments, or approve a previously disapproved system and release withheld payments to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

234.203 Solicitation provisions and contract clause.

For cost or incentive contracts valued at \$20,000,000 or more, and for other contracts for which EVMS will be applied in accordance with [234.201](#)(1)(iii) and (iv)—

(1) Use the provision at [252.234-7001](#), Notice of Earned Value Management System, instead of the provisions at FAR 52.234-2, Notice of Earned Value Management System – Pre-Award IBR, and FAR 52.234-3, Notice of Earned Value Management System – Post-Award IBR, in the solicitation; and

(2) Use the clause at [252.234-7002](#), Earned Value Management System, instead of the clause at FAR 52.234-4, Earned Value Management System, in the solicitation and contract.

**SUBPART 234.70—ACQUISITION OF MAJOR WEAPON SYSTEMS AS
COMMERCIAL ITEMS**
(Revised October 1, 2015)

234.7000 Scope of subpart.

This subpart—

(a) Implements 10 U.S.C. 2379; and

(b) Requires a determination by the Secretary of Defense and a notification to Congress before acquiring a major weapon system as a commercial item.

234.7001 Definition.

“Major weapon system,” as used in this subpart, means a weapon system acquired pursuant to a major defense acquisition program.

234.7002 Policy.

(a) *Major weapon systems.*

(1) A DoD major weapon system may be treated as a commercial item, or acquired under procedures established for the acquisition of commercial items, only if—

(i) The Secretary of Defense determines that—

(A) The major weapon system is a commercial item as defined in FAR 2.101; and

(B) Such treatment is necessary to meet national security objectives;

(ii) The offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for such a system; and

(iii) The congressional defense committees are notified at least 30 days before such treatment or acquisition occurs. Follow the procedures at [PGI 234.7002](#).

(2) The authority of the Secretary of Defense to make a determination under paragraph (a)(1) of this section may not be delegated below the level of the Deputy Secretary of Defense.

(b) *Subsystems.* A subsystem of a major weapon system (other than a commercially available off-the-shelf item) may be treated as a commercial item and acquired under procedures established for the acquisition of commercial items only if—

(1) The subsystem is intended for a major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of commercial items in accordance with paragraph (a) of this section; or

(2) The contracting officer determines in writing that—

(i) The subsystem is a commercial item; and

Defense Federal Acquisition Regulation Supplement

Part 234—Major System Acquisition

(ii) The offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for the subsystem.

(c) *Components and spare parts.*

(1) A component or spare part for a major weapon system (other than a commercially available off-the-shelf item) may be treated as a commercial item only if—

(i) The component or spare part is intended for—

(A) A major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of commercial items in accordance with paragraph (a) of this section; or

(B) A subsystem of a major weapon system that is being acquired, or has been acquired, under procedures established for the acquisition of commercial items in accordance with paragraph (b) of this section; or

(ii) The contracting officer determines in writing that—

(A) The component or spare part is a commercial item; and

(B) The offeror has submitted sufficient information to evaluate, through price analysis, the reasonableness of the price for the component or spare part.

(2) This paragraph (c) shall apply only to components and spare parts that are acquired by DoD through a prime contract or a modification to a prime contract, or through a subcontract under a prime contract or modification to a prime contract on which the prime contractor adds no, or negligible, value.

(d) *Relevant information.* To the extent necessary to make a determination under paragraph (a)(1)(ii), (b)(2), or (c)(1)(ii) of this section, the contracting officer may request the offeror to submit—

(1) Prices paid for the same or similar commercial items under comparable terms and conditions by both Government and commercial customers; and

(2) Other relevant information regarding the basis for price or cost, including information on labor costs, material costs, and overhead rates, if the contracting officer determines that the information described in paragraph (d)(1) of this section is not sufficient to determine price reasonableness.

SUBPART 234.71—COST AND SOFTWARE DATA REPORTING
(Revised November 5, 2014)

234.7100 Policy.

(a) The cost and software data reporting (CSDR) requirement is mandatory for major defense acquisition programs (as defined in 10 U.S.C. 2430), and major automated information system programs (as defined in 10 U.S.C. 2445a) as specified in DoDI 5000.02, Operation of the Defense Acquisition System and the DoD 5000.04–M–1, CSDR Manual. The CSDR system is applied in accordance with the reporting requirements established in DoDI 5000.02. The two principal components of the CSDR system are contractor cost data reporting and software resources data reporting.

(b) Prior to contract award, contracting officers shall consult with the Defense Cost and Resource Center to determine that the offeror selected for award has proposed a standard CSDR system, as described in the offeror's proposal, in response to the provision at [252.234-7003](#), that is in compliance with DoDI 5000.02, Operation of the Defense Acquisition System, and the DoD 5000.04–M–1, CSDR Manual.

(c) Contact information for the Defense Cost and Resource Center and the Deputy Director, Cost Assessment, is located at [PGI 234.7100](#).

234.7101 Solicitation provision and contract clause.

(a) Use the basic or the alternate of the provision at [252.234-7003](#), Notice of Cost and Software Data Reporting System, in any solicitation that includes the basic or the alternate of the clause at [252.234-7004](#), Cost and Software Data Reporting.

(1) Use the basic provision when the solicitation includes the clause at [252.234-7004](#), Cost and Software Data Reporting—Basic.

(2) Use the alternate I provision when the solicitation includes the clause at [252.234-7004](#), Cost and Software Data Reporting—Alternate I.

(b) Use the basic or the alternate of the clause at [252.234-7004](#), Cost and Software Data Reporting System, in solicitations that include major defense acquisition programs or major automated information system programs as follows:

(1) Use the basic clause in solicitations and contracts for major defense acquisition programs or major automated information system programs that exceed \$50 million.

(2) Use the alternate I clause in solicitations and contracts for major defense acquisition programs or major automated information system programs with a value equal to or greater than \$20 million, but less than or equal to \$50 million, when so directed by the program manager with the approval of the OSD Deputy Director, Cost Assessment.

Defense Federal Acquisition Regulation Supplement

Part 235—Research and Development Contracting

TABLE OF CONTENTS (Revised October 14, 2014)

235.001	Definitions.
235.006	Contracting methods and contract type.
235.006-70	Manufacturing Technology Program.
235.006-71	Competition.
235.008	Evaluation for award.
235.010	Scientific and technical reports.
235.015-70	Special use allowances for research facilities acquired by educational institutions.
235.017	Federally Funded Research and Development Centers.
235.017-1	Sponsoring agreements.
235.070	Indemnification against unusually hazardous risks.
235.070-1	Indemnification under research and development contracts.
235.070-2	Indemnification under contracts involving both research and development and other work.
235.070-3	Contract clauses.
235.071	Export-controlled items.
235.072	Additional contract clauses.

(Revised December 11, 2014)

235.001 Definitions.

“Research and development” means those efforts described by the Research, Development, Test, and Evaluation (RDT&E) budget activity definitions found in the DoD Financial Management Regulation (DoD 7000.14-R), Volume 2B, Chapter 5.

235.006 Contracting methods and contract type.

(b)(i) For major defense acquisition programs as defined in 10 U.S.C. 2430—

(A) Follow the procedures at [234.004](#); and

(B) Notify the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) of an intent not to exercise a fixed-price production option on a development contract for a major weapon system reasonably in advance of the expiration of the option exercise period.

(ii) For other than major defense acquisition programs—

(A) Do not award a fixed-price type contract for a development program effort unless—

(1) The level of program risk permits realistic pricing;

(2) The use of a fixed-price type contract permits an equitable and sensible allocation of program risk between the Government and the contractor; and

(3) A written determination that the criteria of paragraphs (b)(ii)(A)(1) and (2) of this section have been met is executed—

(i) By the USD(AT&L) if the contract is over \$25 million and is for: research and development for a non-major system; the development of a major system (as defined in FAR 2.101); or the development of a subsystem of a major system; or

(ii) By the contracting officer for any development not covered by paragraph (b)(ii)(A)(3)(i) of this section.

(B) Obtain USD(AT&L) approval of the Government’s prenegotiation position before negotiations begin, and obtain USD(AT&L) approval of the negotiated agreement with the contractor before the agreement is executed, for any action that is—

(1) An increase of more than \$250 million in the price or ceiling price of a fixed-price type development contract, or a fixed-price type contract for the lead ship of a class;

(2) A reduction in the amount of work under a fixed-price type development contract or a fixed-price type contract for the lead ship of a class, when the value of the work deleted is \$100 million or more; or

(3) A repricing of fixed-price type production options to a development contract, or a contract for the lead ship of a class, that increases the price or ceiling price by more than \$250 million for equivalent quantities.

235.006-70 Manufacturing Technology Program.

In accordance with 10 U.S.C. 2521(d), for acquisitions under the Manufacturing Technology Program—

(a) Award all contracts using competitive procedures; and

(b) Include in all solicitations an evaluation factor that addresses the extent to which offerors propose to share in the cost of the project (see FAR 15.304).

235.006-71 Competition.

See [234.005-1](#) for limitations on the use of contract line items or contract options for the provision of advanced component development or prototypes of technology developed under a competitively awarded proposal.

235.008 Evaluation for award.

See [209.570](#) for limitations on the award of contracts to contractors acting as lead system integrators.

235.010 Scientific and technical reports.

(b) For DoD, the Defense Technical Information Center is responsible for collecting all scientific and technical reports. For access to these reports, follow the procedures at [PGI 235.010\(b\)](#).

235.015-70 Special use allowances for research facilities acquired by educational institutions.

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

(1) “Research facility” means—

(i) Real property, other than land; and

(ii) Includes structures, alterations, and improvements, acquired for the purpose of conducting scientific research under contracts with departments and agencies of the DoD.

(2) “Special use allowance” means a negotiated direct or indirect allowance—

(i) For construction or acquisition of buildings, structures, and real property, other than land; and

(ii) Where the allowance is computed at an annual rate exceeding the rate which normally would be allowed under FAR Subpart 31.3.

(b) *Policy.*

Defense Federal Acquisition Regulation Supplement

Part 235—Research and Development Contracting

(1) Educational institutions are to furnish the facilities necessary to perform defense contracts. FAR 31.3 governs how much the Government will reimburse the institution for the research programs. However, in extraordinary situations, the Government may give special use allowances to an educational institution when the institution is unable to provide the capital for new laboratories or expanded facilities needed for defense contracts.

(2) Decisions to provide a special use allowance must be made on a case-by-case basis, using the criteria in paragraph (c) of this subsection.

(c) *Authorization for special use allowance.* The head of a contracting activity may approve special use allowances only when all of the following conditions are met—

- (1) The research facility is essential to the performance of DoD contracts;
- (2) Existing facilities, either Government or nongovernment, cannot meet program requirements practically or effectively;
- (3) The proposed agreement for special use allowances is a sound business arrangement;
- (4) The Government's furnishing of Government-owned facilities is undesirable or impractical; and
- (5) The proposed use of the research facility is to conduct essential Government research which requires the new or expanded facilities.

(d) *Application of the special use allowance.*

- (1) In negotiating a special use allowance—
 - (i) Compare the needs of DoD and of the institution for the research facility to determine the amount of the special use allowance;
 - (ii) Consider rental costs for similar space in the area where the research facility is or will be located to establish the annual special use allowance;
 - (iii) Do not include or allow—
 - (A) The costs of land; or
 - (B) Interest charges on capital;
 - (iv) Do not include maintenance, utilities, or other operational costs;
 - (v) The period of allowance generally will be—
 - (A) At least ten years; or
 - (B) A shorter period if the total amount to be allowed is less than the construction or acquisition cost for the research facility;

Defense Federal Acquisition Regulation Supplement

Part 235—Research and Development Contracting

(vi) Generally, provide for allocation of the special use allowance equitably among the Government contracts using the research facility;

(vii) Special use allowances apply only in the years in which the Government has contracts in effect with the institution. However, if in any given year there is a reduced level of Government research effort which results in the special use allowance being excessive compared to the Government research funding, a separate special use allowance may be negotiated for that year;

(viii) Special use allowances may be adjusted for the period before construction is complete if the facility is partially occupied and used for Government research during that period.

(2) A special use allowance may be based on either total or partial cost of construction or acquisition of the research facility.

(i) When based on total cost neither the normal use allowance nor depreciation will apply—

(A) During the special use allowance period; and

(B) After the educational institution has recovered the total construction or acquisition cost from the Government or other users.

(ii) When based on partial cost, normal use allowance and depreciation—

(A) Apply to the balance of costs during the special use allowance period to the extent negotiated in the special use allowance agreement; and

(B) Do not apply after the special use allowance period, except for normal use allowance applied to the balance.

(3) During the special use allowance period, the research facility—

(i) Shall be available for Government research use on a priority basis over nongovernment use; and

(ii) Cannot be put to any significant use other than that which justified the special use allowance, unless the head of the contracting activity, who approved the special use allowance, consents.

(4) The Government will pay only an allocable share of the special use allowance when the institution makes any substantial use of the research facility for parties other than the Government during the period when the special use allowance is in effect.

(5) In no event shall the institution be paid more than the acquisition costs.

235.017 Federally Funded Research and Development Centers.

(a) *Policy.*

(2) No DoD fiscal year 1992 or later funds may be obligated or expended to finance activities of a DoD Federally Funded Research and Development Center (FFRDC) if a member of its board of directors or trustees simultaneously serves on the board of directors or trustees of a profit-making company under contract to DoD, unless the FFRDC has a DoD-approved conflict of interest policy for its members (Section 8107 of Pub. L. 102-172 and similar sections in subsequent Defense appropriations acts).

235.017-1 Sponsoring agreements.

(c)(4) DoD-sponsored FFRDCs that function primarily as research laboratories (C3I Laboratory operated by the Institute for Defense Analysis, Lincoln Laboratory operated by Massachusetts Institute of Technology, and Software Engineering Institute operated by Carnegie Mellon) may respond to solicitations and announcements for programs which promote research, development, demonstration, or transfer of technology (Section 217, Pub. L. 103-337).

235.070 Indemnification against unusually hazardous risks.

235.070-1 Indemnification under research and development contracts.

(a) Under 10 U.S.C. 2354, and if authorized by the Secretary concerned, contracts for research and/or development may provide for indemnification of the contractor or subcontractors for—

(1) Claims by third persons (including employees) for death, bodily injury, or loss of or damage to property; and

(2) Loss of or damage to the contractor's property to the extent that the liability, loss, or damage—

(i) Results from a risk that the contract defines as “unusually hazardous;”

(ii) Arises from the direct performance of the contract; and

(iii) Is not compensated by insurance or other means.

(b) Clearly define the specific unusually hazardous risks to be indemnified. Submit this definition for approval with the request for authorization to grant indemnification. Include the approved definition in the contract.

235.070-2 Indemnification under contracts involving both research and development and other work.

These contracts may provide for indemnification under the authority of both 10 U.S.C. 2354 and Pub. L. 85-804. Pub. L. 85-804 will apply only to work to which 10 U.S.C. 2354 does not apply. Actions under Pub. L. 85-804 must also comply with FAR 50.104-3.

235.070-3 Contract clauses.

When the contractor is to be indemnified in accordance with [235.070-1](#), use either—

(a) The clause at [252.235-7000](#), Indemnification Under 10 U.S.C. 2354--Fixed Price; or

(b) The clause at [252.235-7001](#), Indemnification Under 10 U.S.C. 2354--Cost-Reimbursement, as appropriate.

235.071 Export-controlled items.

For requirements regarding access to export-controlled items, see [225.7901](#).

235.072 Additional contract clauses.

(a) Use a clause substantially the same as the clause at [252.235-7002](#), Animal Welfare, in solicitations and contracts involving research, development, test, and evaluation or training that use live vertebrate animals.

(b) Use the basic or the alternate of the clause at [252.235-7003](#), Frequency Authorization, in solicitations and contracts for developing, producing, constructing, testing, or operating a device requiring a frequency authorization.

(1) Use the basic clause if agency procedures do not authorize the use of DD Form 1494, Application for Equipment Frequency Allocation, to obtain radio frequency authorization.

(2) Use the alternate I clause if agency procedures authorize the use of DD Form 1494, Application for Equipment Frequency Allocation, to obtain frequency authorization.

(c) Use the clause at [252.235-7010](#), Acknowledgment of Support and Disclaimer, in solicitations and contracts for research and development.

(d) Use the clause at [252.235-7011](#), Final Scientific or Technical Report, in solicitations and contracts for research and development.

(e) Use the clause at [252.235-7004](#), Protection of Human Subjects, in solicitations and contracts that include or may include research involving human subjects in accordance with 32 CFR Part 219, DoD Directive 3216.02, and 10 U.S.C. 980, including research that meets exemption criteria under 32 CFR 219.101(b). The clause—

(1) Applies to solicitations and contracts awarded by any DoD component, regardless of mission or funding Program Element Code; and

(2) Does not apply to use of cadaver materials alone, which are not directly regulated by 32 CFR Part 219 or DoD Directive 3216.02, and which are governed by other DoD policies and applicable State and local laws.

Defense Federal Acquisition Regulation Supplement

Part 235—Research and Development Contracting

SUBPART 235.70
(Removed November 22, 2004)

TABLE OF CONTENTS
(Revised September 23, 2016)

SUBPART 236.1—GENERAL

236.102 Definitions.

SUBPART 236.2—SPECIAL ASPECTS OF CONTRACTING FOR CONSTRUCTION

236.203 Government estimate of construction costs.
236.204 Disclosure of the magnitude of construction projects.
236.206 Liquidated damages.
236.213 Special procedures for sealed bidding in construction contracting.
236.215 Special procedures for cost-reimbursement contracts for construction.
236.270 Expediting construction contracts.
236.271 Cost-plus-fixed-fee contracts.
236.272 Prequalification of sources.
236.273 Construction in foreign countries.
236.274 Restriction on acquisition of steel for use in military construction projects.
236.275 Construction of industrial resources.

SUBPART 236.5—CONTRACT CLAUSES

236.570 Additional provisions and clauses.

SUBPART 236.6—ARCHITECT-ENGINEER SERVICES

236.601 Policy.
236.602 Selection of firms for architect-engineer contracts.
236.602-1 Selection criteria.
236.602-70 Restriction on award of overseas architect-engineer contracts to foreign firms.
236.604 Performance evaluation.
236.606 Negotiations.
236.606-70 Statutory fee limitation.
236.609 Contract clauses.
236.609-70 Additional provision and clause.

SUBPART 236.7—STANDARD AND OPTIONAL FORMS FOR CONTRACTING FOR CONSTRUCTION, ARCHITECT-ENGINEER SERVICES, AND DISMANTLING, DEMOLITION, OR REMOVAL OF IMPROVEMENTS

236.701 Standard and optional forms for use in contracting for construction or dismantling, demolition, or removal of improvements.

Defense Federal Acquisition Regulation Supplement

Part 236—Construction and Architect-Engineer Contracts

SUBPART 236.1—GENERAL

(Revised September 20, 2011)

236.102 Definitions.

“Construction activity” means an activity at any organizational level of the DoD that—

(1) Is responsible for the architectural, engineering, and other related technical aspects of the planning, design, and construction of facilities; and

(2) Receives its technical guidance from the Army Office of the Chief of Engineers, Naval Facilities Engineering Command, or Air Force Directorate of Civil Engineering.

“Marshallese firm” is defined in the provision at [252.236-7012](#), Military Construction on Kwajalein Atoll--Evaluation Preference.

“United States firm” is defined in the provisions at [252.236-7010](#), Overseas Military Construction--Preference for United States Firms, and [252.236-7011](#), Overseas Architect-Engineer Services--Restriction to United States Firms.

**SUBPART 236.2—SPECIAL ASPECTS OF CONTRACTING FOR
CONSTRUCTION**

(Revised September 23, 2016)

236.203 Government estimate of construction costs.

Follow the procedures at [PGI 236.203](#) for handling the Government estimate of construction costs.

236.204 Disclosure of the magnitude of construction projects.

Additional price ranges are—

- (i) Between \$10,000,000 and \$25,000,000;
- (ii) Between \$25,000,000 and \$100,000,000;
- (iii) Between \$100,000,000 and \$250,000,000;
- (iv) Between \$250,000,000 and \$500,000,000; and
- (v) Over \$500,000,000.

236.206 Liquidated damages.

See [211.503](#) for instructions on use of liquidated damages.

236.213 Special procedures for sealed bidding in construction contracting.

If it appears that sufficient funds may not be available for all the desired construction features, consider using a bid schedule with additive or deductive items in accordance with [PGI 236.213](#).

236.215 Special procedures for cost-reimbursement contracts for construction.

For contracts in connection with a military construction project or military family housing project, see the prohibition at [216.301-3](#).

236.270 Expediting construction contracts.

(a) 10 U.S.C. 2858 requires agency head approval to expedite the completion date of a contract funded by a Military Construction Appropriations Act, if additional costs are involved. This approval authority may not be redelegated. The approval authority must—

- (1) Certify that the additional expenditures are necessary to protect the National interest; and
 - (2) Establish a reasonable completion date for the project.
- (b) The contracting officer may approve an expedited completion date if no additional costs are involved.

236.271 Cost-plus-fixed-fee contracts.

Annual military construction appropriations acts restrict the use of cost-plus-fixed-fee contracts (see [216.306\(c\)](#)). See also [216.301-3](#) regarding the prohibition against the use of certain cost-reimbursement contracts in connection with a military construction project or military family housing project.

236.272 Prequalification of sources.

(a) Prequalification procedures may be used when necessary to ensure timely and efficient performance of critical construction projects. Prequalification—

(1) Results in a list of sources determined to be qualified to perform a specific construction contract; and

(2) Limits offerors to those with proven competence to perform in the required manner.

(b) The head of the contracting activity must—

(1) Authorize the use of prequalification by determining, in writing, that a construction project is of an urgency or complexity that requires prequalification; and

(2) Approve the prequalification procedures.

(c) For small businesses, the prequalification procedures must require the qualifying authority to—

(1) Request a preliminary recommendation from the appropriate Small Business Administration regional office, if the qualifying authority believes a small business is not responsible;

(2) Permit the small business to submit a bid or proposal if the preliminary recommendation is that the small business is responsible; and

(3) Follow the procedures in FAR 19.6, if the small business is in line for award and is found nonresponsible.

236.273 Construction in foreign countries.

(a) In accordance with section 112 of the Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2015 (Division I of Pub. L. 113-235) and the same provision in subsequent military construction appropriations acts, military construction contracts funded with military construction appropriations, that are estimated to exceed \$1,000,000 and are to be performed in the United States outlying areas in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf (i.e., Iran, Oman, United Arab Emirates, Saudi Arabia, Qatar, Bahrain, Kuwait, and Iraq), shall be awarded only to United States firms, unless—

(1) The lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent; or

Defense Federal Acquisition Regulation Supplement

Part 236—Construction and Architect-Engineer Contracts

(2) The contract is for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm.

(b) See [PGI 236.273](#)(b) for guidance on technical working agreements with foreign governments.

236.274 Restriction on acquisition of steel for use in military construction projects.

In accordance with section 108 of the Military Construction and Veterans Affairs Appropriations Act, 2009 (Pub. L. 110-329, Division E) and the same provision in subsequent military construction appropriations acts, do not acquire, or allow a contractor to acquire, steel for any construction project or activity for which American steel producers, fabricators, or manufacturers have been denied the opportunity to compete for such acquisition of steel.

236.275 Construction of industrial resources.

See Subpart [237.75](#) for policy relating to facilities projects.

Defense Federal Acquisition Regulation Supplement

Part 236—Construction and Architect-Engineer Contracts

SUBPART 236.3
(Removed June 27, 2000)

Defense Federal Acquisition Regulation Supplement

Part 236—Construction and Architect-Engineer Contracts

SUBPART 236.4

(Removed August 17, 2000)

SUBPART 236.5—CONTRACT CLAUSES

(Revised March 26, 2015)

236.570 Additional provisions and clauses.

(a) Use the following clauses in all fixed-price construction solicitations and contracts—

(1) [252.236-7000](#), Modification Proposals--Price Breakdown; and

(2) [252.236-7001](#), Contract Drawings and Specifications.

(b) Use the following provisions and clauses in fixed-price construction contracts and solicitations as applicable—

(1) [252.236-7002](#), Obstruction of Navigable Waterways, when the contract will involve work near or on navigable waterways.

(2) When the head of the contracting activity has approved use of a separate bid item for mobilization and preparatory work, use either—

(i) [252.236-7003](#), Payment for Mobilization and Preparatory Work. Use this clause for major construction contracts that require—

(A) Major or special items of plant and equipment; or

(B) Large stockpiles of material which are in excess of the type, kind, and quantity which would be normal for a contractor qualified to undertake the work; or

(ii) [252.236-7004](#), Payment for Mobilization and Demobilization. Use this clause for contracts involving major mobilization expense, or plant equipment and material (other than the situations covered in paragraph (b)(2)(i) of this section) made necessary by the location or nature of the work.

(A) Generally, allocate 60 percent of the lump sum price in paragraph (a) of the clause to the cost of mobilization.

(B) Vary this percentage to reflect the circumstances of the particular contract, but in no event should mobilization exceed 80 percent of the payment item.

(3) [252.236-7005](#), Airfield Safety Precautions, when construction will be performed on or near airfields.

(4) [252.236-7006](#), Cost Limitation, if the solicitation's bid schedule contains one or more items subject to statutory cost limitations, and if a waiver has not been granted (FAR 36.205).

(5) [252.236-7007](#), Additive or Deductive Items, if the procedures in 236.213 are being used.

Defense Federal Acquisition Regulation Supplement

Part 236—Construction and Architect-Engineer Contracts

(6) [252.236-7008](#), Contract Prices--Bidding Schedule, if the contract will contain only unit prices for some items.

(c) Use the following provisions in solicitations for military construction contracts that are funded with military construction appropriations and are estimated to exceed \$1,000,000:

(1) [252.236-7010](#), Overseas Military Construction--Preference for United States Firms, when contract performance will be in a United States outlying area in the Pacific or in a country bordering the Arabian Gulf.

(2) [252.236-7012](#), Military Construction on Kwajalein Atoll--Evaluation Preference, when contract performance will be on Kwajalein Atoll.

(d) Use the clause at [252.236-7013](#), Requirement for Competition Opportunity for American Steel Producers, Fabricators, and Manufacturers, in solicitations and contracts that—

(1) Use funds appropriated for military construction; and

(2) May require the acquisition of steel as a construction material.

(e) Also see [246.710](#)(4) for an additional clause applicable to construction contracts to be performed in Germany.

SUBPART 236.6—ARCHITECT-ENGINEER SERVICES

(Revised October 1, 2015)

236.601 Policy.

(1) Written notification to the congressional defense committees is required if the total estimated contract price for architect-engineer services or construction design, in connection with military construction, military family housing, or restoration or replacement of damaged or destroyed facilities, exceeds \$1.5 million. In accordance with 10 U.S.C. 480, unclassified notifications must be provided by electronic medium.

(i) For military construction or military family housing (10 U.S.C. 2807(b)), the notification—

(A) Must include the scope of the project and the estimated contract price; and

(B)(1) If provided by electronic medium, must be provided at least 14 days before the initial obligation of funds; or

(2) If provided by other than electronic medium, must be received by the congressional defense committees at least 21 days before the initial obligation of funds.

(ii) For restoration or replacement of damaged or destroyed facilities (10 U.S.C. 2854(b)), the notification—

(A) Must include the justification for the project, the estimated contract price, and the source of the funds for the project; and

(B)(1) If provided by electronic medium, must be provided at least 7 days before the initial obligation of funds; or

(2) If provided by other than electronic medium, must be received by the congressional defense committees at least 21 days before the initial obligation of funds.

(2) During the applicable notice period, synopsis of the proposed contract action and administrative actions leading to the award may be started.

236.602 Selection of firms for architect-engineer contracts.

236.602-1 Selection criteria.

(a) Establish the evaluation criteria before making the public announcement required by FAR 5.205(d) and include the criteria and their relative order of importance in the announcement. Follow the procedures at [PGI 236.602-1\(a\)](#).

236.602-70 Restriction on award of overseas architect-engineer contracts to foreign firms.

In accordance with section 111 of the Military Construction and Veterans Affairs and Related Agencies Appropriations Act, 2015 (Division I of Pub. L. 113-235) and the same provision in subsequent military construction appropriations acts, architect-engineer contracts funded by military construction appropriations that are estimated to exceed \$500,000 and are to be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf (i.e., Iran, Oman, United Arab Emirates, Saudi Arabia, Qatar, Bahrain, Kuwait, and Iraq), shall be awarded only to United States firms or to joint ventures of United States and host nation firms.

236.604 Performance evaluation.

Prepare a separate performance evaluation after actual construction of the project. Ordinarily, the evaluating official should be the person most familiar with the architect-engineer contractor's performance.

236.606 Negotiations.

236.606-70 Statutory fee limitation.

(a) 10 U.S.C. 4540, 7212, and 9540 limit the contract price (or fee) for architect-engineer services for the preparation of designs, plans, drawings, and specifications to six percent of the project's estimated construction cost.

(b) The six percent limit also applies to contract modifications, including modifications involving—

(1) Work not initially included in the contract. Apply the six percent limit to the revised total estimated construction cost.

(2) *Redesign*. Apply the six percent limit as follows—

(i) Add the estimated construction cost of the redesign features to the original estimated construction cost;

(ii) Add the contract cost for the original design to the contract cost for redesign; and

(iii) Divide the total contract design cost by the total estimated construction cost. The resulting percentage may not exceed the six percent statutory limitation.

(c) The six percent limit applies only to that portion of the contract (or modification) price attributable to the preparation of designs, plans, drawings, and specifications. If a contract or modification also includes other services, the part of the price attributable to the other services is not subject to the six percent limit.

236.609 Contract clauses.

236.609-70 Additional provision and clause.

(a)(1) Use the clause at [252.236-7009](#), Option for Supervision and Inspection Services, in solicitations and contracts for architect-engineer services when—

(i) The contract will be fixed price; and

(ii) Supervision and inspection services by the architect-engineer contractor may be required during construction.

(2) Include the scope of such services in Appendix A of the contract.

(b) Use the provision at [252.236-7011](#), Overseas Architect-Engineer Services--Restriction to United States Firms, in solicitations for architect-engineer contracts that are—

(1) Funded with military construction appropriations;

(2) Estimated to exceed \$500,000; and

(3) To be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf.

**SUBPART 236.7—STANDARD AND OPTIONAL FORMS FOR CONTRACTING
FOR CONSTRUCTION, ARCHITECT-ENGINEER SERVICES, AND
DISMANTLING, DEMOLITION, OR REMOVAL OF IMPROVEMENTS**
(Revised October 25, 2000)

236.701 Standard and optional forms for use in contracting for construction or dismantling, demolition, or removal of improvements.

- (c) Do not use Optional Form 347, Order for Supplies or Services (see 213.307).

TABLE OF CONTENTS
(Revised June 7, 2016)

SUBPART 237.1—SERVICE CONTRACTS—GENERAL

237.101	Definitions.
237.102	Policy.
237.102-70	Prohibition on contracting for firefighting or security-guard functions.
237.102-71	Limitation on service contracts for military flight simulators.
237.102-72	Contracts for management services.
237.102-73	Prohibition on contracts for services of senior mentors.
237.102-74	Taxonomy for the acquisition of services, and supplies and equipment.
237.102-75	Defense Acquisition Guidebook.
237.102-76	Review criteria for the acquisition of services.
237.102-77	Acquisition requirements roadmap tool.
237.102-78	Market research report guide for improving the tradecraft in services acquisition.
237.102-79	Private sector notification requirements in support of in-sourcing actions.
237.104	Personal services contracts.
237.106	Funding and term of service contracts.
237.109	Services of quasi-military armed forces.
237.170	Approval of contracts and task orders for services.
237.170-1	Scope.
237.170-2	Approval requirements.
237.171	Training for contractor personnel interacting with detainees.
237.171-1	Scope.
237.171-2	Definition.
237.171-3	Policy.
237.171-4	Contract clause.
237.172	Service contracts surveillance.
237.173	Prohibition on interrogation of detainees by contractor personnel.
237.173-1	Scope.
237.173-2	Definitions.
237.173-3	Policy.
237.173-4	Waiver.
237.173-5	Contract clause.
237.174	Disclosure of information to litigation support contractors.
237.175	Training that uses live vertebrate animals.

SUBPART 237.2—ADVISORY AND ASSISTANCE SERVICES

237.270	Acquisition of audit services.
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SUBPART 237.5—MANAGEMENT OVERSIGHT OF SERVICE CONTRACTS

237.503	Agency-head responsibilities.
---------	-------------------------------

SUBPART 237.70—MORTUARY SERVICES

237.7000	Scope.
237.7001	Method of acquisition.
237.7002	Area of performance and distribution of contracts.
237.7003	Solicitation provisions and contract clauses.

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

SUBPART 237.71—LAUNDRY AND DRY CLEANING SERVICES

- 237.7100 Scope.
- 237.7101 Solicitation provisions and contract clauses.

SUBPART 237.72—EDUCATIONAL SERVICE AGREEMENTS

- 237.7200 Scope.
- 237.7201 Educational service agreement.
- 237.7202 Limitations.
- 237.7203 Duration.
- 237.7204 Format and clauses for educational service agreements.

SUBPART 237.73—SERVICES OF STUDENTS AT RESEARCH AND DEVELOPMENT LABORATORIES

- 237.7300 Scope.
- 237.7301 Definitions.
- 237.7302 General.
- 237.7303 Contract clauses.

SUBPART 237.74—SERVICES AT INSTALLATIONS BEING CLOSED

- 237.7400 Scope.
- 237.7401 Policy.
- 237.7402 Contract clause.

SUBPART 237.75—ACQUISITION AND MANAGEMENT OF INDUSTRIAL RESOURCES

- 237.7501 Definition.
- 237.7502 Policy.

SUBPART 237.76—CONTINUATION OF ESSENTIAL CONTRACTOR SERVICES

- 237.7600 Scope.
- 237.7601 Definition.
- 237.7602 Policy.
- 237.7603 Contract clauses.

SUBPART 237.1—SERVICE CONTRACTS—GENERAL
(Revised June 7, 2016)

237.101 Definitions.

As used in this subpart—

“Increased performance of security-guard functions,”

(1) In the case of an installation or facility where no security-guard functions were performed as of September 10, 2001, the entire scope or extent of the performance of security-guard functions at the installation or facility after such date; and

(2) In the case of an installation or facility where security-guard functions were performed within a lesser scope of requirements or to a lesser extent as of September 10, 2001, than after such date, the increment of the performance of security-guard functions at the installation or facility that exceeds such lesser scope of requirements or extent of performance.

“Senior mentors” means retired flag, general, or other military officers or retired senior civilian officials who provide expert experience-based mentoring, teaching, training, advice, and recommendations to senior military officers, staff, and students as they participate in war games, warfighting courses, operational planning, operational exercises, and decision-making exercises.

237.102 Policy.

(b) See [PGI 207.302](#) for information on the Governmentwide moratorium and restrictions on public-private competitions conducted pursuant to Office of Management and Budget (OMB) Circular A-76.

(c) In addition to the prohibition on award of contracts for the performance of inherently governmental functions, contracting officers shall not award contracts for functions that are exempt from private sector performance. See [207.503\(e\)](#) for the associated documentation requirement.

(e) Program officials shall obtain assistance from contracting officials through the Peer Review process at [201.170](#).

237.102-70 Prohibition on contracting for firefighting or security-guard functions.

(a) Under 10 U.S.C. 2465, the DoD is prohibited from entering into contracts for the performance of firefighting or security-guard functions at any military installation or facility unless—

(1) The contract is to be carried out at a location outside the United States and its outlying areas at which members of the armed forces would have to be used for the performance of firefighting or security-guard functions at the expense of unit readiness;

(2) The contract will be carried out on a Government-owned but privately operated installation;

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

(3) The contract (or renewal of a contract) is for the performance of a function under contract on September 24, 1983; or

(4) The contract—

(i) Is for the performance of firefighting functions;

(ii) Is for a period of 1 year or less; and

(iii) Covers only the performance of firefighting functions that, in the absence of the contract, would have to be performed by members of the armed forces who are not readily available to perform such functions by reason of a deployment.

(b) Under Section 2907 of Pub. L. 103-160, this prohibition does not apply to services at installations being closed (see Subpart [237.74](#)).

(c) Under Section 1010 of Pub. L. 107-56, this prohibition does not apply to any contract that--

(1) Is entered into during the period of time that United States armed forces are engaged in Operation Enduring Freedom or during the period 180 days thereafter;

(2) Is for the performance of security functions at any military installation or facility in the United States;

(3) Is awarded to a proximately located local or State government, or a combination of such governments, whether or not any such government is obligated to provide such services to the general public without compensation; and

(4) Prescribes standards for the training and other qualifications of local government law enforcement personnel who perform security functions under the contract in accordance with criteria established by the Secretary of the department concerned.

(d)(1) Under Section 332 of Pub. L. 107-314, as amended by Section 333 of Pub. L. 109-364 and Section 343 of Pub. L. 110-181, this prohibition does not apply to any contract that is entered into for any increased performance of security-guard functions at a military installation or facility undertaken in response to the terrorist attacks on the United States on September 11, 2001, if--

(i) Without the contract, members of the Armed Forces are or would be used to perform the increased security-guard functions;

(ii) The agency has determined that--

(A) Recruiting and training standards for the personnel who are to perform the security-guard functions are comparable to the recruiting and training standards for DoD personnel who perform the same security-guard functions;

(B) Contractor personnel performing such functions will be effectively supervised, reviewed, and evaluated; and

(C) Performance of such functions will not result in a reduction in the security of the installation or facility;

(iii) Contract performance will not extend beyond September 30, 2012; and

(iv) The total number of personnel employed to perform security-guard functions under all contracts entered into pursuant to this authority does not exceed the following limitations:

(A) For fiscal year 2007, the total number of such personnel employed under such contracts on October 1, 2006.

(B) For fiscal year 2008, the number equal to 90 percent of the total number of such personnel employed under such contracts on October 1, 2006.

(C) For fiscal year 2009, the number equal to 80 percent of the total number of such personnel employed under such contracts on October 1, 2006.

(D) For fiscal year 2010, the number equal to 70 percent of the total number of such personnel employed under such contracts on October 1, 2006.

(E) For fiscal year 2011, the number equal to 60 percent of the total number of such personnel employed under such contracts on October 1, 2006.

(F) For fiscal year 2012, the number equal to 50 percent of the total number of such personnel employed under such contracts on October 1, 2006.

(2) Follow the procedures at [PGI 237.102-70\(d\)](#) to ensure that the personnel limitations specified in paragraph (d)(1)(iv) of this subsection are not exceeded.

237.102-71 Limitation on service contracts for military flight simulators.

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

(1) “Military flight simulator” means any system to simulate the form, fit, and function of a military aircraft that has no commonly available commercial variant.

(2) “Service contract” means any contract entered into by DoD, the principal purpose of which is to furnish services in the United States through the use of service employees as defined in 41 U.S.C. 6701.

(b) Under Section 832 of Pub. L. 109-364, as amended by Section 883(b) of Pub. L. 110-181, DoD is prohibited from entering into a service contract to acquire a military flight simulator. However, the Secretary of Defense may waive this prohibition with respect to a contract, if the Secretary—

(1) Determines that a waiver is in the national interest; and

(2) Provides an economic analysis to the congressional defense committees at least 30 days before the waiver takes effect. This economic analysis shall include, at a minimum—

- (i) A clear explanation of the need for the contract; and
- (ii) An examination of at least two alternatives for fulfilling the requirements that the contract is meant to fulfill, including the following with respect to each alternative:
 - (A) A rationale for including the alternative.
 - (B) A cost estimate of the alternative and an analysis of the quality of each cost estimate.
 - (C) A discussion of the benefits to be realized from the alternative.
 - (D) A best value determination of each alternative and a detailed explanation of the life-cycle cost calculations used in the determination.
- (c) When reviewing requirements or participating in acquisition planning that would result in a military department or defense agency acquiring a military flight simulator, the contracting officer shall notify the program officials of the prohibition in paragraph (b) of this subsection. If the program officials decide to request a waiver from the Secretary of Defense under paragraph (b) of this subsection, the contracting officer shall follow the procedures at [PGI 237.102-71](#).

237.102-72 Contracts for management services.

In accordance with Section 802 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181), DoD may award a contract for the acquisition of services the primary purpose of which is to perform acquisition support functions with respect to the development or production of a major system, only if—

- (a) The contract prohibits the contractor from performing inherently governmental functions;
- (b) The DoD organization responsible for the development or production of the major system ensures that Federal employees are responsible for determining—
 - (1) Courses of action to be taken in the best interest of the Government; and
 - (2) Best technical performance for the warfighter; and
- (c) The contract requires that the prime contractor for the contract may not advise or recommend the award of a contract or subcontract for the development or production of the major system to an entity owned in whole or in part by the prime contractor.

237.102-73 Prohibition on contracts for services of senior mentors.

DoD is prohibited from entering into contracts for the services of senior mentors. See [PGI 237.102-73](#) for references to DoD policy and implementation guidance.

237.102-74 Taxonomy for the acquisition of services, and supplies and equipment.

See [PGI 237.102-74](#) for further guidance on the taxonomy for the acquisition of services and the acquisition of supplies and equipment.

237.102-75 Defense Acquisition Guidebook.

See [PGI 237.102-75](#) for information on the Defense Acquisition Guidebook, Chapter 14, Acquisition of Services.

237.102-76 Review criteria for the acquisition of services.

See [PGI 237.102-76](#) for tenets and review criteria to be used when conducting preaward and postaward reviews for the acquisition of services.

237.102-77 Acquisition requirements roadmap tool.

See [PGI 237.102-77](#) for guidance on using the Acquisition Requirements Roadmap Tool to develop and organize performance requirements into draft versions of the performance work statement, the quality assurance surveillance plan, and the performance requirements summary.

237.102-78 Market research report guide for improving the tradecraft in services acquisition.

See [PGI 210.070](#) for guidance on use of the market research report guide to conduct and document market research for service acquisitions.

237.102-79 Private sector notification requirements in support of in-sourcing actions.

In accordance with 10 U.S.C. 2463, contracting officers shall provide written notification to affected incumbent contractors of Government in-sourcing determinations. Notification shall be provided within 20 business days of the contracting officer's receipt of a decision from the cognizant component in-sourcing program official. The notification will summarize the requiring official's final determination as to why the service is being in-sourced and shall be coordinated with the component's in-sourcing program official. No formal hiring or contract-related actions may be initiated prior to such notification, except for preliminary internal actions associated with hiring or contract modification. See the OASD (RFM) memorandum entitled "Private Sector Notification Requirements in Support of In-sourcing Actions," dated January 29, 2013, for further information, which is available at [PGI 237.102-79](#).

237.104 Personal services contracts.

(b)(i) Authorization to acquire the personal services of experts and consultants is included in 10 U.S.C. 129b. Personal service contracts for expert and consultant services must also be authorized by a determination and findings (D&F) in accordance with department/agency regulations.

(A) Generally, the D&F should authorize one contract at a time; however, an authorizing official may issue a blanket D&F for classes of contracts.

(B) Prepare each D&F in accordance with FAR 1.7 and include a determination that—

- (1) The duties are of a temporary or intermittent nature;
- (2) Acquisition of the services is advantageous to the national defense;

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

- (3) DoD personnel with necessary skills are not available;
 - (4) Excepted appointment cannot be obtained;
 - (5) A nonpersonal services contract is not practicable;
 - (6) Statutory authority, 5 U.S.C. 3109 and other legislation, apply; and
 - (7) Any other determination required by statutes has been made.
- (ii) Personal services contracts for health care are authorized by 10 U.S.C. 1091.
- (A) This authority may be used to acquire—
- (1) Direct health care services provided in medical treatment facilities;
 - (2) Health care services at locations outside of medical treatment facilities (such as the provision of medical screening examinations at military entrance processing stations); and
 - (3) Services of clinical counselors, family advocacy program staff, and victim's services representatives to members of the Armed Forces and covered beneficiaries who require such services, provided in medical treatment facilities or elsewhere. Persons with whom a personal services contract may be entered into under this authority include clinical social workers, psychologists, psychiatrists, and other comparable professionals who have advanced degrees in counseling or related academic disciplines and who meet all requirements for State licensure and board certification requirements, if any, within their fields of specialization.
- (B) Sources for personal services contracts with individuals under the authority of 10 U.S.C. 1091 shall be selected through the procedures in this section. These procedures do not apply to contracts awarded to business entities other than individuals. Selections made using the procedures in this section are exempt by statute from FAR Part 6 competition requirements (see [206.001\(b\)](#)).
- (C) Approval requirements for—
- (1) Direct health care personal services contracts (see paragraphs (b)(ii)(A)(1) and (2) of this section) and a pay cap are in DoDI 6025.5, Personal Services Contracts for Health Care Providers.
 - (i) A request to enter into a personal services contract for direct health care services must be approved by the commander of the medical/dental treatment facility where the services will be performed.
 - (ii) A request to enter into a personal services contract for a location outside of a medical treatment facility must be approved by the chief of the medical facility who is responsible for the area in which the services will be performed.

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

(2) Services of clinical counselors, family advocacy program staff, and victim's services representatives (see paragraph (b)(ii)(A)(3) of this section), shall be in accordance with agency procedures.

(D) The contracting officer must ensure that the requiring activity provides a copy of the approval with the purchase request.

(E) The contracting officer must provide adequate advance notice of contracting opportunities to individuals residing in the area of the facility. The notice must include the qualification criteria against which individuals responding will be evaluated. The contracting officer shall solicit applicants through at least one local publication which serves the area of the facility. Acquisitions under this section for personal service contracts are exempt from the posting and synopsis requirements of FAR Part 5.

(F) The contracting officer shall provide the qualifications of individuals responding to the notice to the commander of the facility for evaluation and ranking in accordance with agency procedures. Individuals must be considered solely on the basis of the professional qualifications established for the particular personal services being acquired and the Government's estimate of reasonable rates, fees, or other costs. The commander of the facility shall provide the contracting officer with rationale for the ranking of individuals, consistent with the required qualifications.

(G) Upon receipt from the facility of the ranked listing of applicants, the contracting officer shall either—

(1) Enter into negotiations with the highest ranked applicant. If a mutually satisfactory contract cannot be negotiated, the contracting officer shall terminate negotiations with the highest ranked applicant and enter into negotiations with the next highest.

(2) Enter into negotiations with all qualified applicants and select on the basis of qualifications and rates, fees, or other costs.

(H) In the event only one individual responds to an advertised requirement, the contracting officer is authorized to negotiate the contract award. In this case, the individual must still meet the minimum qualifications of the requirement and the contracting officer must be able to make a determination that the price is fair and reasonable.

(I) If a fair and reasonable price cannot be obtained from a qualified individual, the requirement should be canceled and acquired using procedures other than those set forth in this section.

(iii)(A) In accordance with 10 U.S.C. 129b(d), an agency may enter into a personal services contract if—

(1) The personal services—

(i) Are to be provided by individuals outside the United States, regardless of their nationality;

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

(ii) Directly support the mission of a defense intelligence component or counter-intelligence organization of DoD; or

(iii) Directly support the mission of the special operations command of DoD; and

(2) The head of the contracting activity provides written approval for the proposed contract. The approval shall include a determination that addresses the following:

(i) The services to be procured are urgent or unique;

(ii) It would not be practical to obtain such services by other means; and

(iii) For acquisition of services in accordance with paragraph (b)(iii)(A)(1)(i) of this section, the services to be acquired are necessary and appropriate for supporting DoD activities and programs outside the United States.

(B) The contracting officer shall ensure that the applicable requirements of paragraph (b)(iii)(A)(2) of this section have been satisfied and shall include the approval documentation in the contract file.

(iv) The requirements of 5 U.S.C. 3109, Employment of Experts and Consultants; Temporary or Intermittent, do not apply to contracts entered into in accordance with paragraph (b)(iii) of this section.

(d) See [237.503\(c\)](#) for requirements for certification and approval of requirements for services to prevent contracts from being awarded or administered in a manner that constitutes an unauthorized personal services contract.

(f)(i) Payment to each expert or consultant for personal services under 5 U.S.C. 3109 shall not exceed the highest rate fixed by the Classification Act Schedules for grade GS-15 (see 5 CFR 304.105(a)).

(ii) The contract may provide for the same per diem and travel expenses authorized for a Government employee, including actual transportation and per diem in lieu of subsistence for travel between home or place of business and official duty station.

(iii) Coordinate with the civilian personnel office on benefits, taxes, personnel ceilings, and maintenance of records.

237.106 Funding and term of service contracts.

(1) Personal service contracts for expert or consultant services shall not exceed 1 year. The nature of the duties must be—

(i) Temporary (not more than 1 year); or

(ii) Intermittent (not cumulatively more than 130 days in 1 year).

(2) 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).

237.109 Services of quasi-military armed forces.

See [237.102-70](#) for prohibition on contracting for firefighting or security-guard functions.

237.170 Approval of contracts and task orders for services.

237.170-1 Scope.

This section—

(a) Implements 10 U.S.C. 2330; and

(b) Applies to services acquired for DoD, regardless of whether the services are acquired through--

(1) A DoD contract or task order; or

(2) A contract or task order awarded by an agency other than DoD.

237.170-2 Approval requirements.

(a) *Acquisition of services through a contract or task order that is not performance based.*

(1) For acquisitions at or below \$93 million, obtain the approval of the official designated by the department or agency.

(2) For acquisitions exceeding \$93 million, obtain the approval of the senior procurement executive.

(b) *Acquisition of services through use of a contract or task order issued by a non-DoD agency.* Comply with the review, approval, and reporting requirements established in accordance with subpart 217.7 when acquiring services through use of a contract or task order issued by a non-DoD agency.

237.171 Training for contractor personnel interacting with detainees.

237.171-1 Scope.

This section prescribes policies to prevent the abuse of detainees, as required by Section 1092 of the National Defense Authorization Act for Fiscal Year 2005 (Pub. L. 108-375).

237.171-2 Definition.

“Combatant commander,” “detainee,” and “personnel interacting with detainees,” as used in this section, are defined in the clause at [252.237-7019](#), Training for Contractor Personnel Interacting with Detainees.

237.171-3 Policy.

(a) Each DoD contract in which contractor personnel, in the course of their duties, interact with detainees shall include a requirement that such contractor personnel—

(1) Receive Government-provided training regarding the international obligations and laws of the United States applicable to the detention of personnel, including the Geneva Conventions; and

(2) Provide a copy of the training receipt document to the contractor.

(b) The combatant commander responsible for the area where the detention or interrogation facility is located will arrange for the training and a training receipt document to be provided to contractor personnel. For information on combatant commander geographic areas of responsibility and point of contact information for each command, see [PGI 237.171-3\(b\)](#).

237.171-4 Contract clause.

Use the clause at [252.237-7019](#), Training for Contractor Personnel Interacting with Detainees, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that are for the acquisition of services if—

(a) The clause at [252.225-7040](#), Contractor Personnel Supporting U.S. Armed Force(s) Deployed Outside the United States, is included in the solicitation or contract; or

(b) The services will be performed at a facility holding detainees, and contractor personnel in the course of their duties may be expected to interact with the detainees.

237.172 Service contracts surveillance.

Ensure that quality assurance surveillance plans are prepared in conjunction with the preparation of the statement of work or statement of objectives for solicitations and contracts for services. These plans should be tailored to address the performance risks inherent in the specific contract type and the work effort addressed by the contract. (See FAR subpart 46.4.) Retain quality assurance surveillance plans in the contract file. See <http://sam.dau.mil>, Step Four – Requirements Definition, for examples of quality assurance surveillance plans.

237.173 Prohibition on interrogation of detainees by contractor personnel.

237.173-1 Scope.

This section prescribes policies that prohibit interrogation of detainees by contractor personnel, as required by section 1038 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84).

237.173-2 Definitions. As used in this subpart—

“Detainee” means any person captured, detained, held, or otherwise under the effective control of DoD personnel (military or civilian) in connection with hostilities. This includes, but is not limited to, enemy prisoners of war, civilian internees, and retained personnel. This does not include DoD personnel or DoD contractor personnel being held for law enforcement purposes.

“Interrogation of detainees” means a systematic process of formally and officially questioning a detainee for the purpose of obtaining reliable information to satisfy foreign intelligence collection requirements.

237.173-3 Policy.

(a) No detainee may be interrogated by contractor personnel.

(b) Contractor personnel with proper training and security clearances may be used as linguists, interpreters, report writers, information technology technicians, and other employees filling ancillary positions, including as trainers of and advisors to interrogators, in interrogations of detainees if—

(1) Such personnel are subject to the same laws, rules, procedures, and policies (including DoD Instruction 1100.22, Policy and Procedures for Determining Workforce Mix, (<http://www.dtic.mil/whs/directives/corres/pdf/110022p.pdf>); DoD Directive 2310.01E, The Department of Defense Detainee Program (<http://www.dtic.mil/whs/directives/corres/pdf/231001p.pdf>); and DoD Directive 3115.09, DoD Intelligence Interrogations, Detainee Debriefings, and Tactical Questioning, (<http://www.dtic.mil/whs/directives/corres/pdf/311509p.pdf>)); pertaining to detainee operations and interrogations as those that apply to Government personnel in such positions in such interrogations; and

(2) Appropriately qualified and trained DoD personnel (military or civilian) are available to oversee the contractor’s performance and to ensure that contractor personnel do not perform activities that are prohibited under this section.

237.173-4 Waiver.

The Secretary of Defense may waive the prohibition in [237.173-3\(a\)](#) for a period of 60 days, if the Secretary determines such a waiver is vital to the national security interests of the United States. The Secretary may renew a waiver issued pursuant to this paragraph for an additional 30-day period, if the Secretary determines that such a renewal is vital to the national security interests of the United States. Not later than five days after issuance of the waiver, the Secretary shall submit written notification to Congress. See specific waiver procedures at DoDI 1100.22.

237.173-5 Contract clause.

Insert the clause at [252.237-7010](#), Prohibition on Interrogation of Detainees by Contractor Personnel, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that are for the provision of services.

237.174 Disclosure of information to litigation support contractors.

See [204.74](#) for disclosure of information to litigation support contractors.

237.175 Training that uses live vertebrate animals.

Use the clause at [252.235-7002](#), Animal Welfare, as prescribed in [235.072\(a\)](#), when contracting for training that will use live vertebrate animals.

SUBPART 237.2—ADVISORY AND ASSISTANCE SERVICES

(Revised September 30, 2005)

237.270 Acquisition of audit services.

(a) General policy.

(1) Do not contract for audit services unless—

(i) The cognizant DoD audit organization determines that expertise required to perform the audit is not available within the DoD audit organization; or

(ii) Temporary audit assistance is required to meet audit reporting requirements mandated by law or DoD regulation.

(2) See PGI 237.270 for a list of DoD publications that govern the conduct of audits.

(b) Contract period. Except in unusual circumstances, award contracts for recurring audit services for a 1-year period with at least 2 option years.

(c) Approvals. Do not issue a solicitation for audit services unless the requiring activity provides evidence that the cognizant DoD audit organization has approved the statement of work. The requiring agency shall obtain the same evidence of approval for subsequent material changes to the statement of work.

(d) Solicitation provisions and contract clauses.

(1) Use the provision at 252.237-7000, Notice of Special Standards of Responsibility, in solicitations for audit services.

(2) Use the clause at 252.237-7001, Compliance with Audit Standards, in solicitations and contracts for audit services.

SUBPART 237.5—MANAGEMENT OVERSIGHT OF SERVICE CONTRACTS

(Revised May 5, 2011)

237.503 Agency-head responsibilities.

(c) The agency head or designee shall employ procedures to ensure that requirements for service contracts are vetted and approved as a safeguard to prevent contracts from being awarded or administered in a manner that constitutes an unauthorized personal services contract. Contracting officers shall follow the procedures at PGI [237.503](#), include substantially similar certifications in conjunction with service contract requirements, and place the certification in the contract file. The program manager or other official responsible for the requirement, at a level specified by the agency, should execute the certification. In addition, contracting officers and program managers should remain aware of the descriptive elements at FAR 37.104(d) to ensure that a service contract does not inadvertently become administered as a personal-services contract.

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

SUBPART 237.6—(Removed)
(June 25, 2004)

SUBPART 237.70—MORTUARY SERVICES

(Revised November 5, 2014)

237.7000 Scope.

This subpart—

(a) Applies to contracts for mortuary services (the care of remains) for military personnel within the United States; and

(b) May be used as guidance in areas outside the United States for mortuary services for deceased military and civilian personnel.

237.7001 Method of acquisition.

(a) *Requirements type contract.* By agreement among the military activities, one activity in each geographical area will contract for the estimated requirements for the care of remains for all military activities in the area. Use a requirements type contract (see FAR 16.503) when the estimated annual requirements for the activities in the area are ten or more.

(b) *Purchase order.* Where no contract exists, use DD Form 1155, Order for Supplies or Services, to obtain mortuary services.

237.7002 Area of performance and distribution of contracts.

Follow the procedures at [PGI 237.7002](#) for—

(a) Defining the geographical area to be covered by the contract; and

(b) Distributing copies of the contract.

237.7003 Solicitation provisions and contract clauses.

(a) Use the basic or the alternate of the provision at [252.237-7002](#), Award to Single Offeror, in solicitations and contracts for mortuary services.

(1) Use the basic provision in all sealed bid solicitations for mortuary services.

(2) Use the alternate I provision in all negotiated solicitations for mortuary services.

(b) Use the following clauses in all mortuary service solicitations and contracts, except do not use the clauses at [252.237-7004](#), Area of Performance, in solicitations or contracts that include port of entry requirements:

(1) [252.237-7003](#), Requirements, (insert activities authorized to place orders in paragraph (e) of the clause).

(2) [252.237-7004](#), Area of Performance.

(3) [252.237-7005](#), Performance and Delivery.

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

- (4) [252.237-7006](#), Subcontracting.
- (5) [252.237-7007](#), Termination for Default.
- (6) [252.237-7008](#), Group Interment.
- (7) [252.237-7009](#), Permits.
- (8) [252.237-7011](#), Preparation History.

(c) Use the clause at FAR 52.245-1, Government Property, with its Alternate I, in solicitations and contracts that include port of entry requirements.

SUBPART 237.71—LAUNDRY AND DRY CLEANING SERVICES

(Revised November 5, 2014)

237.7100 Scope.

This subpart—

(a) Applies to contracts for laundry and dry cleaning services within the United States; and

(b) May be used as guidance in areas outside the United States.

237.7101 Solicitation provisions and contract clauses.

(a) Use the provision at [252.237-7012](#), Instruction to Offerors (Count-of-Articles), in solicitations for laundry and dry cleaning services to be provided on a count-of-articles basis.

(b) Use the provision at [252.237-7013](#), Instruction to Offerors (Bulk Weight), in solicitations for laundry services to be provided on a bulk weight basis.

(c) Use the clause at [252.237-7014](#), Loss or Damage (Count-of-Articles), in solicitations and contracts for laundry and dry cleaning services to be provided on a count-of-articles basis.

(d) Use the clause at [252.237-7015](#), Loss or Damage (Weight of Articles), in solicitations and contracts for laundry and dry cleaning services to be provided on a bulk weight basis.

(1) Insert a reasonable per pound price in paragraph (b) of the clause, based on the average per pound value. When the contract requires laundry services on a bag type basis, insert reasonable per pound prices by bag type.

(2) Insert an appropriate percentage in paragraph (e) of the clause, not to exceed eight percent.

(e) Use the basic or an alternate of the clause at [252.237-7016](#), Delivery Tickets, in all solicitations and contracts for laundry and dry cleaning services.

(1) Use the basic clause when services are not to be provided on a bulk weight basis.

(2) Use the alternate I clause when services are for bag type laundry to be provided on a bulk weight basis.

(3) Use the alternate II clause when services are unsorted laundry to be provided on a bulk weight basis.

(f) Use the clause at [252.237-7017](#), Individual Laundry, in solicitations and contracts for laundry and dry cleaning services to be provided to individual personnel.

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

(1) Insert the number of pieces of outer garments in paragraphs (d)(1) and (2) of the clause.

(2) The number of pieces and composition of a bundle in paragraphs (d)(1) and (2) of the clause may be modified to meet local conditions.

(g) Use the clause at [252.237-7018](#), Special Definitions of Government Property, in all solicitations and contracts for laundry and dry cleaning services.

SUBPART 237.72—EDUCATIONAL SERVICE AGREEMENTS
(Revised August 25, 2009)

237.7200 Scope.

(a) This subpart prescribes acquisition procedures for educational services from schools, colleges, universities, or other educational institutions. This subpart does not include tuition assistance agreements, i.e., payment by the Government of partial tuition under the off-duty educational program.

(b) As used in the subpart—

(1) “Facilities” does not include the institution's dining rooms or dormitories;
and

(2) “Fees” does not include charges for meals or lodging.

237.7201 Educational service agreement.

(a) An educational service agreement is not a contract, but is an ordering agreement under which the Government may order educational services.

(b) Educational service agreements provide for ordering educational services when—

(1) The Government pays normal tuition and fees for educational services provided to a student by the institution under its normal schedule of tuition and fees applicable to all students generally; and

(2) Enrollment is at the institution under the institution's normal rules and in courses and curricula which the institution offers to all students meeting admission requirements.

237.7202 Limitations.

(a) Make no agreement under this subpart which will result in payment of Government funds for tuition or other expenses for training in any legal profession, except in connection with the detailing of commissioned officers to law schools under 10 U.S.C. 2004.

(b) Educational service agreements are not used to provide special courses or special fees for Government students.

237.7203 Duration.

(a) Educational service agreements are for an indefinite duration and remain in effect until terminated.

(b) The issuing activity must establish procedures to review each educational service agreement at least once each year. Review dates should consider the institution's academic calendar and occur at least 30 days before the beginning of a

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

term. The purpose of the review is to incorporate changes to reflect requirements of any statute, Executive Order, FAR, or DFARS.

(c) If the contracting officer and the institution do not agree on required changes, terminate the agreement.

237.7204 Format and clauses for educational service agreements.

Educational service agreements under this subpart shall be in the following format. Add to the schedule any other provisions necessary to describe the requirements, if they are consistent with the following provisions and the policy of acquiring educational services in the form of standard course offerings at the prevailing rates of the institution.

EDUCATIONAL SERVICE AGREEMENT

Agreement No. _____

1. This agreement entered into on the _____ day of _____, is between the Government, represented by the Contracting Officer, and the Contractor, _____ (name of institution) _____, an educational institution located in _____ (city) _____, _____ (state) _____.

2. This agreement is for educational services to be provided by the Contractor to Government personnel at the Contractor's institution. The Contractor shall provide instruction with standard offerings of courses available to the public.

3. The Government shall pay for services under the Contractor's normal schedule of tuition and fees applicable to the public and in effect at the time the services are performed.

4. The Government will review this agreement annually before the anniversary of its effective date for the purpose of incorporating changes required by statutes, executive orders, the Federal Acquisition Regulation, or the Defense Federal Acquisition Regulation Supplement. Changes required to be made by modification to this agreement or by issuance of a superseding agreement. If mutual agreement on the changes cannot be reached, the Government will terminate this agreement.

5. The parties may amend this agreement only by mutual consent.

6. This agreement shall start on the date in paragraph 1 and shall continue until terminated.

7. The estimated annual cost of this agreement is \$ _____. This estimate is for administrative purposes only and does not impose any obligation on the Government to request any services or make any payment.

8. Advance payments are authorized by 10 U.S.C. 2396(a)(3).

9. Submit invoices to: _____ (name and address of activity) _____.

SCHEDULE PROVISIONS

1. *Ordering procedures and services to be provided.*

(a) The Contractor shall promptly deliver to the Contracting Officer one copy of each catalog applicable to this agreement, and one copy of any subsequent revision.

(b) The Government will request educational services under this agreement by a (insert type of request, such as, delivery order, official Government order, or other written communication). The (insert type of request, such as, delivery order, official Government order, or other written communication) will contain the number of this agreement and will designate as students at the Contractor's institution one or more Government-selected persons who have already been accepted for admission under the Contractor's usual admission standards.

(c) All students under this agreement shall register in the same manner, be subject to the same academic regulations, and have the same privileges, including the use of all facilities and equipment as any other students enrolled in the institution.

(d) Upon enrolling each student under this agreement, the Contractor shall, where the resident or nonresident status involves a difference in tuition or fees—

(i) Determine the resident or nonresident status of the student;

(ii) Notify the student and the Contracting Officer of the determination. If there is an appeal of the determination;

(iii) If there is an appeal of the determination, process the appeal under the Contractor's standard procedures;

(iv) Notify the student and Contracting Officer of the result; and

(v) Make the determination a part of the student's permanent record.

(e) The Contractor shall not furnish any instruction or other services to any student under this agreement before the effective date of a request for services in the form specified in paragraph (b) of this schedule.

2. *Change in curriculum.* The Contracting Officer may vary the curriculum for any student enrolled under this agreement but shall not require or make any change in any course without the Contractor's consent.

3. *Payment.*

(a) The Government shall pay the Contractor the normal tuition and fees which the Contractor charges any students pursuing the same or similar curricula, except for any tuition and fees which this agreement excludes. The Contractor may change any tuition and fees, provided—

(1) The Contractor publishes the revisions in a catalog or otherwise publicly announces the revisions;

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

(2) Applies the revisions uniformly to all students studying the same or similar curricula;

(3) Provides the Contracting Officer notice of changes before their effective date.

(b) The Contractor shall not establish any tuition or fees which apply solely to students under this agreement.

(c) If the Contractor regularly charges higher tuition and fees for nonresident students, the Contractor may charge the Government the normal nonresident tuition and fees for students under this agreement who are nonresidents. The Government shall not claim resident tuition and fees for any student solely on the basis of the student residing in the State as a consequence of enrollment under this agreement.

(d) The Contractor shall charge the Government only the tuition and fees which relate directly to enrollment as a student. Tuition and fees may include—

(i) Penalty fees for late registration or change of course caused by the Government;

(ii) Mandatory health fees and health insurance charges; and

(iii) Any flat rate charge applicable to all students registered for research that appears in the Contractor's publicly announced fee schedule.

(e) The Contractor shall not charge the Government for—

(i) Permit charges, such as vehicle registration or parking fees, unless specifically authorized in the request for service; and

(ii) Any equipment, refundable deposits, or any items or services (such as computer time) related to student research.

(f) Normally, the Contractor shall not directly charge individual students for application fees or any other fee chargeable to this agreement. However, if the Contractor's standard procedures require payment of any fee before the student is enrolled under this agreement, the Contractor may charge the student. When the Contractor receives payment from the Government, the Contractor shall fully reimburse the student.

(g) For each term the Contractor enrolls students under this agreement, the Contractor shall submit _____ copies of an invoice listing charges for each student separately. The Contractor shall submit invoices within _____ days after the start of the term and shall include—

(i) Agreement number and inclusive dates of the term;

(ii) Name of each student;

(iii) A list showing each course for each student if the school charges by credit hour;

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

(iv) The resident or nonresident status of each student (if applicable to the Contractor's school); and

(v) A breakdown of charges for each student, including credit hours, tuition, application fee, and other fees. Provide a total for each student and a grand total for all students listed on the invoice.

(h) If unforeseen events require additional charges that are otherwise payable under the Contractor's normal tuition and fee schedule, the Contractor may submit a supplemental invoice or make the adjustment on the next regular invoice under this agreement. The Contractor shall clearly identify and explain the supplemental invoice or the adjustment.

(i) The Contractor shall apply any credits resulting from withdrawal of students, or from any other cause under its standard procedures, to subsequent invoices submitted under this agreement. Credits should appear on the first invoice submitted after the action resulting in the credits. If no subsequent invoice is submitted, the Contractor shall deliver to the Contracting Officer a check drawn to the order of the office designated for contract administration. The Contractor shall identify the reason for the credit and the applicable term dates in all cases.

4. *Withdrawal of students.*

(a) The Government may, at its option and at any time, withdraw financial support for any student by issuing official orders. The Government will furnish _____ copies of the orders to the Contractor within a reasonable time after publication.

(b) The Contractor may request withdrawal by the Government of any student for academic or disciplinary reasons.

(c) If withdrawal occurs before the end of a term, the Government will pay any tuition and fees due for the current term. The Contractor shall credit the Government with any charges eligible for refund under the Contractor's standard procedures for any students in effect on the date of withdrawal.

(d) Withdrawal of students by the Government will not be the basis for any special charge or claim by the Contractor other than charges under the Contractor's standard procedures.

5. *Transcripts.* Within a reasonable time after withdrawal of a student for any reason, or after graduation, the Contractor shall send to the Contracting Officer (or to an address supplied by the Contracting Officer) one copy of an official transcript showing all work by the student at the institution until such withdrawal or graduation.

6. *Student teaching.* The Government does not anticipate the Contractor awarding fellowships and assistantships to students attending school under this agreement. However, for graduate students, should both the student and the Contractor decide it to be in the student's best interests to assist in the institution's teaching program, the Contractor may provide nominal compensation for part-time service. Base the compensation on the Contractor's practices and procedures for other students of similar accomplishment in that department or field. The Contractor shall apply the

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

compensation as a credit against any invoices presented for payment for any period in which the student performed the part-time teaching service.

7. *Termination of agreement.*

(a) Either party may terminate this agreement by giving 30 days advance written notice of the effective date of termination. In the event of termination, the Government shall have the right, at its option, to continue to receive educational services for those students already enrolled in the contractor's institution under this agreement until such time that the students complete their courses or curricula or the Government withdraws them from the Contractor's institution. The terms and conditions of this agreement in effect on the effective date of the termination shall continue to apply to such students remaining in the Contractor's institution.

(b) Withdrawal of students under Schedule provision 4 shall not be considered a termination within the meaning of this provision 7.

(c) Termination by either party shall not be the basis for any special charge or claim by the Contractor, other than as provided by the Contractor's standard procedures.

GENERAL PROVISIONS

Use the following clauses in educational service agreements:

1. FAR 52.202-1, Definitions, and add the following paragraphs (h) through (m).

(h) “Term” means the period of time into which the Contractor divides the academic year for purposes of instruction. This includes “semester,” “trimester,” “quarter,” or any similar word the Contractor may use.

(i) “Course” means a series of lectures or instructions, and laboratory periods, relating to one specific representation of subject matter, such as Elementary College Algebra, German 401, or Surveying. Normally, a student completes a course in one term and receives a certain number of semester hours credit (or equivalent) upon successful completion.

(j) “Curriculum” means a series of courses having a unified purpose and belonging primarily to one major academic field. It will usually include certain required courses and elective courses within established criteria. Examples include Business Administration, Civil Engineering, Fine and Applied Arts, and Physics. A curriculum normally covers more than one term and leads to a degree or diploma upon successful completion.

(k) “Catalog” means any medium by which the Contractor publicly announces terms and conditions for enrollment in the Contractor's institution, including tuition and fees to be charged. This includes “bulletin,” “announcement,” or any other similar word the Contractor may use.

(l) “Tuition” means the amount of money charged by an educational institution for instruction, not including fees.

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

(m) “Fees” means those applicable charges directly related to enrollment in the Contractor's institution. Unless specifically allowed in the request for services, fees shall not include—

- (1) Any permit charge, such as parking and vehicle registration; or
- (2) Charges for services of a personal nature, such as food, housing, and laundry.

2. FAR 52.203-3, Gratuities.
3. FAR 52.203-5, Covenant Against Contingent Fees.
4. FAR 52.204-1, Approval of Contract, if required by department/agency procedures.
5. FAR 52.215-2, Audit and Records--Negotiation.
6. FAR 52.215-8, Order of Precedence--Uniform Contract Format.
7. Conflicts Between Agreement and Catalog. Insert the following clause:

CONFLICTS BETWEEN AGREEMENT AND CATALOG

If there is any inconsistency between this agreement and any catalog or other document incorporated in this agreement by reference or any of the Contractor's rules and regulations, the provisions of this agreement shall govern.

8. FAR 52.222-3, Convict Labor.
9. Under FAR 22.802, FAR 22.807, and FAR 22.810, use the appropriate clause from FAR 52.222-26, Equal Opportunity.
10. FAR 52.233-1, Disputes.
11. Assignment of Claims. Insert the following clause:

ASSIGNMENT OF CLAIMS

No claim under this agreement shall be assigned.

12. FAR 52.252-4, Alterations in Contract, if required by department/agency procedures.

Defense Federal Acquisition Regulation Supplement

Part 237—Service Contracting

SIGNATURE PAGE

Agreement No. _____ Date _____

THE UNITED STATES OF AMERICA

BY: _____
(Contracting Officer)

Activity _____
Location _____

(NAME OF CONTRACTOR)

BY: _____
(Title) _____

**SUBPART 237.73—SERVICES OF STUDENTS AT RESEARCH AND
DEVELOPMENT LABORATORIES**

(Revised June 21, 2005)

237.7300 Scope.

This subpart prescribes procedures for acquisition of temporary or intermittent services of students at institutions of higher learning for the purpose of providing technical support at defense research and development laboratories (10 U.S.C. 2360).

237.7301 Definitions.

As used in this subpart—

(a) “Institution of higher learning” means any public or private post-secondary school, junior college, college, university, or other degree granting educational institution that—

- (1) Is located in the United States or its outlying areas;
- (2) Has an accredited education program approved by an appropriate accrediting body; and
- (3) Offers a program of study at any level beyond high school.

(b) “Nonprofit organization” means any organization described by Section 501(c)(3) of Title 26 of the U.S.C. which is exempt from taxation under Section 501(a) of Title 26.

(c) “Student” means an individual enrolled (or accepted for enrollment) at an institution of higher learning before the term of the student technical support contract. The individual shall remain in good standing in a curriculum designed to lead to the granting of a recognized degree, during the term of the contract.

(d) “Technical support” means any scientific or engineering work in support of the mission of the DoD laboratory involved. It does not include administrative or clerical services.

237.7302 General.

Generally, agencies will acquire services of students at institutions of higher learning by contract between a nonprofit organization employing the student and the Government. When it is in the best interest of the Government, contracts may be made directly with students. These services are not subject to the requirements of FAR Part 19, FAR 13.003(b)(1), or DFARS Part 219. Award authority for these contracts is 10 U.S.C. 2304(a)(1) and 10 U.S.C. 2360.

237.7303 Contract clauses.

Contracts made directly with students are nonpersonal service contracts but shall include the clauses at FAR 52.232-3, Payments Under Personal Services Contracts, and FAR 52.249-12, Termination (Personal Services).

SUBPART 237.74—SERVICES AT INSTALLATIONS BEING CLOSED

237.7400 Scope.

This subpart prescribes procedures for contracting, through use of other than full and open competition, with local governments for police, fire protection, airfield operation, or other community services at military installations to be closed under the Defense Authorization Amendments and Base Closure and Realignment Act (Pub. L. 100-526), as amended, and the Defense Base Closure and Realignment Act of 1990 (Pub. L. 101-510), as amended.

237.7401 Policy.

The authority in 206.302-5(b)(ii) to contract with local governments—

(a) May be exercised without regard to the provisions of 10 U.S.C. Chapter 146, Contracting for Performance of Civilian Commercial or Industrial Type Functions;

(b) May not be exercised earlier than 180 days before the date the installation is scheduled to be closed;

(c) Requires a determination by the head of the contracting activity that the services being acquired under contract with the local government are in the best interests of the Department of Defense.

(d) Includes the requirement of Subpart 222.71, Right of First Refusal of Employment, unless it conflicts with the local government's civil service selection procedures.

237.7402 Contract clause.

Use the clause at 252.237-7022, Services at Installations Being Closed, in solicitations and contracts based upon the authority of this subpart.

**SUBPART 237.75—ACQUISITION AND MANAGEMENT OF INDUSTRIAL
RESOURCES**

(Added July 29, 2009)

237.7501 Definition.

“Facilities project,” as used in this subpart, means a Government project to provide, modernize, or replace real property for use by a contractor in performing a Government contract or subcontract.

237.7502 Policy.

(a) Comply with DoD Directive 4275.5, Acquisition and Management of Industrial Resources, in processing requests for facilities projects.

(b) Departments and agencies shall submit reports of facilities projects to the House and Senate Armed Services Committees—

(1) At least 30 days before starting facilities projects involving real property (10 U.S.C. 2662); and

(2) In advance of starting construction for a facilities project regardless of cost. Use DD Form 1391, FY__ Military Construction Project Data, to notify congressional committees of projects that are not included in the annual budget.

SUBPART 237.76—CONTINUATION OF ESSENTIAL CONTRACTOR SERVICES

(Revised November 24, 2010)

237.7600 Scope.

This subpart prescribes procedures for the acquisition of essential contractor services which support mission-essential functions.

237.7601 Definitions.

As used in this subpart, “essential contractor service” and “mission-essential functions” are defined in the clause at 252.237-7023, Continuation of Essential Contractor Services.

237.7602 Policy.

(a) Contractors providing services designated as essential contractor services shall be prepared to continue providing such services, in accordance with the terms and conditions of their contracts, during periods of crisis. As a general rule, the designation of services as essential contractor services will not apply to an entire contract but will apply only to those service functions that have been specifically identified as essential contractor services by the functional commander or civilian equivalent.

(b) Contractors who provide Government-determined essential contractor services shall provide a written plan to be incorporated in the contract to ensure the continuation of these services in crisis situations. Contracting officers shall consult with a functional manager to assess the sufficiency of the contractor-provided written plan. Contractors will activate such plans only during periods of crisis, as authorized by the contracting officer, who does so at the direction of the appropriate functional commander or civilian equivalent.

(c) The contracting officer shall follow the procedures at PGI 207.105(b)(20)(C) in preparing an acquisition plan.

237.7603 Solicitation provision and contract clause.

(a) Use the clause at 252.237-7023, Continuation of Essential Contractor Services in all solicitations and contracts for services that are in support of mission-essential functions.

(b) Use the provision at 252.237-7024, Notice of Continuation of Essential Contractor Services in all solicitations for services that include the clause 252.237-7023.

NO DFARS TEXT

NO DFARS TEXT

Defense Federal Acquisition Regulation Supplement

Part 239—Acquisition of Information Technology

TABLE OF CONTENTS (Revised November 30, 2015)

239.001 Applicability.

SUBPART 239.1—GENERAL

239.101 Policy.

SUBPART 239.70—EXCHANGE OR SALE OF INFORMATION TECHNOLOGY

239.7001 Policy.

SUBPART 239.71—SECURITY AND PRIVACY FOR COMPUTER SYSTEMS

239.7100 Scope of subpart.

239.7101 Definition.

239.7102 Policy and responsibilities.

239.7102-1 General.

239.7102-2 Compromising emanations—TEMPEST or other standard.

239.7102-3 Information assurance contractor training and certification.

239.7103 Contract clauses.

SUBPART 239.72—STANDARDS

239.7201 Solicitation requirements.

SUBPART 239.73— REQUIREMENTS FOR INFORMATION RELATING TO SUPPLY CHAIN RISK

239.7300 Scope of subpart.

239.7301 Definitions.

239.7302 Applicability.

239.7303 Authorized individuals.

239.7304 Determination and notification.

239.7305 Exclusion and limitation on disclosure.

239.7306 Solicitation provision and contract clause.

SUBPART 239.74—TELECOMMUNICATIONS SERVICES

239.7400 Scope.

239.7401 Definitions.

239.7402 Policy.

239.7403 Reserved.

239.7404 Reserved.

239.7405 Delegated authority for telecommunications resources.

239.7406 Certified cost or pricing data and data other than certified cost or
pricing data.

239.7407 Type of contract.

239.7408 Special construction.

239.7408-1 General.

239.7408-2 Applicability of construction labor standards for special construction.

239.7409 Special assembly.

239.7410 Cancellation and termination.

239.7411 Contract clauses.

Defense Federal Acquisition Regulation Supplement

Part 239—Acquisition of Information Technology

SUBPART 239.76—CLOUD COMPUTING

- 239.7600 Scope of subpart.
- 239.7601 Definitions.
- 239.7602 Policy and responsibilities.
- 239.7602-1 General.
- 239.7602-2 Required storage of data within the United States or outlying areas.
- 239.7603 Procedures.
- 239.7604 Solicitation provision and contract clause.

Defense Federal Acquisition Regulation Supplement

Part 239—Acquisition of Information Technology

(Added October 30, 2015)

239.001 Applicability.

Notwithstanding FAR 39.001, this part applies to acquisitions of information technology, including national security systems.

Defense Federal Acquisition Regulation Supplement

Part 239—Acquisition of Information Technology

SUBPART 239.1—GENERAL *(Revised July 15, 2009)*

239.101 Policy.

See Subpart 208.74 when acquiring commercial software or software maintenance. See 227.7202 for policy on the acquisition of commercial computer software and commercial computer software documentation.

Defense Federal Acquisition Regulation Supplement

Part 239—Acquisition of Information Technology

SUBPART 239.70—EXCHANGE OR SALE OF INFORMATION TECHNOLOGY *(Revised July 11, 2006)*

239.7001 Policy.

Agencies shall follow the procedures in DoD 4140.1-R, DoD Supply Chain Materiel Management Regulation, Chapter 9, Section C9.5, when considering the exchange or sale of Government-owned information technology.

SUBPART 239.71—SECURITY AND PRIVACY FOR COMPUTER SYSTEMS
(Revised September 21, 2015)

239.7100 Scope of subpart.

This subpart includes information assurance and Privacy Act considerations. Information assurance requirements are in addition to provisions concerning protection of privacy of individuals (see FAR Subpart 24.1).

239.7101 Definition.

“Information assurance,” as used in this subpart, means measures that protect and defend information, that is entered, processed, transmitted, stored, retrieved, displayed, or destroyed, and information systems, by ensuring their availability, integrity, authentication, confidentiality, and non-repudiation. This includes providing for the restoration of information systems by incorporating protection, detection, and reaction capabilities.

239.7102 Policy and responsibilities.

239.7102-1 General.

(a) Agencies shall ensure that information assurance is provided for information technology in accordance with current policies, procedures, and statutes, to include—

- (1) The National Security Act;
- (2) The Clinger-Cohen Act;
- (3) National Security Telecommunications and Information Systems Security Policy No. 11;
- (4) Federal Information Processing Standards;
- (5) DoD Directive 8500.1, Information Assurance;
- (6) DoD Instruction 8500.2, Information Assurance Implementation;
- (7) DoD Directive 8140.01, Cyberspace Workforce Management; and
- (8) DoD Manual 8570.01-M, Information Assurance Workforce Improvement Program.

(b) For all acquisitions, the requiring activity is responsible for providing to the contracting officer—

- (1) Statements of work, specifications, or statements of objectives that meet information assurance requirements as specified in paragraph (a) of this subsection;
- (2) Inspection and acceptance contract requirements; and
- (3) A determination as to whether the information technology requires protection against compromising emanations.

239.7102-2 Compromising emanations—TEMPEST or other standard.

For acquisitions requiring information assurance against compromising emanations, the requiring activity is responsible for providing to the contracting officer—

- (a) The required protections, i.e., an established National TEMPEST standard (e.g., NACSEM 5100, NACSIM 5100A) or a standard used by other authority;
- (b) The required identification markings to include markings for TEMPEST or other standard, certified equipment (especially if to be reused);
- (c) Inspection and acceptance requirements addressing the validation of compliance with TEMPEST or other standards; and
- (d) A date through which the accreditation is considered current for purposes of the proposed contract.

239.7102-3 Information assurance contractor training and certification.

(a) For acquisitions that include information assurance functional services for DoD information systems, or that require any appropriately cleared contractor personnel to access a DoD information system to perform contract duties, the requiring activity is responsible for providing to the contracting officer—

- (1) A list of information assurance functional responsibilities for DoD information systems by category (e.g., technical or management) and level (e.g., computing environment, network environment, or enclave); and
 - (2) The information assurance training, certification, certification maintenance, and continuing education or sustainment training required for the information assurance functional responsibilities.
- (b) After contract award, the requiring activity is responsible for ensuring that the certifications and certification status of all contractor personnel performing information assurance functions as described in DoD 8570.01-M, Information Assurance Workforce Improvement Program, are in compliance with the manual and are identified, documented, and tracked.
- (c) The responsibilities specified in paragraphs (a) and (b) of this section apply to all DoD information assurance duties supported by a contractor, whether performed full-time or part-time as additional or embedded duties, and when using a DoD contract, or a contract or agreement administered by another agency (e.g., under an interagency agreement).
- (d) See [PGI 239.7102-3](#) for guidance on documenting and tracking certification status of contractor personnel, and for additional information regarding the requirements of DoD 8570.01-M.

239.7103 Contract clauses.

(a) Use the clause at [252.239-7000](#), Protection Against Compromising Emanations, in solicitations and contracts involving information technology that requires protection

Defense Federal Acquisition Regulation Supplement

Part 239—Acquisition of Information Technology

against compromising emanations.

(b) Use the clause at [252.239-7001](#), Information Assurance Contractor Training and Certification, in solicitations and contracts involving contractor performance of information assurance functions as described in DoD 8570.01-M.

Defense Federal Acquisition Regulation Supplement

Part 239—Acquisition of Information Technology

SUBPART 239.72—STANDARDS

(Revised July 11, 2006)

239.7201 Solicitation requirements.

Contracting officers shall ensure that all applicable Federal Information Processing Standards are incorporated into solicitations.

**SUBPART 239.73—REQUIREMENTS FOR INFORMATION RELATING TO
SUPPLY CHAIN RISK**

(Revised October 30, 2015)

239.7300 Scope of subpart.

(a) This subpart implements section 806 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383) and elements of DoD Instruction 5200.44, Protection of Mission Critical Functions to Achieve Trusted Systems and Networks (TSN), at (<http://www.dtic.mil/whs/directives/corres/pdf/520044p.pdf>).

(b) The authority provided in this subpart expires on September 30, 2018 (see section 806(a) of Pub. L. 112-239).

239.7301 Definitions.

As used in this subpart—

“Covered item of supply” means an item of information technology that is purchased for inclusion in a covered system, and the loss of integrity of which could result in a supply chain risk for a covered system (see section 806(e)(6) of Pub. L. 111-383).

“Covered system” means a national security system, as that term is defined at 44 U.S.C. 3542(b) (see section 806(e)(5) of Pub. L. 111-383). It is any information system, including any telecommunications system, used or operated by an agency or by a contractor of an agency, or other organization on behalf of an agency—

(1) The function, operation, or use of which—

(i) Involves intelligence activities;

(ii) Involves cryptologic activities related to national security;

(iii) Involves command and control of military forces;

(iv) Involves equipment that is an integral part of a weapon or weapons system; or

(v) Is critical to the direct fulfillment of military or intelligence missions, but this does not include a system that is to be used for routine administrative and business applications, including payroll, finance, logistics, and personnel management applications; or

(2) Is protected at all times by procedures established for information that have been specifically authorized under criteria established by an Executive order or an Act of Congress to be kept classified in the interest of national defense or foreign policy.

“Supply chain risk” means the risk that an adversary may sabotage, maliciously introduce unwanted function, or otherwise subvert the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of

a national security system (as that term is defined at 44 U.S.C. 3542(b)) so as to surveil, deny, disrupt, or otherwise degrade the function, use, or operation of such system.

239.7302 Applicability.

Notwithstanding FAR 39.001, this subpart shall be applied to acquisition of information technology for national security systems, as that term is defined at 44 U.S.C. 3542(b), for procurements involving—

(a) A source selection for a covered system or a covered item of supply involving either a performance specification (see 10 U.S.C. 2305(a)(1)(C)(ii)), or an evaluation factor (see 10 U.S.C. 2305(a)(2)(A)), relating to supply chain risk;

(b) The consideration of proposals for and issuance of a task or delivery order for a covered system or a covered item of supply where the task or delivery order contract concerned includes a requirement relating to supply chain risk (see 10 U.S.C. 2304c(d)(3) and FAR 16.505(b)(1)(iv)(D)); or

(c) Any contract action involving a contract for a covered system or a covered item of supply where such contract includes a requirement relating to supply chain risk.

239.7303 Authorized individuals.

(a) Subject to [239.7304](#), the following individuals are authorized to take the actions authorized by [239.7305](#):

- (1) The Secretary of Defense.
- (2) The Secretary of the Army.
- (3) The Secretary of the Navy.
- (4) The Secretary of the Air Force.

(b) The individuals authorized at paragraph (a) may not delegate the authority to take the actions at [239.7305](#) or the responsibility for making the determination required by [239.7304](#) to an official below the level of—

(1) For the Department of Defense, the Under Secretary of Defense for Acquisition, Technology, and Logistics; and,

(2) For the military departments, the senior acquisition executive for the department concerned.

239.7304 Determination and notification.

The individuals authorized in [239.7303](#) may exercise the authority provided in [239.7305](#) only after—

Defense Federal Acquisition Regulation Supplement

Part 239—Acquisition of Information Technology

(a) Obtaining a joint recommendation by the Under Secretary of Defense for Acquisition, Technology, and Logistics and the Chief Information Officer of the Department of Defense, on the basis of a risk assessment by the Under Secretary of Defense for Intelligence, that there is a significant supply chain risk to a covered system;

(b) Making a determination in writing, in unclassified or classified form, with the concurrence of the Under Secretary of Defense for Acquisition, Technology, and Logistics, that—

(1) Use of the authority in [239.7305](#)(a), (b), or (c) is necessary to protect national security by reducing supply chain risk;

(2) Less intrusive measures are not reasonably available to reduce such supply chain risk; and

(3) In a case where the individual authorized in [239.7303](#) plans to limit disclosure of information under [239.7305](#)(d), the risk to national security due to the disclosure of such information outweighs the risk due to not disclosing such information; and

(c)(1) Providing a classified or unclassified notice of the determination made under paragraph (b) of this section—

(i) In the case of a covered system included in the National Intelligence Program or the Military Intelligence Program, to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the congressional defense committees; and

(ii) In the case of a covered system not otherwise included in paragraph (a) of this section, to the congressional defense committees; and

(2) The notice shall include—

(i) The following information (see 10 U.S.C. 2304(f)(3)):

(A) A description of the agency's needs.

(B) An identification of the statutory exception from the requirement to use competitive procedures and a demonstration, based on the proposed contractor's qualifications or the nature of the procurement, of the reasons for using that exception.

(C) A determination that the anticipated cost will be fair and reasonable.

(D) A description of the market survey conducted or a statement of the reasons a market survey was not conducted.

(E) A listing of the sources, if any, that expressed in writing an interest in the procurement.

Defense Federal Acquisition Regulation Supplement

Part 239—Acquisition of Information Technology

(F) A statement of the actions, if any, the agency may take to remove or overcome any barrier to competition before a subsequent procurement for such needs;

(ii) The joint recommendation by the Under Secretary of Defense for Acquisition, Technology, and Logistics and the Chief Information Officer of the Department of Defense as specified in paragraph (a) of this section;

(iii) A summary of the risk assessment by the Under Secretary of Defense for Intelligence that serves as the basis for the joint recommendation specified in paragraph (a) of this section; and

(iv) A summary of the basis for the determination, including a discussion of less intrusive measures that were considered and why they were not reasonably available to reduce supply chain risk.

239.7305 Exclusion and limitation on disclosure.

Subject to [239.7304](#), the individuals authorized in [239.7303](#) may, in the course of procuring information technology, whether as a service or as a supply, that is a covered system, is a part of a covered system, or is in support of a covered system—

(a) Exclude a source that fails to meet qualification standards established in accordance with the requirements of 10 U.S.C. 2319, for the purpose of reducing supply chain risk in the acquisition of covered systems;

(b) Exclude a source that fails to achieve an acceptable rating with regard to an evaluation factor providing for the consideration of supply chain risk in the evaluation of proposals for the award of a contract or the issuance of a task or delivery order;

(c) Withhold consent for a contractor to subcontract with a particular source or direct a contractor for a covered system to exclude a particular source from consideration for a subcontract under the contract; and

(d) Limit, notwithstanding any other provision of law, in whole or in part, the disclosure of information relating to the basis for carrying out any of the actions authorized by paragraphs (a) through (c) of this section, and if such disclosures are so limited—

(1) No action undertaken by the individual authorized under such authority shall be subject to review in a bid protest before the Government Accountability Office or in any Federal court; and

(2) The authorized individual shall—

(i) Notify appropriate parties of action taken under paragraphs (a) through (d) of this section and the basis for such action only to the extent necessary to effectuate action;

(ii) Notify other Department of Defense components or other Federal agencies responsible for procurements that may be subject to the same or similar

supply chain risk, in a manner and to the extent consistent with the requirements of national security; and

- (iii) Ensure the confidentiality of any such notifications.

239.7306 Solicitation provision and contract clause.

(a) Insert the provision at [252.239-7017](#), Notice of Supply Chain Risk, in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, for information technology, whether acquired as a service or as a supply, that is a covered system, is a part of a covered system, or is in support of a covered system, as defined at [239.7301](#).

(b) Insert the clause at [252.239-7018](#), Supply Chain Risk, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, for information technology, whether acquired as a service or as a supply, that is a covered system, is a part of a covered system, or is in support of a covered system, as defined at [239.7301](#).

SUBPART 239.74—TELECOMMUNICATIONS SERVICES

(Revised May 10, 2016)

239.7400 Scope.

This subpart prescribes policy and procedures for acquisition of telecommunications services and maintenance of telecommunications security. Telecommunications services meet the definition of information technology.

239.7401 Definitions.

As used in this subpart—

“Common carrier” means any entity engaged in the business of providing telecommunications services which are regulated by the Federal Communications Commission or other governmental body.

“Foreign carrier” means any person, partnership, association, joint-stock company, trust, governmental body, or corporation not subject to regulation by a U.S. governmental regulatory body and not doing business as a citizen of the United States, providing telecommunications services outside the territorial limits of the United States.

“Governmental regulatory body” means the Federal Communications Commission, any statewide regulatory body, or any body with less than statewide jurisdiction when operating under the State authority. The following are not “governmental regulatory bodies”—

- (1) Regulatory bodies whose decisions are not subject to judicial appeal; and
- (2) Regulatory bodies which regulate a company owned by the same entity which creates the regulatory body.

“Long-haul telecommunications” means all general and special purpose long-distance telecommunications facilities and services (including commercial satellite services, terminal equipment, and local circuitry supporting the long-haul service) to or from the post, camp, base, or station switch and/or main distribution frame (except for trunk lines to the first-serving commercial central office for local communications services).

“Noncommon carrier” means any entity other than a common carrier offering telecommunications facilities, services, or equipment for lease.

“Securing,” “sensitive information,” and “telecommunications systems” have the meaning given in the clause at [252.239-7016](#), Telecommunications Security Equipment, Devices, Techniques, and Services.

“Telecommunications” means the transmission, emission, or reception of signals, signs, writing, images, sounds, or intelligence of any nature, by wire, cable, satellite, fiber optics, laser, radio, or any other electronic, electric, electromagnetic, or acoustically coupled means.

“Telecommunications services” means the services acquired, whether by lease or

contract, to meet the Government's telecommunications needs. The term includes the telecommunications facilities and equipment necessary to provide such services.

239.7402 Policy.

(a) *Acquisition.* DoD policy is to acquire telecommunications services from common and noncommon telecommunications carriers—

(1) On a competitive basis, except when acquisition using other than full and open competition is justified;

(2) Recognizing the regulations, practices, and decisions of the Federal Communications Commission (FCC) and other governmental regulatory bodies on rates, cost principles, and accounting practices; and

(3) Making provision in telecommunications services contracts for adoption of—

(i) FCC approved practices; or

(ii) The generally accepted practices of the industry on those issues concerning common carrier services where—

(A) The governmental regulatory body has not expressed itself;

(B) The governmental regulatory body has declined jurisdiction; or

(C) There is no governmental regulatory body to decide.

(b) *Security.*

(1) The contracting officer shall ensure, in accordance with agency procedures, that purchase requests identify—

(i) The nature and extent of information requiring security during telecommunications;

(ii) The requirement for the contractor to secure telecommunications systems;

(iii) The telecommunications security equipment, devices, techniques, or services with which the contractor's telecommunications security equipment, devices, techniques, or services must be interoperable; and

(iv) The approved telecommunications security equipment, devices, techniques, or services, such as found in the National Security Agency's Information Systems Security Products and Services Catalogue.

(2) Contractors and subcontractors shall provide all telecommunications security techniques or services required for performance of Government contracts.

(3) Except as provided in paragraph (b)(4) of this section, contractors and subcontractors shall normally provide all required property, to include

telecommunications security equipment or related devices, in accordance with FAR 45.102. In some cases, such as for communications security (COMSEC) equipment designated as controlled cryptographic item (CCI), contractors or subcontractors must also meet ownership eligibility conditions.

(4) The head of the agency may authorize provision of the necessary property as Government-furnished property or acquisition as contractor-acquired property, as long as conditions of FAR 45.102(b) are met.

(c) *Foreign carriers.* For information on contracting with foreign carriers, see [PGI 239.7402\(c\)](#).

(d) *Long-haul telecommunications services.* When there is a requirement for procurement of long-haul telecommunications services, follow [PGI 239.7402\(d\)](#).

239.7403 Reserved.

239.7404 Reserved.

239.7405 Delegated authority for telecommunications resources.

The contracting officer may enter into a telecommunications service contract on a month-to-month basis or for any longer period or series of periods, not to exceed a total of 10 years. See [PGI 239.7405](#) for documents relating to this contracting authority, which the General Services Administration has delegated to DoD.

239.7406 Certified cost or pricing data and data other than certified cost or pricing data.

(a) Common carriers are not required to submit certified cost or pricing data before award of contracts for tariffed services. Rates or preliminary estimates quoted by a common carrier for tariffed telecommunications services are considered to be prices set by regulation within the provisions of 10 U.S.C. 2306a. This is true even if the tariff is set after execution of the contract.

(b) Rates or preliminary estimates quoted by a common carrier for nontariffed telecommunications services or by a noncommon carrier for any telecommunications service are not considered prices set by law or regulation.

(c) Contracting officers shall obtain sufficient data to determine that the prices are reasonable in accordance with FAR 15.403-3 or 15.403-4. See [PGI 239.7406](#) for examples of instances where additional data may be necessary to determine price reasonableness.

239.7407 Type of contract.

When acquiring telecommunications services, the contracting officer may use a basic agreement (see FAR 16.702) in conjunction with communication service authorizations. When using this method, follow the procedures at [PGI 239.7407](#).

239.7408 Special construction.

239.7408-1 General.

(a) “Special construction” normally involves a common carrier giving a special service or facility related to the performance of the basic telecommunications service requirements. This may include—

- (1) Moving or relocating equipment;
- (2) Providing temporary facilities;
- (3) Expediting provision of facilities; or

(4) Providing specially constructed channel facilities to meet Government requirements.

(b) Use this subpart instead of FAR Part 36 for acquisition of “special construction.”

(c) Special construction costs may be—

(1) A contingent liability for using telecommunications services for a shorter time than the minimum to reimburse the contractor for unamortized nonrecoverable costs. These costs are usually expressed in terms of a termination liability, as provided in the contract or by tariff;

- (2) A onetime special construction charge;
- (3) Recurring charges for constructed facilities;
- (4) A minimum service charge;
- (5) An expediting charge; or
- (6) A move or relocation charge.

(d) When a common carrier submits a proposal or quotation which has special construction requirements, the contracting officer shall require a detailed special construction proposal. Analyze all special construction proposals to—

- (1) Determine the adequacy of the proposed construction;
- (2) Disclose excessive or duplicative construction; and

(3) When different forms of charge are possible, provide for the form of charge most advantageous to the Government.

(e) When possible, analyze and approve special construction charges before receiving the service. Impose a ceiling on the special construction costs before authorizing the contractor to proceed, if prior approval is not possible. The contracting officer must approve special construction charges before final payment.

239.7408-2 Applicability of construction labor standards for special construction.

(a) The construction labor standards in FAR Subpart 22.4 ordinarily do not apply to special construction. However, if the special construction includes construction, alteration, or repair (as defined in FAR 22.401) of a public building or public work, the construction labor standards may apply. Determine applicability under FAR 22.402.

(b) Each CSA or other type contract which is subject to construction labor standards under FAR 22.402 shall cite that fact.

239.7409 Special assembly.

(a) Special assembly is the designing, manufacturing, arranging, assembling, or wiring of equipment to provide telecommunications services that cannot be provided with general use equipment.

(b) Special assembly rates and charges shall be based on estimated costs. The contracting officer should negotiate special assembly rates and charges before starting service. When it is not possible to negotiate in advance, use provisional rates and charges subject to adjustment, until final rates and charges are negotiated. The CSAs authorizing the special assembly shall be modified to reflect negotiated final rates and charges.

239.7410 Cancellation and termination.

(a)(1) Cancellation is stopping a requirement after placing of an order but before service starts.

(2) Termination is stopping a requirement after placing an order and after service starts.

(b) Determine cancellation or termination charges under the provisions of the applicable tariff or agreement/contract.

239.7411 Contract clauses.

(a) In addition to other appropriate FAR and DFARS clauses, use the following clauses in solicitations, contracts, and basic agreements for telecommunications services. Modify the clauses only if necessary to meet the requirements of a governmental regulatory agency—

- (1) [252.239-7002](#), Access;
- (2) [252.239-7004](#), Orders for Facilities and Services;
- (3) [252.239-7005](#), Rates, Charges, and Services;
- (4) [252.239-7006](#), Tariff Information;
- (5) [252.239-7007](#), Cancellation or Termination of Orders;

Defense Federal Acquisition Regulation Supplement

Part 239—Acquisition of Information Technology

(6) [252.239-7008](#), Reuse Arrangements.

(b) Use the following clauses in solicitations, contracts, and basic agreements for telecommunications services when the acquisition includes or may include special construction. Modify the clauses only if necessary to meet the requirements of a governmental regulatory agency—

(1) [252.239-7011](#), Special Construction and Equipment Charges; and

(2) [252.239-7012](#), Title to Telecommunication Facilities and Equipment.

(c) Use the following clauses in basic agreements for telecommunications services—

(1) [252.239-7013](#), Obligation of the Government;

(2) [252.239-7014](#), Term of Agreement, and insert the effective date of the agreement in paragraph (a) of the clause; and

(3) [252.239-7015](#), Continuation of Communication Service Authorizations, as appropriate, and insert in paragraph (a) of the clause, the name of the contracting office and the basic agreement or contract number which is being superseded.

(d) Use the clause at [252.239-7016](#), Telecommunications Security Equipment, Devices, Techniques, and Services, in solicitations and contracts when performance of a contract requires secure telecommunications.

Defense Federal Acquisition Regulation Supplement

Part 239—Acquisition of Information Technology

SUBPART 239.75
(Removed July 11, 2006)

SUBPART 239.76—CLOUD COMPUTING

(Revised November 30, 2015)

239.7600 Scope of subpart.

This subpart prescribes policies and procedures for the acquisition of cloud computing services.

239.7601 Definitions.

As used in this subpart—

“Authorizing official,” as described in DoD Instruction 8510.01, Risk Management Framework (RMF) for DoD Information Technology (IT), means the senior Federal official or executive with the authority to formally assume responsibility for operating an information system at an acceptable level of risk to organizational operations (including mission, functions, image, or reputation), organizational assets, individuals, other organizations, and the Nation.

“Cloud computing” means a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This includes other commercial terms, such as on-demand self-service, broad network access, resource pooling, rapid elasticity, and measured service. It also includes commercial offerings for software-as-a-service, infrastructure-as-a-service, and platform-as-a-service.

“Government data” means any information, document, media, or machine readable material regardless of physical form or characteristics, that is created or obtained by the Government in the course of official Government business.

“Government-related data” means any information, document, media, or machine readable material regardless of physical form or characteristics that is created or obtained by a contractor through the storage, processing, or communication of Government data. This does not include a contractor’s business records (e.g., financial records, legal records, etc.) or data such as operating procedures, software coding, or algorithms that are not uniquely applied to the Government data.

“Spillage” means a security incident that results in the transfer of classified or controlled unclassified information onto an information system not accredited (i.e., authorized) for the appropriate security level.

239.7602 Policy and responsibilities.

239.7602-1 General.

(a) Generally, the DoD shall acquire cloud computing services using commercial terms and conditions that are consistent with Federal law, and an agency’s needs, including those requirements specified in this subpart. Some examples of commercial terms and conditions are license agreements, End User License Agreements (EULAs), Terms of Service (TOS), or other similar legal instruments or agreements. Contracting officers shall incorporate any applicable service provider terms and conditions into the contract by attachment or other appropriate mechanism. Contracting officers shall

carefully review commercial terms and conditions and consult counsel to ensure these are consistent with Federal law, regulation, and the agency's needs.

(b) The contracting officer shall only award a contract to acquire cloud computing services from any cloud service provider (e.g., contractor or subcontractor, regardless of tier) that has been granted provisional authorization by Defense Information Systems Agency, at the level appropriate to the requirement, to provide the relevant cloud computing services in accordance with the Cloud Computing Security Requirements Guide (SRG) (version in effect at the time the solicitation is issued or as authorized by the contracting officer) found at http://iase.disa.mil/cloud_security/Pages/index.aspx. Provisional authorization processes are also available at the SRG website. Cloud service providers with existing provisional authorization are listed at <http://www.disa.mil/Computing/Cloud-Services/Cloud-Support>.

(c) When contracting for cloud computing services, the contracting officer shall ensure the following information is provided in the purchase request—

(1) Government data and Government-related data descriptions;

(2) Data ownership, licensing, delivery and disposition instructions specific to the relevant types of Government data and Government-related data (e.g., CDRL, SOW task, line item). Disposition instructions shall provide for the transition of data in commercially available, or open and non-proprietary format (and for permanent records, in accordance with disposition guidance issued by National Archives and Record Administration);

(3) Appropriate limitations and requirements regarding contractor and third-party access to, and use and disclosure of, Government data and Government-related data;

(4) Appropriate requirements to support applicable inspection, audit, investigation, or other similar authorized activities specific to the relevant types of Government data and Government-related data, or specific to the type of cloud computing services being acquired;

(5) Appropriate requirements to support and cooperate with applicable system-wide search and access capabilities for inspections, audits, investigations, litigation, eDiscovery, records management associated with the agency's retention schedules, and similar authorized activities; and

(6) A requirement for the contractor to coordinate with the responsible Government official designated by the contracting officer, in accordance with agency procedures, to respond to any spillage occurring in connection with the cloud computing services being provided.

239.7602-2 Required storage of data within the United States or outlying areas.

(a) Cloud computing service providers are required to maintain within the 50 states, the District of Columbia, or outlying areas of the United States, all Government data that is not physically located on DoD premises, unless otherwise authorized by the authorizing official, as described in DoD Instruction 8510.01, Risk

Part 239—Acquisition of Information Technology

Management Framework (RMF) for DoD Information Technology (IT), in accordance with the SRG.

(b) The contracting officer shall provide written notification to the contractor when the contractor is permitted to maintain Government data at a location outside the 50 States, the District of Columbia, and outlying areas of the United States.

239.7603 Procedures.

Follow the procedures relating to cloud computing at [PGI 239.7603](#).

239.7604 Solicitation provision and contract clause.

(a) Use the provision at [252.239-7009](#), Representation of Use of Cloud Computing, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial item, for information technology services.

(b) Use the clause at [252.239-7010](#), Cloud Computing Services, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial item, for information technology services.

NO DFARS TEXT

NO DFARS TEXT

Defense Federal Acquisition Regulation Supplement

Part 241—Acquisition of Utility Services

TABLE OF CONTENTS (Revised January 23, 2006)

SUBPART 241.1—GENERAL

- 241.101 Definitions.
- 241.102 Applicability.
- 241.103 Statutory and delegated authority.

SUBPART 241.2—ACQUIRING UTILITY SERVICES

- 241.201 Policy.
- 241.202 Procedures.
- 241.205 Separate contracts.

SUBPART 241.5—SOLICITATION PROVISION AND CONTRACT CLAUSES

- 241.501 Solicitation provision and contract clauses.
- 241.501-70 Additional clauses.

SUBPART 241.1—GENERAL

(Revised May 10, 2016)

241.101 Definitions.

As used in this part—

“Independent regulatory body” means the Federal Energy Regulatory Commission, a state-wide agency, or an agency with less than state-wide jurisdiction when operating pursuant to state authority. The body has the power to fix, establish, or control the rates and services of utility suppliers.

“Nonindependent regulatory body” means a body that regulates a utility supplier which is owned or operated by the same entity that created the regulatory body, e.g., a municipal utility.

“Regulated utility supplier” means a utility supplier regulated by an independent regulatory body.

“Service power procurement officer” means for the—

Army, the Chief of Engineers;
Navy, the Commander, Naval Facilities Engineering Command;
Air Force, the head of a contracting activity; and
Defense Logistics Agency, the head of a contracting activity.

241.102 Applicability.

(a) This part applies to purchases of utility services from nonregulated and regulated utility suppliers. It includes the acquisition of liquefied petroleum gas as a utility service when purchased from regulated utility suppliers.

(b)(7) This part does not apply to third party financed projects. However, it may be used for any purchased utility services directly resulting from such projects, including those authorized by—

(A) 10 U.S.C. 2394 for energy, fuels, and energy production facilities for periods not to exceed 30 years;

(B) 10 U.S.C. 2394a for renewable energy for periods not to exceed 25 years;

(C) 10 U.S.C. 2689 for geothermal resources that result in energy production facilities;

(D) 10 U.S.C. 2809 for potable and waste water treatment plants for periods not to exceed 32 years; and

(E) 10 U.S.C. 2812 for lease/purchase of energy production facilities for periods not to exceed 32 years.

241.103 Statutory and delegated authority.

(1) The contracting officer may enter into a utility service contract related to the conveyance of a utility system for a period not to exceed 50 years (10 U.S.C. 2688(d)(2)).

(2) The contracting officer may enter into an energy savings contract under 10 U.S.C. 2913 for a period not to exceed 25 years.

(3) See [217.174](#) for authority to enter into multiyear contracts for electricity from renewable energy sources.

(4) See [PGI 241.103](#) for statutory authorities and maximum contract periods for utility and energy contracts.

SUBPART 241.2—ACQUIRING UTILITY SERVICES

(Revised December 31, 2012)

241.201 Policy.

(1) DoD, as a matter of comity, generally complies with the current regulations, practices, and decisions of independent regulatory bodies. This policy does not extend to nonindependent regulatory bodies.

(2) Purchases of utility services outside the United States may use—

- (i) Formats and technical provisions consistent with local practice; and
- (ii) Dual language forms and contracts.

(3) Rates established by an independent regulatory body—

- (i) Are considered “prices set by law or regulation”;
- (ii) Are sufficient to set prices without obtaining certified cost or pricing data (see FAR subpart 15.4); and
- (iii) Are a valid basis on which prices can be determined fair and reasonable.

(4) Compliance with the regulations, practices, and decisions of independent regulatory bodies as a matter of comity is not a substitute for the procedures at FAR 41.202(a).

241.202 Procedures.

(1) *Connection and service charges.* The Government may pay a connection charge when required to cover the cost of the necessary connecting facilities. A connection charge based on the estimated labor cost of installing and removing the facility shall not include salvage cost. A lump-sum connection charge shall be no more than the agreed cost of the connecting facilities less net salvage. The order of precedence for contractual treatment of connection and service charges is—

- (i) No connection charge.
- (ii) Termination liability. Use when an obligation is necessary to secure the required services. The obligation must be not more than the agreed connection charge, less any net salvage material costs. Use of a termination liability instead of a connection charge requires the approval of the service power procurement officer or designee.
- (iii) Connection charge, refundable. Use a refundable connection charge when the supplier refuses to provide the facilities based on lack of capital or published rules which prohibit providing up-front funding. The contract should provide for refund of the connection charge within five years unless a longer period or omission of the refund requirement is authorized by the service power procurement officer or designee.

Defense Federal Acquisition Regulation Supplement

Part 241—Acquisition of Utility Services

(iv) Connection and service charges, nonrefundable. The Government may pay certain nonrefundable, nonrecurring charges including service initiation charges, a contribution in aid of construction, membership fees, and charges required by the supplier's rules and regulations to be paid by the customer. If possible, consider sharing with other than Government users the use of (and costs for) facilities when large nonrefundable charges are required.

(2) *Construction and labor requirements.* Follow the procedures at [PGI 241.202](#)(2) for construction and labor requirements associated with connection and service charges.

241.205 Separate contracts.

Follow the procedures at [PGI 241.205](#) when acquiring utility services by separate contract.

SUBPART 241.5—SOLICITATION PROVISION AND CONTRACT CLAUSES

(Revised January 23, 2006)

241.501 Solicitation provision and contract clauses.

(d) (1) Use a clause substantially the same as the clause at FAR 52.241-7, Change in Rates or Terms and Conditions of Service for Regulated Services, when the utility services to be provided are subject to an independent regulatory body.

(2) Use a clause substantially the same as the clause at FAR 52.241-8, Change in Rates or Terms and Conditions of Service for Unregulated Services, when the utility services to be provided are not subject to a regulatory body or are subject to a nonindependent regulatory body.

241.501-70 Additional clauses.

(a) If the Government must execute a superseding contract and capital credits, connection charge credits, or termination liability exist, use the clause at 252.241-7000, Superseding Contract.

(b) Use the clause at 252.241-7001, Government Access, when the clause at FAR 52.241-5, Contractor's Facilities, is used.

SUBPART 242.70— CONTRACTOR BUSINESS SYSTEMS

(Revised February 24, 2012)

242.7000 Contractor business system deficiencies.

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

“Acceptable contractor business systems” and “contractor business systems” are defined in the clause at [252.242-7005](#), Contractor Business Systems.

“Covered contract” means a contract that is subject to the Cost Accounting Standards under 41 U.S.C. chapter 15, as implemented in regulations found at 48 CFR 9903.201-1 (see the FAR Appendix) (10 U.S.C. 2302 note, as amended by section 816 of Public Law 112-81).

“Significant deficiency” is defined in the clause at [252.242-7005](#), Contractor Business Systems.

(b) *Determination to withhold payments.* If the contracting officer makes a final determination to disapprove a contractor’s business system in accordance with the clause at [252.242-7005](#), Contractor Business Systems, the contracting officer shall—

(1) In accordance with agency procedures, identify one or more covered contracts containing the clause at [252.242-7005](#), Contractor Business Systems, from which payments will be withheld. When identifying the covered contracts from which to withhold payments, the contracting officer shall ensure that the total amount of payment withholding under [252.242-7005](#) does not exceed 10 percent of progress payments, performance-based payments, and interim payments under cost-reimbursement, labor-hour, and time-and-materials contracts billed under each of the identified covered contracts. Similarly, the contracting officer shall ensure that the total amount of payment withholding under the clause at [252.242-7005](#), Contractor Business Systems, for each business system does not exceed five percent of progress payments, performance-based payments, and interim payments under cost-reimbursement, labor-hour, and time-and-materials contracts billed under each of the identified covered contracts. The contracting officer has the sole discretion to identify the covered contracts from which to withhold payments.

(2) Promptly notify the contractor, in writing, of the contracting officer’s determination to implement payment withholding in accordance with the clause at [252.242-7005](#), Contractor Business Systems. The notice of payment withholding shall be included in the contracting officer’s written final determination for the contractor business system and shall inform the contractor that—

(i) Payments shall be withheld from the contract or contracts identified in the written determination in accordance with the clause at [252.242-7005](#), Contractor Business Systems, until the contracting officer determines that there are no remaining significant deficiencies; and

(ii) The contracting officer reserves the right to take other actions within the terms and conditions of the contract.

Defense Federal Acquisition Regulation Supplement

Part 242—Contract Administration and Audit Services

(3) Provide all contracting officers administering the selected contracts from which payments will be withheld, a copy of the determination. The contracting officer shall also provide a copy of the determination to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

(c) *Monitoring contractor's corrective action.* The contracting officer, in consultation with the auditor or functional specialist, shall monitor the contractor's progress in correcting the deficiencies. The contracting officer shall notify the contractor of any decision to decrease or increase the amount of payment withholding in accordance with the clause at [252.242-7005](#), Contractor Business Systems.

(d) *Correction of significant deficiencies.* (1) If the contractor notifies the contracting officer that the contractor has corrected the significant deficiencies, the contracting officer shall request the auditor or functional specialist to review the correction to verify that the deficiencies have been corrected. If, after receipt of verification, the contracting officer determines that the contractor has corrected all significant deficiencies as directed by the contracting officer's final determination, the contracting officer shall discontinue the withholding of payments, release any payments previously withheld, and approve the system, unless other significant deficiencies remain.

(2) Prior to the receipt of verification, the contracting officer may discontinue withholding payments pending receipt of verification, and release any payments previously withheld, if the contractor submits evidence that the significant deficiencies have been corrected, and the contracting officer, in consultation with the auditor or functional specialist, determines that there is a reasonable expectation that the corrective actions have been implemented and are expected to correct the significant deficiencies.

(3) Within 90 days of receipt of the contractor notification that the contractor has corrected the significant deficiencies, the contracting officer shall--

(i) Make a determination that—

(A) The contractor has corrected all significant deficiencies as directed by the contracting officer's final determination in accordance with paragraph (d)(1) of this section;

(B) There is a reasonable expectation that the corrective actions have been implemented in accordance with paragraph (d)(2) of this section; or

(C) The contractor has not corrected all significant deficiencies as directed by the contracting officer's final determination in accordance with paragraph (d)(1) of this section, or there is not a reasonable expectation that the corrective actions have been implemented in accordance with paragraph (d)(2) of this section; or

(ii) Reduce withholding directly related to the significant deficiencies covered under the corrective action plan by at least 50 percent of the amount being withheld from progress payments and performance-based payments, and direct the contractor, in writing, to reduce the percentage withheld on interim cost vouchers by at

Defense Federal Acquisition Regulation Supplement

Part 242—Contract Administration and Audit Services

least 50 percent, until the contracting officer makes a determination in accordance with paragraph (d)(3)(i) of this section.

(4) If, at any time, the contracting officer determines that the contractor has failed to correct the significant deficiencies identified in the contractor's notification, the contracting officer will continue, reinstate, or increase withholding from progress payments and performance-based payments, and direct the contractor, in writing, to continue, reinstate, or increase the percentage withheld on interim cost vouchers to the percentage initially withheld, until the contracting officer determines that the contractor has corrected all significant deficiencies as directed by the contracting officer's final determination.

(e) For sample formats for written notifications of contracting officer determinations to initiate payment withholding, reduce payment withholding, and discontinue payment withholding in accordance with the clause at DFARS [252.242-7005](#), Contractor Business Systems, see PGI [242.7000](#).

242.7001 Contract clause.

Use the clause at [252.242-7005](#), Contractor Business Systems, in solicitations and contracts (other than in contracts with educational institutions, Federally Funded Research and Development Centers (FFRDCs), or University Associated Research Centers (UARC)s operated by educational institutions) when—

- (a) The resulting contract will be a covered contract as defined in [242.7000](#)(a); and
- (b) The solicitation or contract includes any of the following clauses:
 - (1) [252.215-7002](#), Cost Estimating System Requirements.
 - (2) [252.234-7002](#), Earned Value Management System.
 - (3) [252.242-7004](#), Material Management and Accounting System.
 - (4) [252.242-7006](#), Accounting System Administration.
 - (5) [252.244-7001](#), Contractor Purchasing System Administration.
 - (6) [252.245-7003](#), Contractor Property Management System Administration.

Defense Federal Acquisition Regulation Supplement

Part 242—Contract Administration and Audit Services

TABLE OF CONTENTS (Revised June 29, 2012)

242.002 Interagency agreements.

SUBPART 242.2—CONTRACT ADMINISTRATION SERVICES

242.200-70 Scope of subpart.

242.202 Assignment of contract administration.

SUBPART 242.3—CONTRACT ADMINISTRATION OFFICE FUNCTIONS

242.301 General.

242.302 Contract administration functions.

SUBPART 242.5—POSTAWARD ORIENTATION

242.503 Postaward conferences.

242.503-2 Postaward conference procedure.

SUBPART 242.6—CORPORATE ADMINISTRATIVE CONTRACTING OFFICER

242.602 Assignment and location.

SUBPART 242.7—INDIRECT COST RATES

242.705 Final indirect cost rates.

242.705-1 Contracting officer determination procedure.

242.705-2 Auditor determination procedure.

242.770 Reserved.

242.771 Independent research and development and bid and proposal costs.

242.771-1 Scope.

242.771-2 Policy.

242.771-3 Responsibilities.

SUBPART 242.8—DISALLOWANCE OF COSTS

242.803 Disallowing costs after incurrence.

SUBPART 242.11—PRODUCTION SURVEILLANCE AND REPORTING

242.1104 Surveillance requirements.

242.1105 Assignment of criticality designator.

242.1106 Reporting requirements.

242.1107 Contract clause.

SUBPART 242.12—NOVATION AND CHANGE-OF-NAME AGREEMENTS

242.1203 Processing agreements.

242.1204 Agreement to recognize a successor in interest (novation agreement).

SUBPART 242.15—CONTRACTOR PERFORMANCE INFORMATION

242.1502 Policy.

SUBPART 242.70—CONTRACTOR BUSINESS SYSTEMS.

242.7000 Contractor business system deficiencies.

242.7001 Contract clause.

SUBPART 242.71—VOLUNTARY REFUNDS

Defense Federal Acquisition Regulation Supplement

Part 242—Contract Administration and Audit Services

242.7100 General.

SUBPART 242.72—CONTRACTOR MATERIAL MANAGEMENT AND ACCOUNTING SYSTEM

242.7200 Scope of subpart.
242.7201 Definitions.
242.7202 Policy.
242.7203 Review procedures.
242.7204 Contract clause.

SUBPART 242.73—CONTRACTOR INSURANCE/PENSION REVIEW

242.7301 General.
242.7302 Requirements.
242.7303 Responsibilities.

SUBPART 242.74—TECHNICAL REPRESENTATION AT CONTRACTOR FACILITIES

242.7400 General.
242.7401 Procedures.

SUBPART 242.75—CONTRACTOR ACCOUNTING SYSTEMS AND RELATED CONTROLS

242.7501 Definitions.
242.7502 Policy.
242.7503 Contract clause.

(Revised November 9, 2005)

242.002 Interagency agreements.

(b)(i) DoD requires reimbursement, at a rate set by the Under Secretary of Defense (Comptroller/Chief Financial Officer), from non-DoD organizations, except for—

(A) Quality assurance, contract administration, and audit services provided under a no-charge reciprocal agreement;

(B) Services performed under subcontracts awarded by the Small Business Administration under FAR Subpart 19.8; and

(C) Quality assurance and pricing services performed for the Supply and Services Canada.

(ii) Departments and agencies may request an exception from the reimbursement policy in paragraph (b)(i) of this section from the Under Secretary of Defense (Comptroller/Chief Financial Officer). A request must show that an exception is in the best interest of the Government.

(iii) Departments and agencies must pay for services performed by non-DoD activities, foreign governments, or international organizations, unless otherwise provided by reciprocal agreements.

(S-70)(i) Foreign governments and international organizations may request contract administration services on their direct purchases from U.S. producers. Direct purchase is the purchase of defense supplies in the United States through commercial channels for use by the foreign government or international organization.

(ii) Supply and Services Canada (SSC) is permitted to submit its requests for contract administration services directly to the cognizant contract administration office.

(iii) Other foreign governments (including Canadian government organizations other than SSC) and international organizations send their requests for contract administration services to the DoD Central Control Point (CCP) at the Headquarters, Defense Contract Management Agency, International and Federal Business Team. Contract administration offices provide services only upon request from the CCP. The CCP shall follow the procedures at PGI 242.002(S-70)(iii).

Defense Federal Acquisition Regulation Supplement

Part 242—Contract Administration and Audit Services

SUBPART 242.1—(Removed)
(November 09, 1999)

SUBPART 242.3—CONTRACT ADMINISTRATION OFFICE FUNCTIONS
(Revised June 26, 2015)

242.301 General.

Contract administration services performed outside the United States should be performed in accordance with FAR 42.301 unless there are no policies and procedures covering a given situation. In this case, coordinate proposed actions with the appropriate U.S. country teams or commanders of unified and specified commands.

242.302 Contract administration functions.

(a)(7) See [242.7502](#) for ACO responsibilities with regard to receipt of an audit report identifying significant accounting system or related internal control deficiencies.

(9) For additional contract administration functions related to IR&D/B&P projects performed by major contractors, see [242.771-3\(a\)](#).

(12) Also perform all payment administration in accordance with any applicable payment clauses.

(13)(A) Do not delegate the responsibility to make payments to the Defense Contract Management Agency (DCMA).

(B) Follow the procedures at [PGI 242.302\(a\)\(13\)\(B\)](#) for designation of payment offices.

(39) See [223.370](#) for contract administration responsibilities on contracts for ammunition and explosives.

(67) Also support program offices and buying activities in precontractual efforts leading to a solicitation or award.

(S-70) Serve as the single point of contact for all Single Process Initiative (SPI) Management Council activities. The ACO shall negotiate and execute facilitywide class modifications and agreements for SPI processes, when authorized by the affected components.

(S-71) DCMA has responsibility for reviewing earned value management system (EVMS) plans and for verifying initial and continuing contractor compliance with DoD EVMS criteria. The contracting officer shall not retain this function.

(S-72) Ensure implementation of the Synchronized Predeployment and Operational Tracker (SPOT) by the contractor and maintain surveillance over contractor compliance with SPOT business rules available at the website provided at [PGI 207.105\(b\)\(20\)\(C\)\(9\)](#) for contracts incorporating the clause at [252.225-7040](#), Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United States. See [PGI 242.302\(a\)\(S-72\)](#) for guidance on assessing contractor's implementation of SPOT.

(S-73) Maintain surveillance over contractor compliance with trafficking in persons requirements for all DoD contracts for services incorporating the clause at FAR

Defense Federal Acquisition Regulation Supplement

Part 242—Contract Administration and Audit Services

52.222-50, Combating Trafficking in Persons, and, when necessary, its Alternate I, as identified in the clause prescription at FAR 22.1705. (See [PGI 222.1703](#).)

(S-74) Approve or disapprove contractor business systems, as identified in the clause at [252.242-7005](#), Contractor Business Systems.

(S-75) See [PGI 242.302](#)(a)(S-75) for guidelines for monitoring contractor costs.

(b)(S-70) Issue, negotiate, and execute orders under basic ordering agreements for overhaul, maintenance, and repair.

SUBPART 242.2—CONTRACT ADMINISTRATION SERVICES

(Revised April 20, 2012)

242.200-70 Scope of subpart.

This subpart does not address the contract administration role of a contracting officer's representative (see [201.602](#)).

242.202 Assignment of contract administration.

(a)(i) DoD activities shall not retain any contract for administration that requires performance of any contract administration function at or near contractor facilities, except contracts for—

- (A) The National Security Agency;
- (B) Research and development with universities;
- (C) Flight training;
- (D) Management and professional support services;
- (E) Mapping, charting, and geodesy services;
- (F) Base, post, camp, and station purchases;
- (G) Operation or maintenance of, or installation of equipment at, radar or communication network sites;
- (H) Communications services;
- (I) Installation, operation, and maintenance of space-track sensors and relays;
- (J) Dependents Medicare program contracts;
- (K) Stevedoring contracts;
- (L) Construction and maintenance of military and civil public works, including harbors, docks, port facilities, military housing, development of recreational facilities, water resources, flood control, and public utilities;
- (M) Architect-engineer services;
- (N) Airlift and sealift services (Air Mobility Command and Military Sealift Command may perform contract administration services at contractor locations involved solely in performance of airlift or sealift contracts);
- (O) Subsistence supplies;

Defense Federal Acquisition Regulation Supplement

Part 242--Contract Administration and Audit Services

(P) Ballistic missile sites (contract administration offices may perform supporting administration of these contracts at missile activation sites during the installation, test, and checkout of the missiles and associated equipment);

(Q) Operation and maintenance of, or installation of equipment at, military test ranges, facilities, and installations; and

(R) The Defense Energy Support Center, Defense Logistics Agency.

(ii) Contract administration functions for base, post, camp, and station contracts on a military installation are normally the responsibility of the installation or tenant commander. However, the Defense Contract Management Agency (DCMA) shall, upon request of the military department, and subject to prior agreement, perform contract administration services on a military installation.

(iii) DCMA shall provide preaward survey assistance for post, camp, and station work performed on a military installation. The contracting office and the DCMA preaward survey monitor should jointly determine the scope of the survey and individual responsibilities.

(iv) To avoid duplication, contracting offices shall not locate their personnel at contractor facilities, except—

(A) In support of contracts retained for administration in accordance with paragraph (a)(i) of this section; or

(B) As permitted under Subpart [242.74](#).

(e)(1)(A) In special circumstances, a contract administration office may request support from a component not listed in the Federal Directory of Contract Administration Services Components (available via the Internet at <https://pubapp.dcmil/CASD/main.jsp>). An example is a situation where the contractor's work site is on a military base and a base organization is asked to provide support. Before formally sending the request, coordinate with the office concerned to ensure that resources are available for, and capable of, providing the support.

(B) When requesting support on a subcontract that includes foreign military sale (FMS) requirements, the contract administration office shall—

(1) Mark “FMS Requirement” on the face of the documents; and

(2) For each FMS case involved, provide the FMS case identifier, associated item quantities, DoD prime contract number, and prime contract line/subline item number.

SUBPART 242.3—CONTRACT ADMINISTRATION OFFICE FUNCTIONS

(Revised August 2, 2016)

242.301 General.

Contract administration services performed outside the United States should be performed in accordance with FAR 42.301 unless there are no policies and procedures covering a given situation. In this case, coordinate proposed actions with the appropriate U.S. country teams or commanders of unified and specified commands.

242.302 Contract administration functions.

(a)(7) See [242.7502](#) for ACO responsibilities with regard to receipt of an audit report identifying significant accounting system or related internal control deficiencies.

(9) For additional contract administration functions related to IR&D/B&P projects performed by major contractors, see [242.771-3\(a\)](#).

(12) Also perform all payment administration in accordance with any applicable payment clauses.

(13)(A) Do not delegate the responsibility to make payments to the Defense Contract Management Agency (DCMA).

(B) Follow the procedures at [PGI 242.302\(a\)\(13\)\(B\)](#) for designation of payment offices.

(39) See [223.370](#) for contract administration responsibilities on contracts for ammunition and explosives.

(67) Also support program offices and buying activities in precontractual efforts leading to a solicitation or award.

(S-70) Serve as the single point of contact for all Single Process Initiative (SPI) Management Council activities. The ACO shall negotiate and execute facilitywide class modifications and agreements for SPI processes, when authorized by the affected components.

(S-71) DCMA has responsibility for reviewing earned value management system (EVMS) plans and for verifying initial and continuing contractor compliance with DoD EVMS criteria. The contracting officer shall not retain this function.

(S-72) Ensure implementation of the Synchronized Predeployment and Operational Tracker (SPOT) by the contractor and maintain surveillance over contractor compliance with SPOT business rules available at the website provided at [PGI 207.105\(b\)\(20\)\(C\)\(9\)](#) for contracts incorporating the clause at [252.225-7040](#), Contractor Personnel Supporting U.S. Armed Forces Deployed Outside the United States. See [PGI 242.302\(a\)\(S-72\)](#) for guidance on assessing contractor's implementation of SPOT.

(S-73) Maintain surveillance over contractor compliance with trafficking in persons requirements for all DoD contracts for services incorporating the clause at FAR

Defense Federal Acquisition Regulation Supplement

Part 242--Contract Administration and Audit Services

52.222-50, Combating Trafficking in Persons, and, when necessary, its Alternate I, as identified in the clause prescription at FAR 22.1705. (See [PGI 222.1703](#).)

(S-74) Approve or disapprove contractor business systems, as identified in the clause at [252.242-7005](#), Contractor Business Systems.

(S-75) See [PGI 242.302](#)(a)(S-75) for guidelines for monitoring contractor costs.

(S-76) Review and audit contractor identification of contractor-approved suppliers for the acquisition of electronic parts, as identified in the clause at [252.246-7008](#), Sources of Electronic Parts.

(b)(S-70) Issue, negotiate, and execute orders under basic ordering agreements for overhaul, maintenance, and repair.

Defense Federal Acquisition Regulation Supplement

Part 242—Contract Administration and Audit Services

SUBPART 242.4
(Removed November 9, 2005)

Defense Federal Acquisition Regulation Supplement

Part 242--Contract Administration and Audit Services

SUBPART 242.5--POSTAWARD ORIENTATION

(Revised November 24, 2010)

242.503 Postaward conferences.

242.503-2 Postaward conference procedure.

(a) DD Form 1484, Post-Award Conference Record, may be used in conducting the conference and in preparing the conference report.

(b) For contracts that include the clause at 252.234-7004, Cost and Software Data Reporting, postaward conferences shall include a discussion of the contractor's standard cost and software data reporting (CSDR) process that satisfies the guidelines contained in the DoD 5000.04-M-1, CSDR Manual, and the requirements in the Government-approved CSDR plan for the contract, DD Form 2794, and related Resource Distribution Table.

Defense Federal Acquisition Regulation Supplement

Part 242—Contract Administration and Audit Services

**SUBPART 242.6—CORPORATE ADMINISTRATIVE CONTRACTING
OFFICER**

(Revised February 14, 2003)

242.602 Assignment and location.

(c)(2) If the agencies cannot agree, refer the matter to the Director of Defense Procurement and Acquisition Policy.

SUBPART 242.7--INDIRECT COST RATES

(Revised November 9, 2005)

242.705 Final indirect cost rates.

See DoD [Class Deviation 2012-O0013](#), DCAA Policy and Procedure for Sampling Low-Risk Incurred Cost Proposals, issued on July 24, 2012. Effective immediately, for the purposes of satisfying the audit requirements at FAR 4.804-5(a)(12), 42.705-1(b)(2), and 42.705-2(b)(2)(i), Department of Defense contracting officers shall continue to rely on either a DCAA audit report or a DCAA memorandum documenting that, based on a risk assessment and a proposal adequacy evaluation pursuant to FAR 42.705-1(b)(1)(iii), DCAA deemed the incurred cost proposal to be low-risk and did not select it for further audit in accordance with the attached DCAA Policy dated July 6, 2012. This deviation is effective until incorporated in the DFARS or rescinded.

242.705-1 Contracting officer determination procedure.

(a) Applicability and responsibility.

(1) The corporate administrative contracting officer and individual administrative contracting officers shall jointly decide how to conduct negotiations. Follow the procedures at PGI 242.705-1(a)(1) when negotiations are conducted on a coordinated basis.

242.705-2 Auditor determination procedure.

(b) Procedures.

(2)(iii) When agreement cannot be reached with the contractor, the auditor will issue a DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved, in addition to the advisory report to the administrative contracting officer.

242.770 Reserved.

242.771 Independent research and development and bid and proposal costs.

242.771-1 Scope.

This section implements 10 U.S.C. 2372, Independent research and development and bid and proposal costs: payments to contractors.

242.771-2 Policy.

Defense contractors are encouraged to engage in independent research and development and bid and proposal (IR&D/B&P) activities of potential interest to DoD, including activities cited in 231.205-18(c)(iii)(B).

242.771-3 Responsibilities.

(a) The cognizant administrative contracting officer (ACO) or corporate ACO shall—

(1) Determine cost allowability of IR&D/B&P costs as set forth in 231.205-18 and FAR 31.205-18;

Defense Federal Acquisition Regulation Supplement

Part 242--Contract Administration and Audit Services

(2) Determine whether IR&D/B&P projects performed by major contractors (see 231.205-18(a)) are of potential interest to DoD; and

(3) Notify the contractor promptly of any IR&D/B&P activities that are not of potential interest to DoD.

(b) The Defense Contract Management Agency or the military department responsible for performing contract administration functions is responsible for providing the Defense Contract Audit Agency (DCAA) with IR&D/B&P statistical information, as necessary, to assist DCAA in the annual report required by paragraph (c) of this subsection.

(c) DCAA is responsible for submitting an annual report to the Director of Defense Procurement and Acquisition Policy, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics) (OUSD(AT&L)), setting forth required statistical information relating to the DoD-wide IR&D/B&P program.

(d) The Director, Defense Research and Engineering (OUSD(AT&L)DDR&E), is responsible for establishing a regular method for communication—

(1) From DoD to contractors, of timely and comprehensive information regarding planned or expected DoD future needs; and

(2) From contractors to DoD, of brief technical descriptions of contractor IR&D projects.

SUBPART 242.8—DISALLOWANCE OF COSTS

(Revised August 29, 2012)

242.803 Disallowing costs after incurrence.

(a) *Contracting officer receipt of vouchers.* Contracting officer receipt of vouchers is applicable only for cost-reimbursement contracts with the Canadian Commercial Corporation. See [225.870-5\(b\)](#) for invoice procedures.

(b) *Auditor receipt of voucher.*

(i) The contract auditor is the authorized representative of the contracting officer for—

(A) Receiving vouchers from contractors electronically or by other delivery methods as directed by the terms of the contract;

(B) Approving interim vouchers, that were selected using sampling methodologies for provisional payment and sending them to the disbursing office after a pre-payment review. Interim vouchers not selected for a pre-payment review will be considered to be provisionally approved and will be sent directly to the disbursing office. All provisionally approved interim vouchers are subject to a later audit of actual costs incurred;

(C) Reviewing completion/final vouchers and sending them to the administrative contracting officer; and

(D) Issuing DCAA Forms 1, Notice of Contract Costs Suspended and/or Disapproved, to deduct costs where allowability is questionable.

(ii) The administrative contracting officer—

(A) Approves all completion/final vouchers and sends them to the disbursing officer; and

(B) May issue or direct the issuance of DCAA Form 1 on any cost when there is reason to believe it should be suspended or disallowed.

SUBPART 242.11—PRODUCTION SURVEILLANCE AND REPORTING
(Revised April 23, 2008)

242.1104 Surveillance requirements.

(a) The cognizant contract administration office (CAO)—

(i) Shall perform production surveillance on all contractors that have Criticality Designator A or B contracts;

(ii) Shall not perform production surveillance on contractors that have only Criticality Designator C contracts, unless specifically requested by the contracting officer; and

(iii) When production surveillance is required, shall—

(A) Conduct a periodic risk assessment of the contractor to determine the degree of production surveillance needed for all contracts awarded to that contractor. The risk assessment shall consider information provided by the contractor and the contracting officer;

(B) Develop a production surveillance plan based on the risk level determined during a risk assessment;

(C) Modify the production surveillance plan to incorporate any special surveillance requirements for individual contracts, including any requirements identified by the contracting officer; and

(D) Monitor contract progress and identify potential contract delinquencies in accordance with the production surveillance plan. Contracts with Criticality Designator C are exempt from this requirement unless specifically requested by the contracting officer.

242.1105 Assignment of criticality designator.

(1) Contracting officers shall—

(i) Assign criticality designator A to items with a priority 01, 02, 03, or 06 (if emergency supply of clothing) under DoD 4140.1-R, DoD Materiel Management Regulation; and

(ii) Ordinarily assign criticality designator C to unilateral purchase orders.

(2) Only the contracting officer shall change the assigned designator.

242.1106 Reporting requirements.

(a) See DoDI 5000.2, Operation of the Defense Acquisition System, for reporting requirements for defense technology projects and acquisition programs.

(b)(i) Within four working days after receipt of the contractor's report, the CAO must provide the report and any required comments to the contracting officer and, unless otherwise specified in the contract, the inventory control manager.

(ii) If the contractor's report indicates that the contract is on schedule and the CAO agrees, the CAO does not need to add further comments. In all other cases, the CAO must add comments and recommend a course of action.

242.1107 Contract clause.

(b) When using the clause at FAR 52.242-2, include the following instructions in the contract schedule—

(i) Frequency and timing of reporting (normally five working days after each reporting period);

(ii) Contract line items, exhibits, or exhibit line items requiring reports;

(iii) Offices (with addressees/codes) where reports should be sent (always include the contracting office and contract administration office); and

(iv) The following requirements for report content—

(A) The problem, actual or potential, and its cause;

(B) Items and quantities affected;

(C) When the delinquency started or will start;

(D) Actions taken to overcome the delinquency;

(E) Estimated recovery date; and/or

(F) Proposed schedule revision.

SUBPART 242.12—NOVATION AND CHANGE-OF-NAME AGREEMENTS

(Revised November 9, 2005)

242.1203 Processing agreements.

The responsible contracting officer shall process and execute novation and change-of-name agreements in accordance with the procedures at PGI 242.1203.

242.1204 Agreement to recognize a successor in interest (novation agreement).

(i) When a novation agreement is required and the transferee intends to incur restructuring costs as defined at 231.205-70, the cognizant contracting officer shall include the following provision as paragraph (b)(7) of the novation agreement instead of the paragraph (b)(7) provided in the sample format at FAR 42.1204(i):

“(7)(i) Except as set forth in subparagraph (7)(ii) below, 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.

(ii) The Government recognizes that restructuring by the Transferee incidental to the acquisition/merger may be in the best interests of the Government. Restructuring costs that are allowable under Part 31 of the Federal Acquisition Regulation (FAR) or Part 231 of the Defense Federal Acquisition Regulation Supplement (DFARS) may be reimbursed under flexibly-priced novated contracts, provided the Transferee demonstrates that the restructuring will reduce overall costs to the Department of Defense (DoD) (and to the National Aeronautics and Space Administration (NASA), where there is a mix of DoD and NASA contracts), and the requirements included in DFARS 231.205-70 are met. Restructuring costs shall not be allowed on novated contracts unless there is an audit of the restructuring proposal; a determination by the contracting officer of overall reduced costs to DoD/NASA; and an Advance Agreement setting forth a cumulative cost ceiling for restructuring projects and the period to which such costs shall be assigned.”

Defense Federal Acquisition Regulation Supplement

Part 242—Contract Administration and Audit Services

SUBPART 242.14—TRAFFIC AND TRANSPORTATION MANAGEMENT
(Removed June 29, 2012)

Defense Federal Acquisition Regulation Supplement

Part 242—Contract Administration and Audit Services

SUBPART 242.15—CONTRACTOR PERFORMANCE INFORMATION (Added May 19, 2006)

242.1502 Policy.

See DoD Class Deviation [2013-O0018](#), Past Performance Evaluation Thresholds and Reporting Requirements, issued on September 24, 2013. This class deviation establishes thresholds for past performance reporting on DoD actions and requires past performance reporting for contracts awarded under FAR 8.6, Acquisition from Federal Prison Industries, Inc., and FAR subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who are Blind or Severely Handicapped, when the thresholds in this class deviation are exceeded. The class deviation also encourages contracting officers to manually register and complete assessment reports on science and technology contracts and delivery/task orders under budget accounts 6.1, 6.2, and 6.3 over \$1,000,000. This deviation is effective until incorporated in the DFARS or rescinded.

SUBPART 242.71—VOLUNTARY REFUNDS

(Revised November 9, 2005)

242.7100 General.

A voluntary refund is a payment or credit (adjustment under one or more contracts or subcontracts) to the Government from a contractor or subcontractor that is not required by any contractual or other legal obligation. Follow the procedures at PGI 242.7100 for voluntary refunds.

**SUBPART 242.72--CONTRACTOR MATERIAL MANAGEMENT AND
ACCOUNTING SYSTEM**
(Revised June 7, 2016)

242.7200 Scope of subpart.

(a) This subpart provides policies, procedures, and standards for use in the evaluation of a contractor's material management and accounting system (MMAS).

(b) The policies, procedures, and standards in this subpart--

(1) Apply only when the contractor has contracts exceeding the simplified acquisition threshold that are not for the acquisition of commercial items and are either--

(i) Cost-reimbursement contracts; or

(ii) Fixed-price contracts with progress payments made on the basis of costs incurred by the contractor as work progresses under the contract; and

(2) Do not apply to small businesses, educational institutions, or nonprofit organizations.

242.7201 Definitions.

“Acceptable material management and accounting system,” “material management and accounting system,” and “valid time-phased requirements” are defined in the clause at [252.242-7004](#), Material Management and Accounting System.

“Significant deficiency” is defined in the clause at [252.242.7004](#), Material Management and Accounting System.

242.7202 Policy.

(a) DoD policy is for its contractors to have an MMAS that conforms to the standards in paragraph (d) of the clause at [252.242-7004](#), Material Management and Accounting System, so that the system—

(1) Reasonably forecasts material requirements;

(2) Ensures the costs of purchased and fabricated material charged or allocated to a contract are based on valid time-phased requirements; and

(3) Maintains a consistent, equitable, and unbiased logic for costing of material transactions.

(b) The cognizant contracting officer, in consultation with the auditor and functional specialist, if appropriate, shall—

(1) Determine the acceptability of the contractor's MMAS and approve or disapprove the system; and

(2) Pursue correction of any deficiencies.

(c) In evaluating the acceptability of the contractor's MMAS, the contracting officer, in consultation with the auditor and functional specialist, if appropriate, shall determine whether the contractor's MMAS complies with the system criteria for an acceptable MMAS as prescribed in the clause at [252.242-7004](#), Material Management and Accounting System.

242.7203 Review procedures.

(a) *Criteria for conducting reviews.* Conduct an MMAS review when--

(1) A contractor has \$40 million of qualifying sales to the Government during the contractor's preceding fiscal year; and

(2) The administrative contracting officer (ACO), with advice from the auditor, determines an MMAS review is needed based on a risk assessment of the contractor's past experience and current vulnerability.

(b) *Qualifying sales.* Qualifying sales are sales for which certified cost or pricing data were required under 10 U.S.C. 2306a, as implemented in FAR 15.403, or that are contracts priced on other than a firm-fixed-price or fixed-price with economic price adjustment basis. Sales include prime contracts, subcontracts, and modifications to such contracts and subcontracts.

(c) *Disposition of findings—*

(1) *Reporting of findings.* The auditor or functional specialist shall document findings and recommendations in a report to the contracting officer. If the auditor or functional specialist identifies any significant MMAS deficiencies, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies.

(2) *Initial determination.* (i) The contracting officer shall review findings and recommendations and, if there are no significant deficiencies, shall promptly notify the contractor, in writing, that the contractor's MMAS is acceptable and approved; or

(ii) If the contracting officer finds that there are one or more significant deficiencies (as defined in the clause at [252.242-7004](#), Material Management and Accounting System) due to the contractor's failure to meet one or more of the MMAS system criteria in the clause at [252.242-7004](#), Material Management and Accounting System, the contracting officer shall—

(A) Promptly make an initial written determination on any significant deficiencies and notify the contractor, in writing, providing a description of each significant deficiency in sufficient detail to allow the contractor to understand the deficiency;

(B) Request the contractor to respond, in writing, to the initial determination within 30 days; and

Defense Federal Acquisition Regulation Supplement

Part 242--Contract Administration and Audit Services

(C) Promptly evaluate the contractor's response to the initial determination in consultation with the auditor or functional specialist, and make a final determination.

(3) *Final determination.* (i) The ACO shall make a final determination and notify the contractor that—

(A) The contractor's MMAS is acceptable and approved, and no deficiencies remain, or

(B) Significant deficiencies remain. The notice shall identify any remaining significant deficiencies, and indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(1) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(2) Disapprove the system in accordance with the clause at [252.242-7004](#), Material Management and Accounting System; and

(3) Withhold payments in accordance with the clause at [252.242-7005](#), Contractor Business Systems, if the clause is included in the contract.

(ii) Follow the procedures relating to monitoring a contractor's corrective action and the correction of significant deficiencies in PGI [242.7203](#).

(d) *System approval.* The contracting officer shall promptly approve a previously disapproved MMAS and notify the contractor when the contracting officer determines that there are no remaining significant deficiencies.

(e) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to approve a system, disapprove a system and withhold payments, or approve a previously disapproved system and release withheld payments to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

242.7204 Contract clause.

Use the clause at [252.242-7004](#), Material Management and Accounting System, in all solicitations and contracts exceeding the simplified acquisition threshold that are not for the acquisition of commercial items and—

(a) Are not awarded to small businesses, educational institutions, or nonprofit organizations; and

(b) Are either—

(1) Cost-reimbursement contracts; or

(2) Fixed-price contracts with progress payments made on the basis of costs incurred by the contractor as work progresses under the contract.

SUBPART 242.73—CONTRACTOR INSURANCE/PENSION REVIEW

(Revised December 31, 2012)

242.7301 General.

(a) The administrative contracting officer (ACO) is responsible for determining the allowability of insurance/pension costs in Government contracts and for determining the need for a Contractor/Insurance Pension Review (CIPR). Defense Contract Management Agency (DCMA) insurance/pension specialists and Defense Contract Audit Agency (DCAA) auditors assist ACOs in making these determinations, conduct CIPRs when needed, and perform other routine audits as authorized under FAR 42.705 and 52.215-2. A CIPR is a DCMA/DCAA joint review that—

- (1) Provides an in-depth evaluation of a contractor's—
 - (i) Insurance programs;
 - (ii) Pension plans;
 - (iii) Other deferred compensation plans; and
 - (iv) Related policies, procedures, practices, and costs; or
- (2) Concentrates on specific areas of the contractor's insurance programs, pension plans, or other deferred compensation plans.

(b) DCMA is the DoD Executive Agency for the performance of all CIPRs.

(c) DCAA is the DoD agency designated for the performance of contract audit responsibilities related to Cost Accounting Standards administration as described in FAR subparts 30.2 and 30.6 as they relate to a contractor's insurance programs, pension plans, and other deferred compensation plans.

242.7302 Requirements.

(a) (1) An in-depth CIPR as described at DFARS [242.7301](#)(a)(1) shall be conducted only when—

- (i) A contractor has \$50 million of qualifying sales to the Government during the contractor's preceding fiscal year; and
- (ii) The ACO, with advice from DCMA insurance/pension specialists and DCAA auditors, determines a CIPR is needed based on a risk assessment of the contractor's past experience and current vulnerability.

(2) Qualifying sales are sales for which certified cost or pricing data were required under 10 U.S.C. 2306a, as implemented in FAR 15.403, or that are contracts priced on other than a firm-fixed-price or fixed-price with economic price adjustment basis. Sales include prime contracts, subcontracts, and modifications to such contracts and subcontracts.

Defense Federal Acquisition Regulation Supplement

Part 242—Contract Administration and Audit Services

(b) A special CIPR that concentrates on specific areas of a contractor's insurance programs, pension plans, or other deferred compensation plans shall be performed for a contractor (including, but not limited to, a contractor meeting the requirements in paragraph (a) of this section) when any of the following circumstances exists, but only if the circumstance(s) may result in a material impact on Government contract costs:

(1) Information or data reveals a deficiency in the contractor's insurance/pension program.

(2) The contractor proposes or implements changes in its insurance, pension, or deferred compensation plans.

(3) The contractor is involved in a merger, acquisition, or divestiture.

(4) The Government needs to follow up on contractor implementation of prior CIPR recommendations.

(c) The DCAA auditor shall use relevant findings and recommendations of previously performed CIPRs in determining the scope of any audits of insurance and pension costs.

(d) When a Government organization believes that a review of the contractor's insurance/pension program should be performed, that organization should provide a recommendation for a review to the ACO. If the ACO concurs, the review should be performed as part of an ACO-initiated special CIPR or as part of a CIPR already scheduled for the near future.

242.7303 Responsibilities.

Follow the procedures at [PGI 242.7303](#) when conducting a CIPR.

SUBPART 242.74—TECHNICAL REPRESENTATION AT CONTRACTOR FACILITIES

(Revised November 9, 2005)

242.7400 General.

(a) Program managers may conclude that they need technical representation in contractor facilities to perform non-contract administration service (CAS) technical duties and to provide liaison, guidance, and assistance on systems and programs. In these cases, the program manager may assign technical representatives under the procedures in 242.7401.

(b) A technical representative is a representative of a DoD program, project, or system office performing non-CAS technical duties at or near a contractor facility. A technical representative is not—

(1) A representative of a contract administration or contract audit component;
or

(2) A contracting officer's representative (see 201.602).

242.7401 Procedures.

When the program, project, or system manager determines that a technical representative is required, follow the procedures at PGI 242.7401.

SUBPART 242.75—CONTRACTOR ACCOUNTING SYSTEMS AND RELATED CONTROLS

(Revised February 26, 2015)

242.7501 Definitions.

As used in this subpart—

“Acceptable accounting system,” and “accounting system” are defined in the clause at [252.242-7006](#), Accounting System Administration.

“Significant deficiency” is defined in the clause at [252.242-7006](#), Accounting System Administration.

242.7502 Policy.

(a) Contractors receiving cost-reimbursement, incentive type, time-and-materials, or labor-hour contracts, or contracts which provide for progress payments based on costs or on a percentage or stage of completion, shall maintain an accounting system.

(b) The cognizant contracting officer, in consultation with the auditor or functional specialist, shall—

(1) Determine the acceptability of a contractor’s accounting system and approve or disapprove the system; and

(2) Pursue correction of any deficiencies.

(c) In evaluating the acceptability of a contractor’s accounting system, the contracting officer, in consultation with the auditor or functional specialist, shall determine whether the contractor’s accounting system complies with the system criteria for an acceptable accounting system as prescribed in the clause at [252.242-7006](#), Accounting System Administration.

(d) *Disposition of findings*—

(1) *Reporting of findings.* The auditor shall document findings and recommendations in a report to the contracting officer. If the auditor identifies any significant accounting system deficiencies, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies. Follow the procedures at PGI [242.7502](#) for reporting of deficiencies.

(2) *Initial determination.* (i) The contracting officer shall review findings and recommendations and, if there are no significant deficiencies, shall promptly notify the contractor, in writing, that the contractor's accounting system is acceptable and approved; or

(ii) If the contracting officer finds that there are one or more significant deficiencies (as defined in the clause at [252.242-7006](#), Accounting System Administration) due to the contractor’s failure to meet one or more of the accounting system criteria in the clause at [252.242-7006](#), the contracting officer shall—

Defense Federal Acquisition Regulation Supplement

Part 242--Contract Administration and Audit Services

(A) Promptly make an initial written determination on any significant deficiencies and notify the contractor, in writing, providing a description of each significant deficiency in sufficient detail to allow the contractor to understand the deficiency;

(B) Request the contractor to respond, in writing, to the initial determination within 30 days; and

(C) Promptly evaluate the contractor's response to the initial determination, in consultation with the auditor or functional specialist, and make a final determination.

(3) *Final determination.* (i) The contracting officer shall make a final determination and notify the contractor, in writing, that-

(A) The contractor's accounting system is acceptable and approved, and no significant deficiencies remain, or

(B) Significant deficiencies remain. The notice shall identify any remaining significant deficiencies, and indicate the adequacy of any proposed or completed corrective action. The contracting officer shall-

(1) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(2) Make a determination to disapprove the system in accordance with the clause at [252.242-7006](#), Accounting System Administration; and

(3) Withhold payments in accordance with the clause at [252.242-7005](#), Contractor Business Systems, if the clause is included in the contract.

(ii) Follow the procedures relating to monitoring a contractor's corrective action and the correction of significant deficiencies in PGI [242.7502](#).

(e) *System approval.* The contracting officer shall promptly approve a previously disapproved accounting system and notify the contractor when the contracting officer determines that there are no remaining significant deficiencies.

(f) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to approve a system, disapprove a system and withhold payments, or approve a previously disapproved system and release withheld payments to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

(g) *Mitigating the risk of accounting system deficiencies on specific proposals.*

(1) Field pricing teams shall discuss identified accounting system deficiencies and their impact in all reports on contractor proposals until the deficiencies are resolved.

Defense Federal Acquisition Regulation Supplement

Part 242—Contract Administration and Audit Services

(2) The contracting officer responsible for negotiation of a proposal generated by an accounting system with an identified deficiency shall evaluate whether the deficiency impacts the negotiations. See [PGI 242.7502\(g\)\(2\)](#). If it does not, the contracting officer should proceed with negotiations. If it does, the contracting officer should consider other alternatives, e.g.—

(i) Allowing the contractor additional time to correct the accounting system deficiency and submit a corrected proposal;

(ii) Considering another type of contract;

(iii) Using additional cost analysis techniques to determine the reasonableness of the cost elements affected by the accounting system's deficiency;

(iv) Reducing the negotiation objective for profit or fee; or

(v) Including a contract (reopener) clause that provides for adjustment of the contract amount after award.

(3) The contracting officer who incorporates a reopener clause into the contract is responsible for negotiating price adjustments required by the clause. Any reopener clause necessitated by an accounting system deficiency should—

(i) Clearly identify the amounts and items that are in question at the time of negotiation;

(ii) Indicate a specific time or subsequent event by which the contractor will submit a supplemental proposal, including certified cost or pricing data, identifying the cost impact adjustment necessitated by the deficient accounting system;

(iii) Provide for the contracting officer to adjust the contract price unilaterally if the contractor fails to submit the supplemental proposal; and

(iv) Provide that failure of the Government and the contractor to agree to the price adjustment shall be a dispute under the Disputes clause.

242.7503 Contract clause.

Use the clause at [252.242-7006](#), Accounting System Administration, in solicitations and contracts when contemplating—

(a) A cost-reimbursement, incentive type, time-and-materials, or labor-hour contract;

(b) A contract with progress payments made on the basis of costs incurred by the contractor or on a percentage or stage of completion.

TABLE OF CONTENTS
(Revised February 28, 2014)

SUBPART 243.1—GENERAL

- 243.107-70 Notification of substantial impact on employment.
- 243.170 Identification of foreign military sale (FMS) requirements.
- 243.171 Obligation or deobligation of funds.
- 243.172 Application of modifications.

SUBPART 243.2—CHANGE ORDERS

- 243.204 Administration.
- 243.204-70 Definitization of change orders.
- 243.204-70-1 Scope.
- 243.204-70-2 Price ceiling.
- 243.204-70-3 Definitization schedule.
- 243.204-70-4 Limitations on obligations.
- 243.204-70-5 Exceptions.
- 243.204-70-6 Allowable profit.
- 243.204-70-7 Plans and reports.
- 243.204-71 Certifications of requests for equitable adjustment.
- 243.205 Contract clauses.
- 243.205-70 Pricing of contract modifications.
- 243.205-71 Requests for equitable adjustment.
- 243.205-72 Unpriced change orders.

SUBPART 243.1—GENERAL

(Revised February 26, 2016)

243.107-70 Notification of substantial impact on employment.

The Secretary of Defense is required to notify the Secretary of Labor if a modification of a major defense contract or subcontract will have a substantial impact on employment. The clause prescribed at [249.7003\(c\)](#) requires that the contractor notify its employees, its subcontractors, and State and local officials when a contract modification will have a substantial impact on employment.

243.170 Identification of foreign military sale (FMS) requirements.

Follow the procedures at [PGI 243.170](#) for identifying contract modifications that add FMS requirements.

243.171 Obligation or deobligation of funds.

Follow the procedures at [PGI 243.171](#) when obligating or deobligating funds.

243.172 Application of modifications.

Follow the procedures at [204.1671](#) for determining the sequence for application of modifications to a contract or order.

SUBPART 243.2—CHANGE ORDERS

(Revised June 25, 2013)

243.204 Administration.

Follow the procedures at [PGI 243.204](#) for administration of change orders.

243.204-70 Definitization of change orders.

243.204-70-1 Scope.

(a) This subsection applies to unpriced change orders with an estimated value exceeding \$5 million.

(b) Unpriced change orders for foreign military sales and special access programs are not subject to this subsection, but the contracting officer shall apply the policy and procedures to them to the maximum extent practicable. If the contracting officer determines that it is impracticable to adhere to the policy and procedures of this subsection for an unpriced change order for a foreign military sale or a special access program, the contracting officer shall provide prior notice, through agency channels, to the Deputy Director, Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), 3060 Defense Pentagon, Washington, DC 20301-3060.

243.204-70-2 Price Ceiling.

Unpriced change orders shall include a not-to-exceed price.

243.204-70-3 Definitization schedule.

(a) Unpriced change orders shall contain definitization schedules that provide for definitization by the earlier of—

(1) The date that is 180 days after issuance of the change order (this date may be extended but may not exceed the date that is 180 days after the contractor submits a qualifying proposal); or

(2) The date on which the amount of funds obligated under the change order is equal to more than 50 percent of the not-to-exceed price.

(b) Submission of a qualifying proposal in accordance with the definitization schedule is a material element of the contract. If the contractor does not submit a timely qualifying proposal, the contracting officer may suspend or reduce progress payments under FAR 32.503-6, or take other appropriate action.

243.204-70-4 Limitations on obligations.

(a) The Government shall not obligate more than 50 percent of the not-to-exceed price before definitization. However, if a contractor submits a qualifying proposal before 50 percent of the not-to-exceed price has been obligated by the Government, the limitation on obligations before definitization may be increased to no more than 75 percent (see [232.102-70](#) for coverage on provisional delivery payments).

Part 243—Contract Modifications

(b) Obligations should be consistent with the contractor's requirements for the undefinitized period.

243.204-70-5 Exceptions.

(a) The limitations in [243.204-70-2](#), [243.204-70-3](#), and [243.204-70-4](#) do not apply to unpriced change orders for the purchase of initial spares.

(b) The limitations in [243.204-70-4](#)(a) do not apply to unpriced change orders for ship construction and ship repair.

(c) The head of the agency may waive the limitations in [243.204-70-2](#), [243.204-70-3](#), and [243.204-70-4](#) for unpriced change orders if the head of the agency determines that the waiver is necessary to support—

(1) A contingency operation; or

(2) A humanitarian or peacekeeping operation.

243.204-70-6 Allowable profit.

When the final price of an unpriced change order is negotiated after a substantial portion of the required performance has been completed, the head of the contracting activity shall ensure the profit allowed reflects—

(a) Any reduced cost risk to the contractor for costs incurred during contract performance before negotiation of the final price;

(b) The contractor's reduced cost risk for costs incurred during performance of the remainder of the contract; and

(c) The extent to which costs have been incurred prior to definitization of the contract action (see [215.404-71-3](#) (d) (2)). The risk assessment shall be documented in the contract file.

243.204-70-7 Plans and reports.

To provide for enhanced management and oversight of unpriced change orders, departments and agencies shall—

(a) Include in the Consolidated Undefinitized Contract Action (UCA) Management Plan required by [217.7405](#), the actions planned and taken to ensure that unpriced change orders are definitized in accordance with this subsection; and

(b) Include in the Consolidated UCA Management Report required by [217.7405](#), each unpriced change order with an estimated value exceeding \$5 million.

243.204-71 Certification of requests for equitable adjustment.

(a) A request for equitable adjustment to contract terms that exceeds the simplified acquisition threshold may not be paid unless the contractor certifies the request in accordance with the clause at [252.243-7002](#).

(b) To determine if the dollar threshold for requiring certification is met, add together the absolute value of each cost increase and each cost decrease. See [PGI 243.204-71\(b\)](#) for an example.

(c) The certification required by 10 U.S.C. 2410(a), as implemented in the clause at [252.243-7002](#), is different from the certification required by 41 U.S.C. 7103, Disputes. If the contractor has certified a request for equitable adjustment in accordance with 10 U.S.C. 2410(a), and desires to convert the request to a claim under the Contract Disputes statute, the contractor shall certify the claim in accordance with FAR subpart 33.2.

243.205 Contract clauses.

243.205-70 Pricing of contract modifications.

Use the clause at [252.243-7001](#), Pricing of Contract Modifications, in solicitations and contracts when anticipating and using a fixed price type contract.

243.205-71 Requests for equitable adjustment.

Use the clause at [252.243-7002](#), Requests for Equitable Adjustment, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that are estimated to exceed the simplified acquisition threshold.

243.205-72 Unpriced change orders.

See the clause prescriptions at [217.7406](#) for all unpriced change orders with an estimated value exceeding \$5 million.

Defense Federal Acquisition Regulation Supplement

Part 244—Subcontracting Policies and Procedures

TABLE OF CONTENTS (Revised February 28, 2014)

SUBPART 244.1—GENERAL

244.101 Definitions.

SUBPART 244.2—CONSENT TO SUBCONTRACTS

244.201 Consent and advance notification requirements.

244.201-1 Consent requirements.

244.202 Contracting officer's evaluation.

244.202-2 Considerations.

SUBPART 244.3—CONTRACTORS' PURCHASING SYSTEMS REVIEWS

244.301 Objective.

244.303 Extent of review.

244.305 Granting, withholding, or withdrawing approval.

244.305-70 Policy.

244.305-71 Contract clause.

SUBPART 244.4—SUBCONTRACTS FOR COMMERCIAL ITEMS AND COMMERCIAL COMPONENTS

244.402 Policy requirements.

244.403 Contract clause.

Defense Federal Acquisition Regulation Supplement

Part 244—Subcontracting Policies and Procedures

SUBPART 244.1—GENERAL *(Added May 18, 2011)*

244.101 Definitions.

As used in this subpart—

“Acceptable purchasing system” and “purchasing system” are defined in the clause at [252.244-7001](#), Contractor Purchasing System Administration.

“Significant deficiency” is defined in the clause at [252.244-7001](#), Contractor Purchasing System Administration.

SUBPART 244.2—CONSENT TO SUBCONTRACTS

(Revised October 30, 2015)

244.201 Consent and advance notification requirements.

244.201-1 Consent requirements.

In solicitations and contracts for information technology, whether acquired as a service or as a supply, that is a covered system or covered item of supply as those terms are defined at [239.7301](#), consider the need for a consent to subcontract requirement regarding supply chain risk (see subpart [239.73](#)). For additional guidance see [PGI 244.201-1](#).

244.202 Contracting officer's evaluation.

244.202-2 Considerations.

(a) Where other than lowest price is the basis for subcontractor selection, has the contractor adequately substantiated the selection as offering the greatest value to the Government?

SUBPART 244.3—CONTRACTORS' PURCHASING SYSTEMS REVIEWS

(Revised May 6, 2014)

244.301 Objective.

The administrative contracting officer (ACO) is solely responsible for initiating reviews of the contractor's purchasing systems, but other organizations may request that the ACO initiate such reviews.

244.303 Extent of review.

(a) Also review the adequacy of rationale documenting commercial item determinations to ensure compliance with the definition of “commercial item” in FAR 2.101.

(b) Also review the adequacy of the contractor's counterfeit electronic part detection and avoidance system under DFARS [252.246-7007](#), Contractor Counterfeit Electronic Part Detection and Avoidance System.

244.305 Granting, withholding, or withdrawing approval.

244.305-70 Policy.

Use this subsection instead of FAR 44.305-2(c) and 44.305-3(b).

(a) The cognizant contracting officer, in consultation with the purchasing system analyst or auditor, shall—

(1) Determine the acceptability of the contractor's purchasing system and approve or disapprove the system; and

(2) Pursue correction of any deficiencies.

(b) In evaluating the acceptability of the contractor's purchasing system, the contracting officer, in consultation with the purchasing system analyst or auditor, shall determine whether the contractor's purchasing system complies with the system criteria for an acceptable purchasing system as prescribed in the clause at [252.244-7001](#), Contractor Purchasing System Administration.

(c) *Disposition of findings—*

(1) *Reporting of findings.* The purchasing system analyst or auditor shall document findings and recommendations in a report to the contracting officer. If the auditor or purchasing system analyst identifies any significant purchasing system deficiencies, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies.

(2) *Initial determination.* (i) The contracting officer shall review all findings and recommendations and, if there are no significant deficiencies, shall promptly notify the contractor that the contractor's purchasing system is acceptable and approved; or

(ii) If the contracting officer finds that there are one or more significant deficiencies (as defined in the clause at [252.244-7001](#), Contractor Purchasing System

Defense Federal Acquisition Regulation Supplement

Part 244—Subcontracting Policies and Procedures

Administration) due to the contractor's failure to meet one or more of the purchasing system criteria in the clause at [252.244-7001](#), the contracting officer shall—

(A) Promptly make an initial written determination on any significant deficiencies and notify the contractor, in writing, providing a description of each significant deficiency in sufficient detail to allow the contractor to understand the deficiency;

(B) Request the contractor to respond, in writing, to the initial determination within 30 days; and

(C) Evaluate the contractor's response to the initial determination in consultation with the auditor or purchasing system analyst, and make a final determination.

(3) *Final determination.* (i) The contracting officer shall make a final determination and notify the contractor, in writing, that—

(A) The contractor's purchasing system is acceptable and approved, and no significant deficiencies remain, or

(B) Significant deficiencies remain. The notice shall identify any remaining significant deficiencies, and indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(1) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(2) Disapprove the system in accordance with the clause at [252.244-7001](#), Contractor Purchasing System Administration; and

(3) Withhold payments in accordance with the clause at [252.242-7005](#), Contractor Business Systems, if the clause is included in the contract.

(ii) Follow the procedures relating to monitoring a contractor's corrective action and the correction of significant deficiencies in [PGI 244.305-70](#).

(d) *System approval.* The contracting officer shall promptly approve a previously disapproved purchasing system and notify the contractor when the contracting officer determines that there are no remaining significant deficiencies.

(e) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to approve a system, disapprove a system and withhold payments, or approve a previously disapproved system and release withheld payments to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

(f) *Mitigating the risk of purchasing system deficiencies on specific proposals.*

(1) Source selection evaluation teams shall discuss identified purchasing system deficiencies and their impact in all reports on contractor proposals until the deficiencies are resolved.

(2) The contracting officer responsible for negotiation of a proposal generated by a purchasing system with an identified deficiency shall evaluate whether the deficiency impacts the negotiations. If it does not, the contracting officer should proceed with negotiations. If it does, the contracting officer should consider other alternatives, e.g.—

(i) Allowing the contractor additional time to correct the purchasing system deficiency and submit a corrected proposal;

(ii) Considering another type of contract, e.g., a fixed-price incentive (firm target) contract instead of firm-fixed-price;

(iii) Using additional cost analysis techniques to determine the reasonableness of the cost elements affected by the purchasing system's deficiency;

(iv) Segregating the questionable areas as a cost-reimbursable line item;

(v) Reducing the negotiation objective for profit or fee; or

(vi) Including a contract (reopener) clause that provides for adjustment of the contract amount after award.

(3) The contracting officer who incorporates a reopener clause into the contract is responsible for negotiating price adjustments required by the clause. Any reopener clause necessitated by a purchasing system deficiency should—

(i) Clearly identify the amounts and items that are in question at the time of negotiation;

(ii) Indicate a specific time or subsequent event by which the contractor will submit a supplemental proposal, including certified cost or pricing data, identifying the cost impact adjustment necessitated by the deficient purchasing system;

(iii) Provide for the contracting officer to adjust the contract price unilaterally if the contractor fails to submit the supplemental proposal; and

(iv) Provide that failure of the Government and the contractor to agree to the price adjustment shall be a dispute under the Disputes clause.

244.305-71 Contract clause.

Use the Contractor Purchasing System Administration basic clause or its alternate as follows:

(a) Use the clause at [252.244-7001](#), Contractor Purchasing System Administration—Basic, in solicitations and contracts containing the clause at FAR 52.244-2, Subcontracts.

Defense Federal Acquisition Regulation Supplement

Part 244—Subcontracting Policies and Procedures

(b) Use the clause at [252.244-7001](#), Contractor Purchasing System Administration—Alternate I, in solicitations and contracts that contain the clause at [252.246-7007](#), Contractor Counterfeit Electronic Part Detection and Avoidance System, but do not contain FAR 52.244-2, Subcontracts.

**SUBPART 244.4—SUBCONTRACTS FOR COMMERCIAL ITEMS AND
COMMERCIAL COMPONENTS**

(Revised June 25, 2013)

244.402 Policy requirements.

(a) Contractors shall determine whether a particular subcontract item meets the definition of a commercial item. This requirement does not affect the contracting officer's responsibilities or determinations made under FAR 15.403-1(c)(3). Contractors are expected to exercise reasonable business judgment in making such determinations, consistent with the guidelines for conducting market research in FAR Part 10.

244.403 Contract clause.

Use the clause at [252.244-7000](#), Subcontracts for Commercial Items, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items.

TABLE OF CONTENTS
(Revised December 31, 2012)

SUBPART 245.1—GENERAL

- 245.101 Definitions.
- 245.102 Policy.
- 245.103 General.
- 245.103-70 Furnishing Government property to contractors.
- 245.103-71 Transferring Government property accountability.
- 245.103-72 Government-furnished property attachments to solicitations and awards.
- 245.103-73 Contracting office responsibilities.
- 245.104 Responsibility and liability for Government property.
- 245.105 Contractor's property management system compliance.
- 245.107 Contract clauses.

SUBPART 245.2—SOLICITATION AND EVALUATION PROCEDURES

- 245.201 Solicitation.
- 245.201-70 Definitions.
- 245.201-71 Security classification.

**SUBPART 245.3—AUTHORIZING THE USE AND RENTAL OF
GOVERNMENT PROPERTY**

- 245.302 Contracts with foreign governments or international organizations.

SUBPART 245.4—TITLE TO GOVERNMENT PROPERTY

- 245.402 Title to contractor-acquired property.
- 245.402-70 Policy.
- 245.402-71 Delivery of contractor-acquired property.

SUBPART 245.5—SUPPORT GOVERNMENT PROPERTY ADMINISTRATION

- 245.570 Storage at the Government's expense.

SUBPART 245.6—REPORTING, REUTILIZATION, AND DISPOSAL

- 245.602 Reutilization of Government property.
- 245.602-1 Inventory disposal schedules.
- 245.602-3 Screening.
- 245.602-70 Plant clearance procedures.
- 245.604 Disposal of surplus property.
- 245.604-3 Sale of surplus property.

SUBPART 245.70—PLANT CLEARANCE FORMS

- 245.7001 Forms.
- 245.7001-1 Standard Form 97, Certificate of Release of a Motor Vehicle (Agency Record Copy).
- 245.7001-2 DD Form 1149, Requisition and Invoice Shipping Document.
- 245.7001-3 DD Form 1348-1, DoD Single Line Item Release/Receipt Document.
- 245.7001-4 DD Form 1640, Request for Plant Clearance.
- 245.7001-5 DD Form 1641, Disposal Determination/Approval.
- 245.7001-6 DLA Form 1822, End Use Certificate.

SUBPART 245.1—GENERAL
(Revised June 7, 2016)

245.101 Definitions.

“Mapping, charting, and geodesy property,” as used in this subpart, is defined in the clause at [252.245-7000](#), Government-Furnished Mapping, Charting, and Geodesy Property.

245.102 Policy.

See the policy guidance at [PGI 245.102-70](#).

(1) *Mapping, charting, and geodesy property.* All Government-furnished mapping, charting, and geodesy (MC&G) property is under the control of the Director, National Geospatial Intelligence Agency.

(i) MC&G property shall not be duplicated, copied, or otherwise reproduced for purposes other than those necessary for contract performance.

(ii) Upon completion of contract performance, the contracting officer shall—

(A) Contact the Director, National Geospatial-Intelligence Agency, 7500 Geoint Drive, Springfield, VA 22150, for disposition instructions;

(B) Direct the contractor to destroy or return all Government-furnished MC&G property not consumed during contract performance; and

(C) Specify the destination and means of shipment for property to be returned to the Government.

(2) *Government supply sources.* When a contractor will be responsible for preparing requisitioning documentation to acquire Government-furnished property from Government supply sources, include in the contract the requirement to prepare the documentation in accordance with DoD 4000.25-1-M, Military Standard Requisitioning and Issue Procedures (MILSTRIP). Copies are available from the address cited at [PGI 251.102](#).

(3) *Acquisition and management of industrial resources.* See Subpart [237.75](#) for policy relating to facilities projects.

(4) *Government-furnished property identification.*

(i) It is DoD policy that Government-furnished property be tagged, labeled, or marked based on DoD marking standards (MIL Standard 130) or other standards, when the requiring activity determines that such items are subject to serialized item management (serially-managed items). The list of Government-furnished property subject to serialized item management will be identified in the contract in accordance with [PGI 245.103-72](#), GFP attachments to solicitations and awards.

(ii) *Exceptions.* The Contractor will not be required to tag, label, or mark—

Defense Federal Acquisition Regulation Supplement

Part 245—Government Property

(A) Government-furnished property that was previously tagged, labeled, or marked;

(B) Items, as determined by the head of the agency, that are to be used to support a contingency operation; or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack;

(C) Items for which a determination and findings has been executed concluding that it is more cost effective for the Government requiring activity to assign, mark, and register the unique item identification after delivery of an item acquired from a small business concern or a commercial item acquired under FAR part 12 or part 8.

(1) The determination and findings shall be executed by—

(i) The Component Acquisition Executive for an Acquisition Category (ACAT) I program; or

(ii) The head of the contracting activity for all other programs.

(2) A copy of the executed determination and findings shall be provided to the DoD Unique Item Identification Policy Office at this address: OUSD(AT&L)DPAP/Program Development and Implementation, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060; or by facsimile to 703-602-6047.

(D) Items that are contractor-acquired property;

(E) Property under any statutory leasing authority;

(F) Property to which the Government has acquired a lien or title solely because of partial, advance, progress, or performance-based payments;

(G) Intellectual property or software; or

(H) Real property.

(5) *Reporting loss of Government property.* The Defense Contract Management Agency (DCMA) eTools software application is the DoD data repository for reporting loss of Government property in the possession of contractors. The requirements and procedures for reporting loss of Government property to eTools are set forth in the clause at [252.245-7002](#), Reporting Loss of Government Property, prescribed at [245.107](#).

245.103 General.

245.103-70 Furnishing Government property to contractors.

Follow the procedures at [PGI 245.103-70](#) for furnishing Government property to contractors.

245.103-71 Transferring Government property accountability.

Follow the procedures at [PGI 245.103-71](#) for transferring Government property accountability.

245.103-72 Government-furnished property attachments to solicitations and awards.

When performance will require the use of Government-furnished property, contracting officers shall use the fillable electronic “Requisitioned Government Furnished Property” and/or “Scheduled Government Furnished Property” formats as attachments to solicitations and awards. See [PGI 245.103-72](#) for links to the formats and procedures for preparing Government-furnished property attachments to solicitations and awards.

245.103-73 Contracting office responsibilities.

See [PGI 245.103-73](#) for contracting office responsibilities.

245.104 Responsibility and liability for Government property.

In addition to the contract types listed at FAR 45.104, contractors are not held liable for loss of Government property under negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data.

245.105 Contractor’s property management system compliance.

(a) *Definitions*—

(1) “Acceptable property management system” and “property management system” are defined in the clause at [252.245-7003](#), Contractor Property Management System Administration.

(2) “Significant deficiency” is defined in the clause at [252.245-7003](#), Contractor Property Management System Administration.

(b) *Policy*. The cognizant contracting officer, in consultation with the property administrator, shall—

(1) Determine the acceptability of the system and approve or disapprove the system; and

(2) Pursue correction of any deficiencies.

(c) In evaluating the acceptability of a contractor’s property management system, the contracting officer, in consultation with the property administrator, shall determine whether the contractor’s property management system complies with the system criteria for an acceptable property management system as prescribed in the clause at [252.245-7003](#), Contractor Property Management System Administration.

(d) *Disposition of findings*—

(1) *Reporting of findings*. The property administrator shall document findings and recommendations in a report to the contracting officer. If the property administrator identifies any significant property system deficiencies, the report shall describe the deficiencies in sufficient detail to allow the contracting officer to understand the deficiencies.

(2) *Initial determination*. (i) The contracting officer shall review findings and recommendations and, if there are no significant deficiencies, shall promptly notify the

Defense Federal Acquisition Regulation Supplement

Part 245—Government Property

contractor, in writing, that the contractor's property management system is acceptable and approved; or

(ii) If the contracting officer finds that there are one or more significant deficiencies (as defined in the clause at [252.245-7003](#), Contractor Property Management System Administration) due to the contractor's failure to meet one or more of the property management system criteria in the clause at [252.245-7003](#), the contracting officer shall—

(A) Promptly make an initial written determination on any significant deficiencies and notify the contractor, in writing, providing a description of each significant deficiency in sufficient detail to allow the contractor to understand the deficiency;

(B) Request the contractor to respond, in writing, to the initial determination within 30 days and;

(C) Evaluate the contractor's response to the initial determination, in consultation with the property administrator, and make a final determination.

(3) *Final determination.* (i) The contracting officer shall make a final determination and notify the contractor, in writing, that—

(A) The contractor's property management system is acceptable and approved, and no significant deficiencies remain, or

(B) Significant deficiencies remain. The notice shall identify any remaining significant deficiencies, and indicate the adequacy of any proposed or completed corrective action. The contracting officer shall—

(1) Request that the contractor, within 45 days of receipt of the final determination, either correct the deficiencies or submit an acceptable corrective action plan showing milestones and actions to eliminate the deficiencies;

(2) Disapprove the system in accordance with the clause at [252.245-7003](#), Contractor Property Management System Administration; and

(3) Withhold payments in accordance with the clause at [252.242-7005](#), Contractor Business Systems, if the clause is included in the contract.

(ii) Follow the procedures relating to monitoring a contractor's corrective action and the correction of significant deficiencies in [PGI 245.105](#).

(e) *System approval.* The contracting officer shall promptly approve a previously disapproved property management system and notify the contractor when the contracting officer determines, in consultation with the property administrator, that there are no remaining significant deficiencies.

(f) *Contracting officer notifications.* The cognizant contracting officer shall promptly distribute copies of a determination to approve a system, disapprove a system and withhold payments, or approve a previously disapproved system and release withheld payments to the auditor; payment office; affected contracting officers at the buying activities; and cognizant contracting officers in contract administration activities.

245.107 Contract clauses.

(1) Use the clause at [252.245-7000](#), Government-Furnished Mapping, Charting, and Geodesy Property, in solicitations and contracts when mapping, charting, and geodesy property is to be furnished.

(2) Use the clause at [252.245-7001](#), Tagging, Labeling, and Marking of Government-Furnished Property, in solicitations and contracts that contain the clause at FAR 52.245-1, Government Property.

(3) Use the clause at [252.245-7002](#), Reporting Loss of Government Property, in solicitations and contracts that contain the clause at FAR 52.245-1, Government Property.

(4) Use the clause at [252.245-7003](#), Contractor Property Management System Administration, in solicitations and contracts containing the clause at FAR 52.245-1, Government Property.

(5) Use the clause at [252.245-7004](#), Reporting, Reutilization, and Disposal, in solicitations and contracts that contain the clause at FAR 52.245-1, Government Property.

(6) For negotiated fixed-price contracts awarded on a basis other than submission of certified cost or pricing data for which Government property is provided, use the clause at FAR 52.245-1, Government Property, without its Alternate I.

SUBPART 245.2— SOLICITATION AND EVALUATION PROCEDURES
(Revised December 31, 2012)

245.201 Solicitation.

245.201-70 Definitions.

See the definitions at [PGI 245.201-70](#).

245.201-71 Security classification.

Follow the procedures at [PGI 245.201-71](#) for security classification.

**SUBPART 245.3—AUTHORIZING THE USE AND RENTAL OF
GOVERNMENT PROPERTY**
(Revised October 31, 2013)

245.302 Contracts with foreign governments or international organizations.

(1) *General.*

(i) *Approval.* A contractor may use Government property on work for foreign governments and international organizations only when approved in writing by the contracting officer having cognizance of the property. The contracting officer may grant approval, provided—

(A) The use will not interfere with foreseeable requirements of the United States;

(B) The work is undertaken as a DoD foreign military sale; or

(C) For a direct commercial sale, the foreign country or international organization would be authorized to contract with the department concerned under the Arms Export Control Act.

(ii) *Use charges.*

(A) The Use and Charges clause is applicable on direct commercial sales to foreign governments or international organizations.

(B) When a particular foreign government or international organization has funded the acquisition of property, do not assess the foreign government or international organization rental charges or nonrecurring recoupments for the use of such property.

(2) *Special tooling and special test equipment.*

(i) DoD normally recovers a fair share of nonrecurring costs of special tooling and special test equipment by including these costs in its calculation of the nonrecurring cost recoupment charge when major defense equipment is sold by foreign military sales or direct commercial sales to foreign governments or international organizations. “Major defense equipment” is defined in DoD Directive 2140.2, Recoupment of Nonrecurring Costs on Sales of U.S. Items, as any item of significant military equipment on the United States Munitions List having a nonrecurring research, development, test, and evaluation cost of more than \$50 million or a total production cost of more than \$200 million.

(ii) When the cost thresholds in paragraph (2)(i) of this section are not met, the contracting officer shall assess rental charges for use of special tooling and special test equipment pursuant to the Use and Charges clause if administratively practicable.

Defense Federal Acquisition Regulation Supplement

Part 245—Government Property

(3) *Waivers.*

(i) Rental charges for use of U.S. production and research property on commercial sales transactions to the Government of Canada are waived for all commercial contracts. This waiver is based on an understanding wherein the Government of Canada has agreed to waive its rental charges.

(ii) Requests for waiver or reduction of charges for the use of Government property on work for foreign governments or international organizations shall be submitted to the contracting officer, who is authorized to approve the requests in consultation with the appropriate functional specialist.

SUBPART 245.4—TITLE TO GOVERNMENT PROPERTY
(Revised August 2, 2016)

245.402 Title to contractor-acquired property.

245.402-70 Policy.

Review the guidance at [PGI 245.402-70](#) with regard to oversight and surveillance of contractor-acquired property.

245.402-71 Delivery of contractor-acquired property.

Follow the procedures at [PGI 245.402-71](#) for the delivery of contractor-acquired property.

Defense Federal Acquisition Regulation Supplement

Part 245—Government Property

SUBPART 245.5—SUPPORT GOVERNMENT PROPERTY ADMINISTRATION *(Added August 19, 2011)*

245.570 Storage at the Government's expense.

All storage contracts or agreements shall be separately priced and shall include all costs associated with the storage.

SUBPART 245.6—REPORTING, REUTILIZATION, AND DISPOSAL
(Revised August 19, 2011)

245.602 Reutilization of Government property.

245.602-1 Inventory disposal schedules.

For termination inventory, plant clearance officers shall verify inventory schedules, either directly or through appropriate technical personnel, to determine the following:

(a) *Allocability.*

(1) Review contract requirements, delivery schedules, bills of material, and other pertinent documents to determine whether schedules include property that—

(i) Is appropriate for use on the contract; or

(ii) Exceeds the quantity required for completion of the contract, but could be diverted to other commercial work or Government use.

(2) Review the contractor's—

(i) Recent purchases of similar material;

(ii) Plans for current and scheduled production;

(iii) Stock record entries; and

(iv) Bills of material for similar items.

(b) *Quantity.* Take measures to provide assurance that available inventory is in accordance with quantities listed on the inventory schedules. Quantities may be verified by actual item count, acceptance of labeled quantities in unopened/sealed packages, scale counts, or other appropriate methods.

(c) *Condition.* Ensure that the physical condition of the property is reasonably consistent with the Federal Condition Code supplied by the contractor.

245.602-3 Screening.

Property will be screened DoD-wide, including the contracting agency, requiring agency, and, as appropriate, the General Services Administration. The requiring agency shall have priority for retention of listed items. All required screening must be completed before any sale of contractor inventory, including contractor inventory in overseas locations (foreign excess personal property) can take place. Upon request of the prospective reutilization, transfer, donation, or sales customer, the plant clearance officer shall arrange for inspection of property at the contractor's plant in such a manner as to avoid interruption of the contractor's operations, and consistent with any security requirements.

245.602-70 Plant clearance procedures.

Follow the procedures at PGI [245.602-70](#) for establishing and processing a plant clearance case.

245.604 Disposal of surplus property.

245.604-3 Sale of surplus property.

(a) Plant clearance officers shall determine a best value sales approach (formal or informal sales), to include due consideration for costs, risks, and benefits, e.g., potential sales proceeds.

(b) *Informal bid procedures.* The plant clearance officer may direct the contractor to issue informal invitations for bid (orally, telephonically, or by other informal media), provided—

- (1) Maximum practical competition is obtained;
- (2) Sources solicited are recorded; and
- (3) Informal bids are confirmed in writing.

(c) *Sale approval and award.* Plant clearance officers shall—

(1) Evaluate bids to establish that the sale price is fair and reasonable, taking into consideration—

- (i) Knowledge or tests of the market;
- (ii) Current published prices for the property;
- (iii) The nature, condition, quantity, and location of the property; and
- (iv) Past sale history for like or similar items;

(2) Approve award to the responsible bidder whose bid is most advantageous to the Government. The plant clearance officer shall not approve award to any bidder who is an ineligible transferee, as defined in [252.245-7004](#), Reporting, Reutilization, and Disposal; and

(3) Notify the contractor of the bidder to whom an award will be made within five working days from receipt of bids.

(d) *Noncompetitive sales.*

(1) Noncompetitive sales include purchases or retention at less than cost by the contractor. Noncompetitive sales may be made when—

- (i) The plant clearance officer determines that this method is essential to expeditious plant clearance; and
- (ii) The Government's interests are adequately protected.

Defense Federal Acquisition Regulation Supplement

Part 245—Government Property

(2) Noncompetitive sales shall be at fair and reasonable prices, not less than those reasonably expected under competitive sales.

(3) Conditions justifying noncompetitive sales are—

- (i) No acceptable bids are received under competitive sale;
- (ii) Anticipated sales proceeds do not warrant competitive sale;
- (iii) Specialized nature of the property would not create bidder interest;
- (iv) Removal of the property would reduce its value or result in disproportionate handling expenses; or
- (v) Such action is essential to the Government's interests.

(e) Plant clearance officers shall consider any special disposal requirements such as demilitarization or trade security control requirements in accordance with DoDM 4160.28-M, Defense Demilitarization Manual, and DoDI 2030.08, Implementation of Trade Security Controls, respectively (See PGI [245.6](#)).

SUBPART 245.70—PLANT CLEARANCE FORMS

(Revised August 29, 2012)

245.7001 Forms.

Use the forms listed below in performance of plant clearance actions.

245.7001-1 Standard Form 97, Certificate of Release of a Motor Vehicle (Agency Record Copy).

Use for transfers, donations, and sales of motor vehicles. The contracting officer shall execute the SF 97 and furnish it to the purchaser.

245.7001-2 DD Form 1149, Requisition and Invoice Shipping Document.

Use for transfer and donation of contractor inventory.

245.7001-3 DD Form 1348-1, DoD Single Line Item Release/Receipt Document.

Use when authorized by the plant clearance officer.

245.7001-4 DD Form 1640, Request for Plant Clearance.

Use to request plant clearance assistance or transfer plant clearance.

245.7001-5 DD Form 1641, Disposal Determination/Approval.

Use to record rationale for the following disposal determinations:

- (a) Downgrade useable property to scrap.
- (b) Abandonment or destruction.
- (c) Noncompetitive sale of surplus property.
- (d) Other disposal actions.

245.7001-6 DLA Form 1822, End Use Certificate.

Use when directed by the plant clearance officer.

Defense Federal Acquisition Regulation Supplement

Part 245—Government Property

SUBPART 245.71—PLANT CLEARANCE FORMS
(Deleted August 19, 2011)

Defense Federal Acquisition Regulation Supplement

Part 245—Government Property

SUBPART 245.72—SPECIAL INSTRUCTIONS
(Deleted August 19, 2011)

Defense Federal Acquisition Regulation Supplement

Part 245—Government Property

SUBPART 245.73—SALE OF SURPLUS CONTRACTOR INVENTORY
(Deleted August 19, 2011)

TABLE OF CONTENTS
(Revised August 2, 2016)

SUBPART 246.1—GENERAL

- 246.101 Definitions.
- 246.102 Policy.
- 246.103 Contracting office responsibilities.

SUBPART 246.2—CONTRACT QUALITY REQUIREMENTS

- 246.202 Types of contract quality requirements.
- 246.202-4 Higher-level contract quality requirements.
- 246.270 Safety of facilities, infrastructure, and equipment for military operations.
- 246.270-1 Scope.
- 246.270-2 Policy.
- 246.270-3 Exceptions.
- 246.270-4 Contract clause.

SUBPART 246.3—CONTRACT CLAUSES

- 246.370 Material inspection and receiving report.
- 246.371 Notification of potential safety issues.

SUBPART 246.4—GOVERNMENT CONTRACT QUALITY ASSURANCE

- 246.401 General.
- 246.402 Government contract quality assurance at source.
- 246.404 Government contract quality assurance for acquisitions at or below the simplified acquisition threshold.
- 246.406 Foreign governments.
- 246.407 Nonconforming supplies or services.
- 246.408 Single-agency assignments of Government contract quality assurance.
- 246.408-70 Subsistence.
- 246.408-71 Aircraft.
- 246.470 Government contract quality assurance actions.
- 246.470-1 Assessment of additional costs.
- 246.470-2 Quality evaluation data.
- 246.471 Authorizing shipment of supplies.
- 246.472 Inspection stamping.

SUBPART 246.5—ACCEPTANCE

- 246.504 Certificate of conformance.

SUBPART 246.6—MATERIAL INSPECTION AND RECEIVING REPORTS

- 246.601 General.

SUBPART 246.7—WARRANTIES

- 246.701 Definitions.
- 246.704 Authority for use of warranties.
- 246.705 Limitations.
- 246.706 Warranty terms and conditions.
- 246.708 Warranties of data.

Defense Federal Acquisition Regulation Supplement

Part 246—Quality Assurance

- 246.710 Solicitation provision and contract clauses.
- 246.710-70 Warranty attachments.

SUBPART 246.8—CONTRACTOR LIABILITY FOR LOSS OF OR DAMAGE TO PROPERTY OF THE GOVERNMENT

- 246.870 Contractors' Counterfeit Electronic Part Detection and Avoidance.
- 246.870-0 Scope.
- 246.870-1 Definition.
- 246.870-2 Policy.
- 246.870-3 Contract clauses.

SUBPART 246.1—GENERAL
(Revised October 29, 2010)

246.101 Definitions.

“Discipline Working Group,” as used in this subpart, is defined in the clause at 252.246-7004, Safety of Facilities, Infrastructure, and Equipment for Military Operations.

246.102 Policy.

Departments and agencies shall also—

(1) Develop and manage a systematic, cost-effective Government contract quality assurance program to ensure that contract performance conforms to specified requirements. Apply Government quality assurance to all contracts for services and products designed, developed, purchased, produced, stored, distributed, operated, maintained, or disposed of by contractors.

(2) Conduct quality audits to ensure the quality of products and services meet contractual requirements.

(3) Base the type and extent of Government contract quality assurance actions on the particular acquisition.

(4) Provide contractors the maximum flexibility in establishing efficient and effective quality programs to meet contractual requirements. Contractor quality programs may be modeled on military, commercial, national, or international quality standards.

246.103 Contracting office responsibilities.

(1) The contracting office must coordinate with the quality assurance activity before changing any quality requirement.

(2) The activity responsible for technical requirements may prepare instructions covering the type and extent of Government inspections for acquisitions that are complex, have critical applications, or have unusual requirements. Follow the procedures at PGI 246.103(2) for preparation of instructions.

SUBPART 246.2—CONTRACT QUALITY REQUIREMENTS
(Revised June 25, 2013)

246.202 Types of contract quality requirements.

246.202-4 Higher-level contract quality requirements.

(1) Higher-level contract quality requirements are used in addition to a standard inspection requirement.

(2) Higher-level contract quality requirements, including nongovernment quality system standards adopted to meet DoD needs, are listed in the DoD Index of Specifications and Standards.

246.270 Safety of facilities, infrastructure, and equipment for military operations.

246.270-1 Scope.

This section implements section 807 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84). It establishes policies and procedures intended to ensure the safety and habitability of facilities, infrastructure, and equipment acquired for use by DoD military or civilian personnel during military operations performed outside the United States, Guam, Puerto Rico, and the Virgin Islands.

246.270-2 Policy.

(a) Contracts (including task and delivery orders) for the construction, installation, repair, maintenance, or operation of facilities, infrastructure, and equipment configured for occupancy, including but not limited to, existing host nation facilities, new construction, and relocatable buildings acquired for use by DoD military or civilian personnel, shall require a pre-occupancy safety and habitability inspection.

(b) To minimize safety and health risks, each contract covered by this policy shall require the contractor's compliance with the Unified Facilities Criteria (UFC) 1-200-01 and its referenced standards for—

- (1) Fire protection;
- (2) Structural integrity;
- (3) Electrical systems;
- (4) Plumbing;
- (5) Water treatment;
- (6) Waste disposal; and
- (7) Telecommunications networks.

Defense Federal Acquisition Regulation Supplement

Part 246—Quality Assurance

(c) Existing host nation facilities constructed to standards equivalent to or more stringent than UFC 1-200-01 are acceptable upon a written determination of the acceptability of the standards by the Discipline Working Group.

(d) Inspections to ensure compliance with UFC 1-200-01 standards shall be conducted in accordance with the inspection clause of the contract.

246.270-3 Exceptions.

The combatant commander may waive compliance with the foregoing standards when it is impracticable to comply with such standards under prevailing operational conditions.

246.270-4 Contract clause.

Use the clause at [252.246-7004](#), Safety of Facilities, Infrastructure, and Equipment for Military Operations, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, for the construction, installation, repair, maintenance, or operation of facilities, infrastructure, or for equipment configured for occupancy, planned for use by DoD military or civilian personnel during military operations.

SUBPART 246.3—CONTRACT CLAUSES

(Revised June 25, 2013)

246.370 Material inspection and receiving report.

(a) Use the clause at [252.246-7000](#), Material Inspection and Receiving Report, in solicitations and contracts when there will be separate and distinct deliverables, even if the deliverables are not separately priced.

(b) When contract administration is retained by the contracting office, the clause at [252.246-7000](#), Material Inspection and Receiving Report, is not required for—

- (1) Contracts awarded using simplified acquisition procedures;
- (2) Negotiated subsistence contracts;
- (3) Contracts for fresh milk and related fresh dairy products;
- (4) Contracts for which the deliverable is a scientific or technical report;
- (5) Research and development contracts not requiring the delivery of separately priced end items;
- (6) Base, post, camp, or station contracts;
- (7) Contracts in overseas areas when the preparation and distribution of the DD Form 250, Material Inspection and Receiving Report, by the contractor would not be practicable. In these cases, arrange for the contractor to provide the information necessary for the contracting office to prepare the DD Form 250;
- (8) Contracts for services when hardware is not acquired as an item in the contract; and
- (9) Indefinite delivery type contracts placed by central contracting offices which authorize only base, post, camp, or station activities to issue orders.

246.371 Notification of potential safety issues.

(a) Use the clause at [252.246-7003](#), Notification of Potential Safety Issues, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, for the acquisition of—

- (1) Repairable or consumable parts identified as critical safety items;
 - (2) Systems and subsystems, assemblies, and subassemblies integral to a system; or
 - (3) Repair, maintenance, logistics support, or overhaul services for systems and subsystems, assemblies, subassemblies, and parts integral to a system.
- (b) Follow the procedures at [PGI 246.371](#) for the handling of notifications received

Defense Federal Acquisition Regulation Supplement

Part 246—Quality Assurance

under the clause at [252.246-7003](#).

SUBPART 246.4—GOVERNMENT CONTRACT QUALITY ASSURANCE
(Revised October 1, 2010)

246.401 General.

The requirement for a quality assurance surveillance plan shall be addressed and documented in the contract file for each contract except for those awarded using simplified acquisition procedures. For contracts for services, the contracting officer should prepare a quality assurance surveillance plan to facilitate assessment of contractor performance, see 237.172. For contracts for supplies, the contracting officer should address the need for a quality assurance surveillance plan.

246.402 Government contract quality assurance at source.

Do not require Government contract quality assurance at source for contracts or delivery orders valued below \$300,000, unless—

- (1) Mandated by DoD regulation;
- (2) Required by a memorandum of agreement between the acquiring department or agency and the contract administration agency; or
- (3) The contracting officer determines that—
 - (i) Contract technical requirements are significant (e.g., the technical requirements include drawings, test procedures, or performance requirements);
 - (ii) The product being acquired—
 - (A) Has critical characteristics;
 - (B) Has specific features identified that make Government contract quality assurance at source necessary; or
 - (C) Has specific acquisition concerns identified that make Government contract quality assurance at source necessary; and
 - (iii) The contract is being awarded to—
 - (A) A manufacturer or producer; or
 - (B) A non-manufacturer or non-producer and specific Government verifications have been identified as necessary and feasible to perform.

246.404 Government contract quality assurance for acquisitions at or below the simplified acquisition threshold.

Do not require Government contract quality assurance at source for contracts or delivery orders valued at or below the simplified acquisition threshold unless the criteria at 246.402 have been met.

246.406 Foreign governments.

- (1) *Quality assurance among North Atlantic Treaty Organization (NATO) countries.*

Defense Federal Acquisition Regulation Supplement

Part 246—Quality Assurance

(i) NATO Standardization Agreement (STANAG) 4107, Mutual Acceptance of Government Quality Assurance and Usage of the Allied Quality Assurance Publications—

(A) Contains the processes, procedures, terms, and conditions under which one NATO member nation will perform quality assurance for another NATO member nation or NATO organization;

(B) Standardizes the development, updating, and application of the Allied Quality Assurance Publications; and

(C) Has been ratified by the United States and other nations in NATO with certain reservations identified in STANAG 4107.

(ii) Departments and agencies shall follow STANAG 4107 when—

(A) Asking a NATO member nation to perform quality assurance; or

(B) Performing quality assurance when requested by a NATO member nation or NATO organization.

(2) *International military sales (non-NATO)*. Departments and agencies shall—

(i) Perform quality assurance services on international military sales contracts or in accordance with existing agreements;

(ii) Inform host or U.S. Government personnel and contractors on the use of quality assurance publications; and

(iii) Delegate quality assurance to the host government when satisfactory services are available.

(3) *Reciprocal quality assurance agreements*. A Memorandum of Understanding (MOU) with a foreign country may contain an annex that provides for the reciprocal performance of quality assurance services. MOUs should be checked to determine whether such an annex exists for the country where a defense contract will be performed. (See Subpart 225.8 for more information about MOUs.)

246.407 Nonconforming supplies or services.

(f) If nonconforming material or services are discovered after acceptance, the defect appears to be the fault of the contractor, any warranty has expired, and there are no other contractual remedies, the contracting officer—

(i) Shall notify the contractor in writing of the nonconforming material or service;

(ii) Shall request that the contractor repair or replace the material, or perform the service, at no cost to the Government; and

Part 246—Quality Assurance

(iii) May accept consideration if offered. For guidance on solicitation of a refund, see Subpart 242.71.

(S-70) The head of the design control activity is the approval authority for acceptance of any nonconforming aviation or ship critical safety items or nonconforming modification, repair, or overhaul of such items (see 209.270). Authority for acceptance of minor nonconformances in aviation or ship critical safety items may be delegated as determined appropriate by the design control activity. See additional information at PGI 246.407.

246.408 Single-agency assignments of Government contract quality assurance.

246.408-70 Subsistence.

(a) The Surgeons General of the military departments are responsible for—

- (1) Acceptance criteria;
- (2) Technical requirements; and
- (3) Inspection procedures needed to assure wholesomeness of foods.

(b) The contracting office may designate any Federal activity, capable of assuring wholesomeness and quality in food, to perform quality assurance for subsistence contract items. The designation may—

- (1) Include medical service personnel of the military departments; and
- (2) Be on a reimbursable basis.

246.408-71 Aircraft.

(a) The Federal Aviation Administration (FAA) has certain responsibilities and prerogatives in connection with some commercial aircraft and of aircraft equipment and accessories (Pub. L. 85-726 (72 Stat 776, 49 U.S.C. 1423)). This includes the issuance of various certificates applicable to design, manufacture, and airworthiness.

(b) FAA evaluations are not a substitute for normal DoD evaluations of the contractor's quality assurance measures. Actual records of FAA evaluations may be of use to the contract administration office (CAO) and should be used to their maximum advantage.

(c) The CAO shall ensure that the contractor possesses any required FAA certificates prior to acceptance.

246.470 Government contract quality assurance actions.

246.470-1 Assessment of additional costs.

(a) Under the clause at FAR 52.246-2, Inspection of Supplies—Fixed-Price, after considering the factors in paragraph (c) of this subsection, the quality assurance

representative (QAR) may believe that the assessment of additional costs is warranted. If so, the representative shall recommend that the contracting officer take the necessary action and provide a recommendation as to the amount of additional costs. Costs are based on the applicable Federal agency, foreign military sale, or public rate in effect at the time of the delay, reinspection, or retest.

(b) If the contracting officer agrees with the QAR, the contracting officer shall—

(1) Notify the contractor, in writing, of the determination to exercise the Government's right under the clause at FAR 52.246-2, Inspection of Supplies--Fixed-Price; and

(2) Demand payment of the costs in accordance with the collection procedures contained in FAR Subpart 32.6.

(c) In making a determination to assess additional costs, the contracting officer shall consider—

(1) The frequency of delays, reinspection, or retest under both current and prior contracts;

(2) The cause of such delay, reinspection, or retest; and

(3) The expense of recovering the additional costs.

246.470-2 Quality evaluation data.

The contract administration office shall establish a system for the collection, evaluation, and use of the types of quality evaluation data specified in PGI 246.470-2.

246.471 Authorizing shipment of supplies.

(a) *General.*

(1) Ordinarily, a representative of the contract administration office signs or stamps the shipping papers that accompany Government source-inspected supplies to release them for shipment. This is done for both prime and subcontracts.

(2) An alternative procedure (see paragraph (b) of this section) permits the contractor to assume the responsibility for releasing the supplies for shipment.

(3) The alternative procedure may include prime contractor release of supplies inspected at a subcontractor's facility.

(4) The use of the alternative procedure releases DoD manpower to perform technical functions by eliminating routine signing or stamping of the papers accompanying each shipment.

(b) *Alternative Procedures--Contract Release for Shipment.*

(1) The contract administration office may authorize, in writing, the contractor to release supplies for shipment when—

Defense Federal Acquisition Regulation Supplement

Part 246—Quality Assurance

(i) The stamping or signing of the shipping papers by a representative of the contract administration office interferes with the operation of the Government contract quality assurance program or takes too much of the Government representative's time;

(ii) There is sufficient continuity of production to permit the Government to establish a systematic and continuing evaluation of the contractor's control of quality; and

(iii) The contractor has a record of satisfactory quality, including that pertaining to preparation for shipment.

(2) The contract administration office shall withdraw, in writing, the authorization when there is an indication that the conditions in paragraph (b)(1) of this subsection no longer exist.

(3) When the alternative procedure is used, require the contractor to—

(i) Type or stamp, and sign, the following statement on the required copy or copies of the shipping paper(s), or on an attachment—

The supplies in this shipment—

1. Have been subjected to and have passed all examinations and tests required by the contract;
2. Were shipped in accordance with authorized shipping instructions;
3. Conform to the quality, identity, and condition called for by the contract; and
4. Are of the quantity shown on this document.

This shipment was—

1. Released in accordance with section 246.471 of the Defense FAR Supplement; and
2. Authorized by (name and title of the authorized representative of the contract administration office) in a letter dated (date of authorizing letter). (Signature and title of contractor's designated official.)

(ii) Release and process, in accordance with established instructions, the DD Form 250, Material Inspection and Receiving Report, or other authorized receiving report.

246.472 Inspection stamping.

(a) DoD quality inspection approval marking designs (stamps) may be used for both prime contracts and subcontracts. Follow the procedures at PGI 246.472(a) for use of DoD inspection stamps.

Defense Federal Acquisition Regulation Supplement

Part 246—Quality Assurance

(b) Policies and procedures regarding the use of National Aeronautics and Space Administration (NASA) quality status stamps are contained in NASA publications. When requested by NASA centers, the DoD inspector shall use NASA quality status stamps in accordance with current NASA requirements.

Defense Federal Acquisition Regulation Supplement

Part 246—Quality Assurance

SUBPART 246.5—ACCEPTANCE

(Revised January 10, 2008)

246.504 Certificate of conformance.

Before authorizing a certificate of conformance for aviation or ship critical safety items, obtain the concurrence of the head of the design control activity (see 209.270).

SUBPART 246.6—MATERIAL INSPECTION AND RECEIVING REPORTS
(Revised May 12, 2006)

246.601 General.

See Appendix F, Material Inspection and Receiving Report, for procedures and instructions for the use, preparation, and distribution of—

- (1) The Material Inspection and Receiving Report (DD Form 250 series); and
- (2) Supplier's commercial shipping/packing lists used to evidence Government contract quality assurance.

SUBPART 246.7—WARRANTIES

(Revised March 25, 2016)

246.701 Definitions.

As used in this subpart—

“Acceptance,” as used in this subpart and in the warranty clauses at FAR 52.246-17, Warranty of Supplies of a Noncomplex Nature; FAR 52.246-18, Warranty of Supplies of a Complex Nature; FAR 52.246-19, Warranty of Systems and Equipment Under Performance Specifications or Design Criteria; and FAR 52.246-20, Warranty of Services, includes the execution of an official document (e.g., DD Form 250, Material Inspection and Receiving Report) by an authorized representative of the Government.

“Defect” means any condition or characteristic in any supply or service furnished by the contractor under the contract that is not in compliance with the requirements of the contract.

“Enterprise” means the entity (e.g., a manufacturer or vendor) responsible for granting the warranty and/or assigning unique item identifiers to serialized warranty items.

“Enterprise identifier” means a code that is uniquely assigned to an enterprise by an issuing agency.

“Issuing agency” means an organization responsible for assigning a globally unique identifier to an enterprise, as indicated in the Register of Issuing Agency Codes for International Standards Organization/International Electrotechnical Commission 15459, located at http://www.aimglobal.org/?Reg_Authority15459.

“Serialized item” means each item produced is assigned a serial number that is unique among all the collective tangible items produced by the enterprise, or each item of a particular part, lot, or batch number is assigned a unique serial number within that part, lot, or batch number assignment within the enterprise identifier. The enterprise is responsible for ensuring unique serialization within the enterprise identifier or within the part, lot, or batch numbers, and that serial numbers, once assigned, are never used again.

“Unique item identifier” means a set of data elements marked on an item that is globally unique and unambiguous.

“Warranty tracking” means the ability to trace a warranted item from delivery through completion of the effectivity of the warranty.

246.704 Authority for use of warranties.

(1) The chief of the contracting office must approve use of a warranty, except in acquisitions for—

(i) Commercial items (see FAR 46.709);

(ii) Technical data, unless the warranty provides for extended liability (see [246.708](#));

(iii) Supplies and services in fixed-price type contracts containing quality assurance provisions that reference higher-level contract quality requirements (see [246.202-4](#)); or

(iv) Supplies and services in construction contracts when using the warranties that are contained in Federal, military, or construction guide specifications.

(2) The chief of the contracting office shall approve the use of a warranty only when the benefits are expected to outweigh the cost.

246.705 Limitations.

(a) In addition to the exceptions provided in FAR 46.705(a), warranties in the clause at [252.246-7001](#), Warranty of Data, may be used in cost-reimbursement contracts.

246.706 Warranty terms and conditions.

(b)(5) *Markings.* For non-commercial items, use MIL-STD-129, Marking for Shipments and Storage, and MIL-STD-130, Identification Marking of U.S. Military Property, when marking warranty items.

246.708 Warranties of data.

Obtain warranties on technical data when practicable and cost effective. Consider the factors in FAR 46.703 in deciding whether to obtain warranties of technical data. Consider the following in deciding whether to use extended liability provisions—

(1) The likelihood that correction or replacement of the nonconforming data, or a price adjustment, will not give adequate protection to the Government; and

(2) The effectiveness of the additional remedy as a deterrent against furnishing nonconforming data.

246.710 Contract clauses.

(1) Use a clause substantially the same as the basic or one of the alternates of the clause at [252.246-7001](#), Warranty of Data, in solicitations and contracts that include the clause at [252.227-7013](#), Rights in Technical Data and Computer Software, when there is a need for greater protection or period of liability than provided by the inspection and warranty clauses prescribed in FAR part 46.

(i) Use the basic clause in solicitations and contracts that are not firm-fixed price or fixed-price incentive.

(ii) Use alternate I in fixed-price-incentive solicitations and contracts.

(iii) Use alternate II in firm-fixed-price solicitations and contracts.

(2) Use the clause at [252.246-7002](#), Warranty of Construction (Germany), instead of the clause at FAR 52.246-21, Warranty of Construction, in solicitations and contracts for construction when a fixed-price contract will be awarded and contract performance will be in Germany.

(3) When the solicitation includes the clause at [252.211-7003](#), Item Unique Identification and Valuation, which is prescribed in [211.274-6\(a\)](#), and it is anticipated that the resulting contract will include a warranty for serialized items—

(i) Use the provision at [252.246-7005](#), Notice of Warranty Tracking of Serialized Items, in the solicitation if the Government does not specify a warranty and offerors will be required to enter data with the offer;

(ii) Use the clause at [252.246-7006](#), Warranty Tracking of Serialized Items, in the solicitation and contract; and

(iii) Include the following warranty attachments, available at https://www.pdrep.csd.disa.mil/pdrep_files/other/wsr.htm, in the solicitation and contract and see [246.710-70](#):

(A) Warranty Tracking Information.

(B) Source of Repair Instructions.

246.710-70 Warranty attachments.

Follow the procedures at [PGI 246.710-70](#) regarding warranty attachments.

**SUBPART 246.8—CONTRACTOR LIABILITY FOR LOSS OF OR DAMAGE TO
PROPERTY OF THE GOVERNMENT**

(Revised August 2, 2016)

246.870 Contractors' Counterfeit Electronic Part Detection and Avoidance.

246.870-0 Scope. This section—

(a) Partially implements section 818(c) and (e) of the National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81), as amended by section 817 of the National Defense Authorization Act for Fiscal Year 2015 (Pub. L. 113-291); and

(b) Prescribes policy and procedures for preventing counterfeit electronic parts and suspect counterfeit electronic parts from entering the supply chain when procuring electronic parts or end items, components, parts, or assemblies that contain electronic parts.

246.870-1 Definition. “Authorized supplier,” as used in this subpart, means a supplier, distributor, or an aftermarket manufacturer with a contractual arrangement with, or the express written authority of, the original manufacturer or current design activity to buy, stock, repackage, sell, or distribute the part.

246.870-2 Policy.

(a) *Sources of electronic parts.*

(1) Except as provided in paragraph (a)(2) of this section, the Government requires contractors and subcontractors at all tiers, to—

(i) Obtain electronic parts that are in production by the original manufacturer or an authorized aftermarket manufacturer or currently available in stock from—

(A) The original manufacturers of the parts;

(B) Their authorized suppliers; or

(C) Suppliers that obtain such parts exclusively from the original manufacturers of the parts or their authorized suppliers; and

(ii) Obtain electronic parts that are not in production by the original manufacturer or an authorized aftermarket manufacturer, and that are not currently available in stock from a source listed in paragraph (a)(1)(i) of this section, from suppliers identified by the Contractor as contractor-approved suppliers, provided that—

(A) For identifying and approving such contractor-approved suppliers, the contractor uses established counterfeit prevention industry standards and processes (including inspection, testing, and authentication), such as the DoD-adopted standards at <https://assist.dla.mil>;

Defense Federal Acquisition Regulation Supplement

Part 246—Quality Assurance

(B) The contractor assumes responsibility for the authenticity of parts provided by such contractor-approved suppliers (see [231.205-71](#)); and

(C) The selection of such contractor-approved suppliers is subject to review and audit by the contracting officer.

(2) The Government requires contractors and subcontractors to comply with the notification, inspection, testing, and authentication requirements of paragraph (b)(3)(ii) through (b)(3)(iv) of the clause at [252.246-7008](#), Sources of Electronic Parts, if the contractor—

(i) Obtains an electronic part from—

(A) A source other than any of the sources identified in paragraph (a)(1) of this section, due to nonavailability from such sources; or

(B) A subcontractor (other than the original manufacturer) that refuses to accept flowdown of this clause; or

(ii) Cannot confirm that an electronic part is new or not previously used and that it has not been comingled in supplier new production or stock with used, refurbished, reclaimed, or returned parts.

(3) Contractors and subcontractors are still required to comply with the requirements of paragraphs (a)(1) or (2) of this section, as applicable, if—

(i) Authorized to purchase electronic parts from the Federal Supply Schedule;

(ii) Purchasing electronic parts from suppliers accredited by the Defense Microelectronics Activity; or

(iii) Requisitioning electronic parts from Government inventory/stock under the authority of the clause at [252.251-7000](#), Ordering from Government Supply Sources.

(A) The cost of any required inspection, testing, and authentication of such parts may be charged as a direct cost.

(B) The Government is responsible for the authenticity of the requisitioned electronic parts. If any such part is subsequently found to be counterfeit or suspect counterfeit, the Government will—

(1) Promptly replace such part at no charge; and

(2) Consider an adjustment in the contract schedule to the extent that replacement of the counterfeit or suspect counterfeit electronic parts caused a delay in performance.

(b) *Contractor counterfeit electronic part detection and avoidance system.*

(1) Contractors that are subject to the cost accounting standards and that supply electronic parts or products that include electronic parts, and their

subcontractors that supply electronic parts or products that include electronic parts, are required to establish and maintain an acceptable counterfeit electronic part detection and avoidance system. Failure to do so may result in disapproval of the purchasing system by the contracting officer and/or withholding of payments (see [252.244-7001](#), Contractor Purchasing System Administration).

(2) *System criteria.* A counterfeit electronic part detection and avoidance system shall include risk-based policies and procedures that address, at a minimum, the following areas (see the clause at [252.246-7007](#), Contractor Counterfeit Electronic Part Detection and Avoidance System):

- (i) The training of personnel.
- (ii) The inspection and testing of electronic parts, including criteria for acceptance and rejection.
- (iii) Processes to abolish counterfeit parts proliferation.
- (iv) Processes for maintaining electronic part traceability.
- (v) Use of suppliers in accordance with paragraph (a) of this section.
- (vi) The reporting and quarantining of counterfeit electronic parts and suspect counterfeit electronic parts.
- (vii) Methodologies to identify suspect counterfeit electronic parts and to rapidly determine if a suspect counterfeit electronic part is, in fact, counterfeit.
- (viii) Design, operation, and maintenance of systems to detect and avoid counterfeit electronic parts and suspect counterfeit electronic parts.
- (ix) Flow down of counterfeit detection and avoidance requirements.
- (x) Process for keeping continually informed of current counterfeiting information and trends.
- (xi) Process for screening the Government-Industry Data Exchange Program (GIDEP) reports and other credible sources of counterfeiting information.
- (xii) Control of obsolete electronic parts.

246.870-3 Contract clauses.

(a)(1) Except as provided in paragraph (a)(2) of this section, use the clause at [252.246-7007](#), Contractor Counterfeit Electronic Part Detection and Avoidance System, in solicitations and contracts when procuring—

- (i) Electronic parts;
 - (ii) End items, components, parts, or assemblies containing electronic parts;
- or

Defense Federal Acquisition Regulation Supplement

Part 246—Quality Assurance

(iii) Services, if the contractor will supply electronic parts or components, parts, or assemblies containing electronic parts as part of the service.

(2) Do not use the clause in solicitations and contracts that are set aside for small business.

(b) Use the clause at [252.246-7008](#), Sources of Electronic Parts, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, when procuring—

(1) Electronic parts;

(2) End items, components, parts, or assemblies containing electronic parts; or

(3) Services, if the contractor will supply electronic parts or components, parts, or assemblies containing electronic parts as part of the service.

TABLE OF CONTENTS
(Revised October 14, 2014)

247.001 Definitions.

SUBPART 247.1—GENERAL

247.101 Policies.

**SUBPART 247.2—CONTRACTS FOR TRANSPORTATION OR FOR
TRANSPORTATION-RELATED SERVICES**

247.200 Scope of subpart.

247.206 Preparation of solicitations and contracts.

247.207 Solicitation provisions, contract clauses, and special requirements.

247.270 Stevedoring contracts.

247.270-1 Definitions.

247.270-2 Technical provisions.

247.270-3 Evaluation of bids and proposals.

247.270-4 Contract clauses.

247.271 Contracts for the preparation of personal property for shipment or storage or for performance of intra-city or intra-area movement.

247.271-1 Policy.

247.271-2 Procedures.

247.271-3 Solicitation provisions, schedule formats, and contract clauses.

SUBPART 247.3—TRANSPORTATION IN SUPPLY CONTRACTS

247.301 General.

247.301-70 Definition.

247.301-71 Evaluation factor or subfactor.

247.305 Solicitation provisions, contract clauses, and transportation factors.

247.305-10 Packing, marking, and consignment instructions.

247.305-70 Returnable containers other than cylinders.

247.370 DD Form 1384, Transportation Control and Movement Document.

247.371 DD Form 1653, Transportation Data for Solicitations.

247.372 DD Form 1654, Evaluation of Transportation Cost Factors.

SUBPART 247.5—OCEAN TRANSPORTATION BY U.S.-FLAG VESSELS

247.570 Scope.

247.571 Definitions.

247.572 Policy.

247.573 General.

247.574 Solicitation provisions and contract clauses.

Defense Federal Acquisition Regulation Supplement

Part 247—Transportation

(Revised August 20, 2010)

247.001 Definitions.

For definitions of "Civil Reserve Air Fleet" and "Voluntary Intermodal Sealift Agreement," see Joint Pub 1-02, DoD Dictionary of Military and Associated Terms. See additional information at PGI 247.001 for the Voluntary Intermodal Sealift Agreement program.

Defense Federal Acquisition Regulation Supplement

Part 247—Transportation

SUBPART 247.1—GENERAL

(Added June 29, 2012)

247.101 Policies.

(h) *Shipping documents covering f.o.b. origin shipments.*

(i) Procedures for the contractor to obtain bills of lading are in the clause at [252.247-7028](#), Application for U.S. Government Shipping Documentation/ Instructions.

(ii) The term “commercial bills of lading” includes the use of any commercial form or procedure.

**SUBPART 247.2—CONTRACTS FOR TRANSPORTATION OR FOR
TRANSPORTATION-RELATED SERVICES**

(Revised April 21, 2014)

247.200 Scope of subpart.

This subpart does not apply to the operation of vessels owned by, or bareboat chartered by, the Government. See additional guidance at [PGI 247.200](#) for procurement of transportation or related services.

247.206 Preparation of solicitations and contracts.

Consistent with FAR 15.304 and [215.304](#), consider using the following as evaluation factors or subfactors:

- (1) Record of claims involving loss or damage; and
- (2) Commitment of transportation assets to readiness support (e.g., Civil Reserve Air Fleet and Voluntary Intermodal Sealift Agreement).

247.207 Solicitation provisions, contract clauses, and special requirements.

(1) Use the clause at [252.247-7003](#), Pass-Through of Motor Carrier Fuel Surcharge Adjustment to the Cost Bearer, in solicitations and contracts for carriage in which a motor carrier, broker, or freight forwarder will provide or arrange truck transportation services that provide for a fuel-related adjustment.

(2) Use the clause at [252.247-7028](#), Application for U.S. Government Shipping Documentation/Instructions, when shipping under Bills of Lading and Domestic Route Order under FOB origin contracts, Export Traffic Release regardless of FOB terms, or foreign military sales shipments.

247.270 Stevedoring contracts.

247.270-1 Definitions.

(a) “Commodity rate” is—

(1) The price quoted for handling a ton (weight or measurement) of a specified commodity; and

(2) Computed by dividing the hourly stevedoring gang cost by the estimated number of tons of the specified commodity that can be handled in one hour.

(b) “Gang cost” is—

(1) The total hourly wages paid to the workers in the gang, in accordance with the collective bargaining agreement between the maritime industry and the unions at a specific port; and

(2) Payments for workmen's compensation, social security taxes, unemployment insurance, taxes, liability and property damage insurance, general and administrative expenses, and profit.

(c) “Stevedoring” is the—

(1) Loading of cargo from an agreed point of rest on a pier or lighter and its storage aboard a vessel; or

(2) Breaking out and discharging of cargo from any space in the vessel to an agreed point of rest dockside or in a lighter.

247.270-2 Technical provisions.

(a) Because conditions vary at different ports, and sometimes within the same port it is not practical to develop standard technical provisions covering all phases of stevedoring operations.

(b) When including rail car, truck, or intermodal equipment loading and unloading, or other dock and terminal work under a stevedoring contract, include these requirements as separate items of work.

247.270-3 Evaluation of bids and proposals.

As a minimum, require that offers include—

(a) Tonnage or commodity rates that apply to the bulk of the cargo worked under normal conditions;

(b) Labor-hour rates that apply to services not covered by commodity rates, or to work performed under hardship conditions; and

(c) Rates for equipment rental.

247.270-4 Contract clauses.

Use the following clauses in solicitations and contracts for stevedoring services as indicated:

(a) [252.247-7000](#), Hardship Conditions, in all solicitations and contracts.

(b) [252.247-7001](#), Price Adjustment, when using sealed bidding.

(c) [252.247-7002](#), Revision of Prices, when using negotiation.

(d) [252.247-7004](#), Indefinite Quantities--Fixed Charges, when the contract is an indefinite-quantity type and will provide for the payment of fixed charges.

(e) [252.247-7005](#), Indefinite Quantities--No Fixed Charges, when the contract is an indefinite-quantity type and will not provide for the payment of fixed charges.

(f) [252.247-7006](#), Removal of Contractor's Employees, in all solicitations and contracts.

- (g) [252.247-7007](#), Liability and Insurance, in all solicitations and contracts.

247.271 Contracts for the preparation of personal property for shipment or storage or for performance of intra-city or intra-area movement.

247.271-1 Policy.

- (a) *Annual contracts.* Normally—

- (1) Use requirements contracts to acquire services for the—

- (i) Preparation of personal property for shipment or storage; and
(ii) Performance of intra-area movement.

- (2) Award contracts on a calendar year basis.

- (3) Provide for option years.

- (4) Award contracts, or exercise option years, before November 1 of each year, if possible.

- (b) *Areas of performance.* Define clearly in the solicitation each area of performance.

- (1) Establish one or more areas; however, hold the number to a minimum consistent with local conditions.

- (2) Each schedule may provide for the same or different areas of performance. Determine the areas as follows—

- (i) Use political boundaries, streets, or any other features as lines of demarcation. Consider such matters as—

- (A) Total volume;
(B) Size of overall area; and
(C) The need to service isolated areas of high population density.

- (ii) Specifically identify frequently used terminals, and consider them as being included in each area of performance described in the solicitation.

- (c) *Maximum requirements-minimum capability.* The contracting officer must—

- (1) Establish realistic quantities on the Estimated Quantities Report in DoD 4500.9-R, Defense Transportation Regulation, Part IV;

- (2) Ensure that the Government's minimum acceptable daily capability—

- (i) Will at least equal the maximum authorized individual weight allowance as prescribed by the Joint Federal Travel Regulations; and

(ii) Will encourage maximum participation of small business concerns as offerors.

247.271-2 Procedures.

Follow the procedures at [PGI 247.271-2](#) for contracting for the preparation of personal property for shipment or storage.

247.271-3 Solicitation provisions, schedule formats, and contract clauses.

When acquiring services for the preparation of personal property for movement or storage, or for performance of intra-city or intra-area movement, use the following provisions, clauses, and schedules. Revise solicitation provisions and schedules, as appropriate, if using negotiation rather than sealed bidding. Overseas commands, except those in Alaska and Hawaii, may modify these clauses to conform to local practices, laws, and regulations.

(a) Use the basic or the alternate of the provision at [252.247-7008](#), Evaluation of Bids.

(1) Use the basic provision when there are no “additional services” items being added to the schedule.

(2) Use the alternate I provision when adding “additional services” items to the schedule.

(b) The provision at [252.247-7009](#), Award.

(c) In solicitations and resulting contracts, the schedules provided by the installation personal property shipping office. Follow the procedures at [PGI 247.271-3\(c\)](#) for use of schedules.

(d) The clause at [252.247-7010](#), Scope of Contract.

(e) The clause at [252.247-7011](#), Period of Contract. When the period of performance is less than a calendar year, modify the clause to indicate the beginning and ending dates. However, the contract period must not end later than December 31 of the year in which the contract is awarded.

(f) In addition to designating each ordering activity, as required by the clause at FAR 52.216-18, Ordering, identify by name or position title the individuals authorized to place orders for each activity. When provisions are made for placing oral orders in accordance with FAR 16.504(a)(4)(vii), document the oral orders in accordance with department or agency instructions.

(g) The clause at [252.247-7012](#), Ordering Limitation.

(h) The clause at [252.247-7013](#), Contract Areas of Performance.

(i) The clause at [252.247-7014](#), Demurrage. See additional information at [PGI 247.271-3\(c\)\(1\)](#) for demurrage and detention charges.

(j) The clause at [252.247-7016](#), Contractor Liability for Loss and Damage.

Defense Federal Acquisition Regulation Supplement

Part 247—Transportation

- (k) The clause at [252.247-7017](#), Erroneous Shipments.
- (l) The clause at [252.247-7018](#), Subcontracting.
- (m) The clause at [252.247-7019](#), Drayage.
- (n) The clause at [252.247-7020](#), Additional Services.
- (o) The clauses at FAR 52.247-8, Estimated Weight or Quantities Not Guaranteed, and FAR 52.247-13, Accessorial Services--Moving Contracts.
- (p) See the prescription at [216.506](#)(d) requiring the use of [252.216-7010](#), Requirements.

SUBPART 247.3—TRANSPORTATION IN SUPPLY CONTRACTS

(Revised August 20, 2010)

247.301 General.

See PGI 247.301 for transportation guidance relating to Government Purchase Card purchases that require shipments to destinations outside CONUS.

247.301-70 Definition.

"Integrated logistics managers" or "third-party logistics providers" means providers of multiple logistics services. Some examples of logistics services are the management of transportation, demand forecasting, information management, inventory maintenance, warehousing, and distribution.

247.301-71 Evaluation factor or subfactor.

For contracts that will include a significant requirement for transportation of items outside CONUS, include an evaluation factor or subfactor that favors suppliers, third-party logistics providers, and integrated logistics managers that commit to using carriers that participate in one of the readiness programs (e.g., Civil Reserve Air Fleet and Voluntary Intermodal Sealift Agreement).

247.305 Solicitation provisions, contract clauses, and transportation factors.

247.305-10 Packing, marking, and consignment instructions.

Follow the procedures at PGI 247.305-10 for preparation of consignment instructions.

247.305-70 Returnable containers other than cylinders.

Use the clause at 252.247-7021, Returnable Containers Other Than Cylinders, in solicitations and contracts for supplies involving contractor-furnished returnable reels, spools, or other returnable containers if the contractor is to retain title to the containers.

247.370 DD Form 1384, Transportation Control and Movement Document.

The transportation office of the shipping activity prepares the DD Form 1384 to accompany all shipments made through a military air or water port, in accordance with DoD 4500.9-R, Defense Transportation Regulation, Part II, Chapter 203. A link to this document is available in PGI 247.370.

247.371 DD Form 1653, Transportation Data for Solicitations.

The transportation specialist prepares the DD Form 1653 to accompany requirements for the acquisition of supplies. The completed form should contain recommendations for suitable f.o.b. terms and other suggested transportation provisions for inclusion in the solicitation.

247.372 DD Form 1654, Evaluation of Transportation Cost Factors.

Contracting personnel may use the DD Form 1654 to furnish information to the transportation office for development of cost factors for use by the contracting officer in the evaluation of f.o.b. origin offers.

SUBPART 247.5—OCEAN TRANSPORTATION BY U.S.-FLAG VESSELS

(Revised October 14, 2014)

247.570 Scope.

This subpart—

(a) Implements—

(1) The Cargo Preference Act of 1904 ("the 1904 Act"), 10 U.S.C. 2631, which applies to the ocean transportation of cargo owned by, or destined for use by, DoD;

(2) Section 1017 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364), which requires consideration, in solicitations requiring a covered vessel, of the extent to which offerors have had overhaul, repair, and maintenance work performed in shipyards located in the United States or Guam; and

(3) Section 3504 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417), which addresses requirements that apply to riding gang members and DoD-exempted individuals (see [252.247-7027\(c\)](#)) who perform work on U.S.-flag vessels under DoD contracts for transportation services documented under chapter 121, title 46 U.S.C.

(b) Does not specifically implement the Cargo Preference Act of 1954 ("the 1954 Act"), 46 U.S.C. 1241(b). The 1954 Act is applicable to DoD, but DFARS coverage is not required because compliance with the 1904 Act historically has resulted in DoD exceeding the 1954 Act's requirements; and

(c) Does not apply to ocean transportation of the following products, in which case FAR Subpart 47.5 applies:

(1) Products obtained for contributions to foreign assistance programs.

(2) Products owned by agencies other than DoD, unless the products are clearly identifiable for eventual use by DoD.

247.571 Definitions.

As used in this subpart—

(a) "Components," "foreign flag vessel," "ocean transportation," "supplies," and "U.S.-flag vessel" have the meaning given in the clause at [252.247-7023](#), Transportation of Supplies by Sea.

(b) "Reflagging or repair work" has the meaning given in the clause at [252.247-7025](#), Reflagging or Repair Work.

(c) "Covered vessel," "foreign shipyard," "overhaul, repair, and maintenance work," "shipyard," and "U.S. shipyard" have the meaning given in the provision at [252.247-7026](#), Evaluation Preference for Use of Domestic Shipyards – Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade.

247.572 Policy.

(a) In accordance with 10 U.S.C. 2631(a), DoD contractors shall transport supplies, as defined in the clause at [252.247-7023](#), Transportation of Supplies by Sea, exclusively on U.S.-flag vessels unless—

- (1) Those vessels are not available;
- (2) The proposed charges to the Government are higher than charges to private persons for the transportation of like goods; or
- (3) The proposed freight charges are excessive or unreasonable.

(b) Contracts must provide for the use of Government-owned vessels when security classifications prohibit the use of other than Government-owned vessels.

(c) In accordance with 10 U.S.C. 2631(b)—

(1) Any vessel used under a time charter contract for the transportation of supplies under this section shall have any reflagging or repair work, as defined in the clause at [252.247-7025](#), Reflagging or Repair Work, performed in the United States or its outlying areas, if the reflagging or repair work is performed—

(i) On a vessel for which the contractor submitted an offer in response to the solicitation for the contract; and

(ii) Prior to acceptance of the vessel by the Government.

(2) The Secretary of Defense may waive this requirement if the Secretary determines that such waiver is critical to the national security of the United States.

(d) In accordance with Section 1017 of the National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364)—

(1) When obtaining carriage requiring a covered vessel, the contracting officer must consider the extent to which offerors have had overhaul, repair, and maintenance work for covered vessels performed in shipyards located in the United States or Guam; and

(2) DoD must submit an annual report to the congressional defense committees, addressing the information provided by offerors with regard to overhaul, repair, and maintenance for covered vessels performed in the United States or Guam.

(e) In accordance with section 3504 of the National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417), DoD may not award, renew or extend, or exercise an option under a charter of, or contract for carriage of cargo by, a U.S.-flag vessel documented under chapter 121 of title 46 U.S.C, unless the contract contains the clause at [252.247-7027](#).

247.573 General.

(a) *Delegated authority.* Pursuant to 10 U.S.C. 2631(a) and Secretary of Defense Memorandum dated February 7, 2012, (see [PGI 247.573](#)) the authority to make determinations of excessive ocean liner rates and excessive charter rates is delegated to—

(1) The Commander, United States Transportation Command, for excessive ocean liner rate determinations; and

(2) The Secretary of the Navy for excessive charter rate determinations.

(b) *Procedures.*

(1) Contracting officers shall follow the procedures at [PGI 247.573\(b\)\(1\)](#) when purchase of ocean transportation services is incidental to a contract for supplies, services, or construction.

(2) Contracting officers shall follow the procedures at [PGI 247.573\(b\)\(2\)](#) when direct purchase of ocean transportation services is the principal purpose of the contract.

(3) Agency and department procedures relating to annual reporting requirements of information received from offerors in response to solicitation provision [252.247-7026](#), Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise of Noncontiguous Trade, are found at [PGI 247.573\(b\)\(3\)](#).

(4) Procedures are provided at [PGI 247.573\(b\)\(4\)](#) to accomplish security background checks pursuant to clause [252.247-7027](#), Riding Gang Member Requirements.

247.574 Solicitation provisions and contract clauses.

(a)(1) Use the provision at [252.247-7022](#), Representation of Extent of Transportation by Sea, in all solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, except—

(i) Those for direct purchase of ocean transportation services; or

(ii) Those with an anticipated value at or below the simplified acquisition threshold.

(2) If the solicitation includes the provision at FAR 52.204-7, do not separately list [252.247-7022](#) in the solicitation.

(b) Use the basic or one of the alternates of the clause at [252.247-7023](#), Transportation of Supplies by Sea, in all solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, except those for direct purchase of ocean transportation services.

Defense Federal Acquisition Regulation Supplement

Part 247--Transportation

(1) Use the basic clause unless any of the supplies to be transported are commercial items that are—

(i) Shipped in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations when the contract is not a construction contract; or

(ii) Commissary or exchange cargoes transported outside of the Defense Transportation System when the contract is not a construction contract.

(2) Use the alternate I clause if any of the supplies to be transported are commercial items that are shipped in direct support of U.S. military contingency operations, exercises, or forces deployed in humanitarian or peacekeeping operations when the contract is not a construction contract.

(3) Use the alternate II clause if any of the supplies to be transported are commercial items that are commissary or exchange cargoes transported outside of the Defense Transportation System (10 U.S.C. 2643), when the contract is not a construction contract.

(c) Use the clause at [252.247-7024](#), Notification of Transportation of Supplies by Sea, in all contracts, including contracts using FAR part 12 procedures for the acquisition of commercial items, for which the offeror made a negative response to the inquiry in the provision at [252.247-7022](#), Representation of Extent of Transportation by Sea.

(d) Use the clause at [252.247-7025](#), Reflagging or Repair Work, in all time charter solicitations and contracts, including time charter solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that are for the use of a vessel for the transportation of supplies, unless a waiver has been granted in accordance with [247.572\(c\)\(2\)](#).

(e) Use the provision at [252.247-7026](#), Evaluation Preference for Use of Domestic Shipyards—Applicable to Acquisition of Carriage by Vessel for DoD Cargo in the Coastwise or Noncontiguous Trade, in solicitations, including solicitations using FAR part 12 procedures for the acquisition of commercial items, that require a covered vessel for carriage of cargo for DoD.

(f) Use the clause at [252.247-7027](#), Riding Gang Member Requirements, in solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial items, that are for the charter of, or contract for carriage of cargo by, a U.S.-flag vessel documented under chapter 121 of title 46 U.S.C.

Defense Federal Acquisition Regulation Supplement

Part 248—Value Engineering

TABLE OF CONTENTS—(Removed)
(October 01, 2001)

Defense Federal Acquisition Regulation Supplement

Part 248—Value Engineering

SUBPART 248.2—(Removed)
(October 01, 2001)

Defense Federal Acquisition Regulation Supplement

Part 249—Termination of Contracts

TABLE OF CONTENTS

(Revised May 12, 2006)

SUBPART 249.1—GENERAL PRINCIPLES

- 249.105 Duties of termination contracting officer after issuance of notice of termination.
- 249.105-1 Termination status reports.
- 249.105-2 Release of excess funds.
- 249.109 Settlement agreements.
- 249.109-7 Settlement by determination.
- 249.110 Settlement negotiation memorandum.

SUBPART 249.5—CONTRACT TERMINATION CLAUSES

- 249.501 General.
- 249.501-70 Special termination costs.

SUBPART 249.70—SPECIAL TERMINATION REQUIREMENTS

- 249.7000 Terminated contracts with Canadian Commercial Corporation.
- 249.7001 Congressional notification on significant contract terminations.
- 249.7002 Reserved.
- 249.7003 Notification of anticipated contract terminations or reductions.

SUBPART 249.1—GENERAL PRINCIPLES

(Revised May 12, 2006)

249.105 Duties of termination contracting officer after issuance of notice of termination.

249.105-1 Termination status reports.

Follow the procedures at PGI 249.105-1 for reporting status of termination actions.

249.105-2 Release of excess funds.

See PGI 249.105-2 for guidance on recommending the release of excess funds.

249.109 Settlement agreements.

249.109-7 Settlement by determination.

Follow the procedures at PGI 249.109-7 for settlement of a convenience termination by determination.

249.110 Settlement negotiation memorandum.

Follow the procedures at PGI 249.110 for preparation of a settlement negotiation memorandum.

SUBPART 249.5—CONTRACT TERMINATION CLAUSES

249.501 General.

249.501-70 Special termination costs.

(a) The clause at 252.249-7000, Special Termination Costs, may be used in an incrementally funded contract when its use is approved by the agency head.

(b) The clause is authorized when—

(1) The contract term is two years or more;

(2) The contract is estimated to require—

(i) Total RDT&E financing in excess of \$25 million; or

(ii) Total production investment in excess of \$100 million; and

(3) Adequate funds are available to cover the contingent reserve liability for special termination costs.

(c) The contractor and the contracting officer must agree upon an amount that represents their best estimate of the total special termination costs to which the contractor would be entitled in the event of termination of the contract. Insert this amount in paragraph (c) of the clause.

(d)(1) Consider substituting an alternate paragraph (c) for paragraph (c) of the basic clause when—

(i) The contract covers an unusually long performance period; or

(ii) The contractor's cost risk associated with contingent special termination costs is expected to fluctuate extensively over the period of the contract.

(2) The alternate paragraph (c) should provide for periodic negotiation and adjustment of the amount reserved for special termination costs. Occasions for periodic adjustment may include—

(i) The Government's incremental assignment of funds to the contract;

(ii) The time when certain performance milestones are accomplished by the contractor; or

(iii) Other specific time periods agreed upon by the contracting officer and the contractor.

SUBPART 249.70—SPECIAL TERMINATION REQUIREMENTS

(Revised September 19, 2014)

249.7000 Terminated contracts with Canadian Commercial Corporation.

(a) Terminate contracts with the Canadian Commercial Corporation in accordance with—

(1) The Letter of Agreement (LOA) between the Department of Defence Production (Canada) and the U.S. DoD, “Canadian Agreement” (for a copy of the LOA or for questions on its currency, contact the Office of the Director of Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), osd.pentagon.ousd-atl.mbx.cpic@mail.mil;

(2) Policies in the Canadian Agreement and Part 249; and

(3) The Canadian Supply Manual, Chapter 8, Annex 8.3, available at <http://www.tpsgc-pwgsc.gc.ca/app-acq/ga-sm/index-eng.html>, “Termination for Convenience Process, Public Works and Government Services Canada.”

(b) Contracting officers shall ensure that the Canadian Commercial Corporation submits termination settlement proposals in the format prescribed in FAR 49.602 and that they contain the amount of settlements with subcontractors. The termination contracting officer (TCO) shall prepare an appropriate settlement agreement. (See FAR 49.603.) The letter transmitting a settlement proposal must certify—

(1) That disposition of inventory has been completed; and

(2) That the Contract Claims Resolution Board of the Public Works and Government Services Canada has approved settlements with Canadian subcontractors when the Procedures Manual on Termination of Contracts requires such approval.

(c)(1) The Canadian Commercial Corporation will—

(i) Settle all Canadian subcontractor termination claims under the Canadian Agreement; and

(ii) Submit schedules listing serviceable and usable contractor inventory for screening to the TCO (see FAR 45.6).

(2) After screening, the TCO must provide guidance to the Canadian Commercial Corporation for disposition of the contractor inventory.

(3) Settlement of Canadian subcontractor claims are not subject to the approval and ratification of the TCO. However, when the proposed negotiated settlement exceeds the total contract price of the prime contract, the TCO shall obtain from the U.S. contracting officer prior to final settlement—

(i) Ratification of the proposed settlement; and

Defense Federal Acquisition Regulation Supplement

Part 249—Termination of Contracts

(ii) A contract modification increasing the contract price and obligating the additional funds.

(d) The Canadian Commercial Corporation should send all termination settlement proposals submitted by U.S. subcontractors and suppliers to the TCO of the cognizant contract administration office of the Defense Contract Management Agency for settlement. The TCO will inform the Canadian Commercial Corporation of the amount of the net settlement of U.S. subcontractors and suppliers so that this amount can be included in the Canadian Commercial Corporation termination proposal. The Canadian Commercial Corporation is responsible for execution of the settlement agreement with these subcontractors.

(e) The Canadian Commercial Corporation will continue administering contracts that the U.S. contracting officer terminates.

(f) The Canadian Commercial Corporation will settle all Canadian subcontracts in accordance with the policies, practices, and procedures of the Canadian Government.

(g) The U.S. agency administering the contract with the Canadian Commercial Corporation shall provide any services required by the Canadian Commercial Corporation, including disposal of inventory, for settlement of any subcontracts placed in the United States. Settlement of such U.S. subcontracts will be in accordance with this regulation.

249.7001 Congressional notification on significant contract terminations.

Congressional notification is required for any termination involving a reduction in employment of 100 or more contractor employees. Proposed terminations must be cleared through department/agency liaison offices before release of the termination notice, or any information on the proposed termination, to the contractor. Follow the procedures at PGI [249.7001](#) for congressional notification and release of information.

See DoD Class Deviation [2011-O0002](#), Congressional Notification on Significant Contract Terminations, issued on October 8, 2010. The class deviation eliminates the congressional notification requirement for firms performing in Iraq or Afghanistan if the firm is not incorporated in the United States. This deviation is effective until incorporated in the DFARS or rescinded.

249.7002 Reserved.

249.7003 Notification of anticipated contract terminations or reductions.

(a) Section 1372 of the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103-160) and Section 824 of the National Defense Authorization Act for Fiscal Year 1997 (Pub. L. 104-201) are intended to help establish benefit eligibility under the Job Training Partnership Act (29 U.S.C. 1661 and 1662) for employees of DoD contractors and subcontractors adversely affected by termination or substantial reductions in major defense programs.

(b) Departments and agencies are responsible for establishing procedures to:

Defense Federal Acquisition Regulation Supplement

Part 249—Termination of Contracts

(1) Identify which contracts (if any) under major defense programs will be terminated or substantially reduced as a result of the funding levels provided in an appropriations act.

(2) Within 60 days of the enactment of such an act, provide notice of the anticipated termination of or substantial reduction in the funding of affected contracts—

(i) Directly to the Secretary of Labor; and

(ii) Through the contracting officer to each prime contractor.

(c) Use the clause at [252.249-7002](#), Notification of Anticipated Contract Termination or Reduction, in all contracts under a major defense program.

TABLE OF CONTENTS
(Revised August 12, 2008)

SUBPART 250.1—EXTRAORDINARY CONTRACTUAL ACTIONS

250.100	Definitions.
250.101	General.
250.101-2	Policy.
250.101-2-70	Limitations on payment.
250.101-3	Records.
250.102	Delegation of and limitations on exercise of authority.
250.102-1	Delegation of authority.
250.102-1-70	Delegations.
250.102-2	Contract adjustment boards.
250.103	Contract adjustments.
250.103-3	Contract adjustment.
250.103-5	Processing cases.
250.103-6	Disposition.
250.104	Residual powers.
250.104-3	Special procedures for unusually hazardous or nuclear risks.
250.104-3-70	Indemnification under contracts involving both research and development and other work.

Defense Federal Acquisition Regulation Supplement

Part 250—Extraordinary Contractual Actions

SUBPART 250.0
(Removed August 12, 2008)

SUBPART 250.1—EXTRAORDINARY CONTRACTUAL ACTIONS

(Revised October 1, 2015)

250.100 Definitions.

“Secretarial level,” as used in this subpart, means—

(1) An official at or above the level of an Assistant Secretary (or Deputy) of Defense or of the Army, Navy, or Air Force; and

(2) A contract adjustment board established by the Secretary concerned.

250.101 General.

250.101-2 Policy.

250.101-2-70 Limitations on payment.

See 10 U.S.C. 2410(b) for limitations on Congressionally directed payment of a request for equitable adjustment to contract terms or a request for relief under Pub. L. 85-804.

250.101-3 Records.

Follow the procedures at [PGI 250.101-3](#) for preparation of records.

250.102 Delegation of and limitations on exercise of authority.

250.102-1 Delegation of authority.

(b) Authority under FAR 50.104 to approve actions obligating \$70,000 or less may not be delegated below the level of the head of the contracting activity.

(d) In accordance with the acquisition authority of the Under Secretary of Defense (Acquisition, Technology, and Logistics (USD(AT&L))) under 10 U.S.C. 133, in addition to the Secretary of Defense and the Secretaries of the military departments, the USD(AT&L) may exercise authority to indemnify against unusually hazardous or nuclear risks.

250.102-1-70 Delegations.

(a) *Military departments.* The Departments of the Army, Navy, and Air Force will specify delegations and levels of authority for actions under the Act and the Executive Order in departmental supplements or agency acquisition guidance.

(b) *Defense agencies.* Subject to the restrictions on delegations of authority in [250.102-1](#)(b) and FAR 50.102-1, the directors of the defense agencies may exercise and redelegate the authority contained in the Act and the Executive Order. The agency supplements or agency acquisition guidance shall specify the delegations and levels of authority.

(1) Requests to obligate the Government in excess of \$70,000 must be submitted to the USD(AT&L) for approval.

(2) Requests for indemnification against unusually hazardous or nuclear risks must be submitted to the USD(AT&L) for approval before using the indemnification clause at FAR 52.250-1, Indemnification Under Public Law 85-804.

(c) *Approvals.* The Secretary of the military department or the agency director must approve any delegations in writing.

250.102-2 Contract adjustment boards.

The Departments of the Army, Navy, and Air Force each have a contract adjustment board. The board consists of a Chair and not less than two nor more than six other members, one of whom may be designated the Vice-Chair. A majority constitutes a quorum for any purpose and the concurring vote of a majority of the total board membership constitutes an action of the board. Alternates may be appointed to act in the absence of any member.

250.103 Contract adjustments.

250.103-3 Contract adjustment.

(a) Contractor requests should be filed with the procuring contracting officer (PCO). However, if filing with the PCO is impractical, requests may be filed with an authorized representative, an administrative contracting officer, or the Office of General Counsel of the applicable department or agency, for forwarding to the cognizant PCO.

250.103-5 Processing cases.

(1) At the time the request is filed, the activity shall prepare the record described at [PGI 250.101-3](#)(1)(i) and forward it to the appropriate official within 30 days after the close of the month in which the record is prepared.

(2) The officer or official responsible for the case shall forward to the contract adjustment board, through departmental channels, the documentation described at [PGI 250.103-5](#).

(3) Contract adjustment boards will render decisions as expeditiously as practicable. The Chair shall sign a memorandum of decision disposing of the case. The decision shall be dated and shall contain the information required by FAR 50.103-6. The memorandum of decision shall not contain any information classified “Confidential” or higher. The board's decision will be sent to the appropriate official for implementation.

250.103-6 Disposition.

For requests denied or approved below the Secretarial level, follow the disposition procedures at [PGI 250.103-6](#).

250.104 Residual powers.

250.104-3 Special procedures for unusually hazardous or nuclear risks.

250.104-3-70 Indemnification under contracts involving both research and development and other work.

Defense Federal Acquisition Regulation Supplement

Part 250—Extraordinary Contractual Actions and the Safety Act

When indemnification is to be provided on contracts requiring both research and development work and other work, the contracting officer shall insert an appropriate clause using the authority of both 10 U.S.C. 2354 and Pub. L. 85-804.

(a) The use of Pub. L. 85-804 is limited to work which cannot be indemnified under 10 U.S.C. 2354 and is subject to compliance with FAR 50.104.

(b) Indemnification under 10 U.S.C. 2354 is covered by [235.070](#).

Defense Federal Acquisition Regulation Supplement

Part 250—Extraordinary Contractual Actions

SUBPART 250.2
(Removed August 12, 2008)

Defense Federal Acquisition Regulation Supplement

Part 250—Extraordinary Contractual Actions

SUBPART 250.3
(Removed August 12, 2008)

Defense Federal Acquisition Regulation Supplement

Part 250—Extraordinary Contractual Actions

SUBPART 250.4
(Removed August 12, 2008)

Defense Federal Acquisition Regulation Supplement

Part 251—Use of Government Sources by Contractors

TABLE OF CONTENTS *(Revised November 22, 2004)*

SUBPART 251.1—CONTRACTOR USE OF GOVERNMENT SUPPLY SOURCES

- 251.102 Authorization to use Government supply sources.
- 251.107 Contract clause.

SUBPART 251.2—CONTRACTOR USE OF INTERAGENCY FLEET MANAGEMENT SYSTEM (IFMS) VEHICLES

- 251.202 Authorization.
- 251.205 Contract clause.

SUBPART 251.1—CONTRACTOR USE OF GOVERNMENT SUPPLY SOURCES

(Revised November 22, 2004)

251.102 Authorization to use Government supply sources.

(e) When authorizing contractor use of Government supply sources, follow the procedures at PGI 251.102.

(3)(ii) The contracting officer may also authorize the contractor to use the DD Form 1155 when requisitioning from the Department of Veterans Affairs.

(f) The authorizing agency is also responsible for promptly considering requests of the DoD supply source for authority to refuse to honor requisitions from a contractor that is indebted to DoD and has failed to pay proper invoices in a timely manner.

251.107 Contract clause.

Use the clause at 252.251-7000, Ordering From Government Supply Sources, in solicitations and contracts which include the clause at FAR 52.251-1, Government Supply Sources.

See DoD [Class Deviation 2013-O0012](#), Authorization for Contractors to Use Government Supply Sources in Support of Operation Enduring Freedom, issued on April 24, 2013. This deviation encourages contracting officers to authorize contractors (including contractors with fixed-price contracts) to use appropriate Government supply sources, including DLA (for construction materials) and GSA Central Asia and South Caucasus Supply Catalog under the GSA Global Supply Program, in performance of contracts in support of Operation Enduring Freedom. This constitutes a deviation from the policy at FAR 51.101. This class deviation remains in effect until incorporated in the DFARS or otherwise rescinded.

**SUBPART 251.2—CONTRACTOR USE OF INTERAGENCY FLEET
MANAGEMENT SYSTEM (IFMS) VEHICLES**

251.202 Authorization.

(a)(2)(A) See FAR 28.307-2(c) for policy on contractor insurance.

(B) See FAR 28.308 for policy on self-insurance.

(C) See FAR 31.205-19 for allowability of insurance costs.

(5) Paragraph (d) of the clause at 252.251-7001 satisfies the requirement of FAR 51.202(a)(5) for a written statement.

251.205 Contract clause.

Use the clause at 252.251-7001, Use of Interagency Fleet Management System (IFMS) Vehicles and Related Services, in solicitations and contracts which include the clause at FAR 52.251-2, Interagency Fleet Management System (IFMS) Vehicles and Related Services.