

OFFICE OF THE UNDER SECRETARY OF DEFENSE
DEFENSE PROCUREMENT AND ACQUISITION POLICY.
White Paper: Revision to Federal Acquisition Regulation, Part 45 and its
Associated Clauses (FAR Case 2004-025)

Background.

After several attempts, the Civilian Agency Acquisition Council and Defense Acquisition Regulation Council reached consensus on revised Federal Acquisition Regulation (FAR) contract property management requirements. Published as a final rule under Federal Acquisition Circular 2005-16, the new regulation amends, updates, and revises the FAR Part 45, Government Property, and associated clauses related to the management and disposition of Government property in the possession of contractors. The final rule replaces outmoded regulations that were essentially unchanged for many years.

Discussion.

The final rule clarifies and updates terminology, and embraces the use of commercial standards and industry leading practices to help foster efficiency, best value, and overall customer satisfaction. The regulation has also been restructured; in all, eliminating 15 clauses and consolidating contractor requirements into one basic clause. The rule combines prescriptive regulations where needed to protect the Government's interests, with principle-based standards to allow for "Lean" approaches and greater flexibility. This "balance" was achieved after several years of consensus building and outreach between Government and industry.

Summary.

Those familiar with the "old" FAR will find well-reasoned, yet sweeping changes throughout the updated regulation. Those entering the field of Government contracting will find clear and straight-forward regulatory policy related to the management and disposition of Government property in the possession of contractors.

Recommendation. None, for information only.

Attachment: "Frequently Asked Questions"

FREQUENTLY ASKED QUESTIONS:
FEDERAL ACQUISITION REGULATION, PART 45 AND ITS ASSOCIATED
CLAUSES

The following list of Frequently Asked Questions was developed at the request of, and in concert with, interested parties; and is designed to help the implementation of the FAR Final Property rule. These responses do not abrogate the FAR or any contract terms and conditions.

1. Why re-write the FAR property rules?

The rules contained inconsistent, often conflicting guidance, that was incompatible with acquisition reform, i.e., they did not allow an environment that fosters efficiency, creativity, and innovation. Moreover, these “old rules” were at odds with the general trend toward commercialization of components and equipment contained within weapons systems, modern material management techniques, and technology such as Enterprise Resource Planning, relational databases, unique item identification, radio frequency tags, and bar-coding.

2. How does the new rule effect current and future contracts?

Guidance for transitioning to new rules is contained in FAR 1.108 (d)--*Application of FAR changes to solicitations and contracts*. Unless otherwise specified – (1) FAR changes apply to solicitations issued on or after the effective date of the change; (2) Contracting officers may, at their discretion, include the FAR changes in solicitations issued before the effective date, provided award of the resulting contract(s) occurs on or after the effective date; and (3) Contracting officers may, at their discretion, include the changes in any existing contract with appropriate consideration.

3. How does the recent cancellation of the Low Value Property Class Deviation effect this FAR change?

Although cancelled, the requirements of the Low Value Property (LVP) Deviation remain in effect for those contracts where it had been incorporated through the previous Government property clause, provided that such contracts were not modified to incorporate the new clause at 52.245-1. The new property clause requires contractors to manage Government property consistent with Voluntary Consensus Standards and Industry Leading Practices. In doing so, it supports the

thrust of what the LVP deviation sought to achieve: that the type and scope of control should be commensurate with the level or risk.

4. Can the Government Property Administrator recommend or mandate the frequency of a contractor's self assessment practice?

No, the Government Property Administrator cannot mandate the frequency of a contractor's self assessment practice. These self-assessments are based on contractor's management practices, as well as applicable industry or voluntary consensus standards. The Government Property Administrator may recommend changes to the contractor's proposed frequency if the frequency differs from these standards, or if there are inconsistencies between the contractor normal practice and their application to Government work.

5. Please explain how the definition of Plant Equipment relates to other categories of property.

The term " Plant Equipment" derives from the old DoD General Reserve Inventory of Machine Tools program, managed by the then Defense Industrial Plant Equipment Center (DIPEC), Memphis, TN. Plant Equipment is an obsolete DoD term that will eventually be deleted from the FAR.

As background, machine tools managed by DIPEC were called Industrial Plant Equipment (IPE); machine tools not managed by DIPEC were called "Other Plant Equipment (OPE)." ["OPE" was meant only to distinguish DIPEC managed machine tools from non-DIPEC machine tools]. Collectively, they were called "Plant Equipment." Both the General Reserve Inventory of Machine Tools program and DIPEC no longer exist. In 1994, DIPEC functions were transferred to the Defense General Supply Center, Richmond, VA., (now called the Defense Supply Center Richmond (DSCR)). The DSCR organization now provides some of the services previously offered by DIPEC is called the Industrial Machinery Division. Bottom line: no more IPE; no more OPE; and by extension, no more "Plant Equipment." For purposes of contract property requirements, there is only "Equipment" (one form of which is called Industrial Machinery).

6. What are Voluntary Consensus Standards?

Voluntary Consensus Standards are "common and repeated use of rules, conditions, guidelines or characteristics for products or related processes and production methods, and related management systems." (OMB Circular A-119)

7. Why use them? OMB Circular A-119 directs Federal agencies to use Voluntary Consensus Standards in lieu of Government-unique standards (except where

inconsistent with law or otherwise impractical). The use of Voluntary Consensus Standards: 1) eliminates the cost of Government to develop its own standards; 2) decreases the cost of goods procured and the burden of complying with agency regulation; 3) provides incentives and opportunities to establish standards that serve national needs; encourages long-term growth for U.S. enterprise and promotes efficiency and economic competition through harmonization of standards; and furthers the policy of reliance upon the private sector to supply Government needs for goods and services. The use of Voluntary Consensus Standards in Federal acquisitions is already a FAR requirement, and can be found in FAR Parts 11 and 12.

8. What are Industry Leading Practices?

Industry Leading Practices are “strategies and processes that are both generally believed to be quantifiably and qualitatively demonstrated to be top performing” or “The marriage of applied behavior and knowledge that have been demonstrated and validated to yield a competitive advantage for organizations that employ them.”

9. What is meant by Best Value?

Best Value means: “The expected outcome of an acquisition that, in the Government’s estimation, provides the greatest overall benefit in response to the requirement” (FAR, Part 2); or “The expected outcome of an action, in the entity’s estimation, which provides the greatest overall benefit” (ASTM International, E-2279-03). The ASTM-International definition is included in the new clause.

10. Are there any changes to the policy on lost, damaged, destroyed, or stolen Government property?

The policy has not changed, although it has been further clarified. Contractor’s are still liable for loss, damage, destruction, or theft of Government property that occurs under fixed-price contracts where there is adequate price competition, i.e., “plain vanilla” fixed-price contracts (see FAR 45.107).

Consistent with the Government’s overall policy of self-insurance, contractors are generally not held liable for loss, damage, destruction, or theft of Government property, under the following types of contracts: Cost-reimbursement contracts; Time and Material contracts; Labor-hour contracts; Fixed-price contracts awarded on the basis of submission of cost and pricing data (see FAR Part 15.403).

The exception to this policy is where either willful misconduct or lack of good faith on the part of the contractor’s managerial personnel is involved.

11. Are insurance costs (relating to Government Property) allowable?

Unless the Government has determined that the contractor's property management practices are inadequate and/or present an undue risk to the Government, the costs of insurance covering the risk of loss, damage, destruction, or theft of Government property are allowable to the extent that the contractor is liable, provided that such insurance does not cover loss, damage, destruction, or theft that results from willful misconduct or lack of good faith on the part of any of the contractor's managerial personnel. The FAR 31.205-19, Insurance and Indemnification, has been so clarified.

12. Do the loss, damage, destruction, or theft of property reporting requirements apply to normal and reasonable adjustments of non-sensitive consumable material?

No, generally such losses are considered normal process variation. A contractor's property management system should provide management control measures, e.g., upper and lower control limits, as a means of controlling and/or managing such variation. The reporting requirements would apply to losses outside such limits or, for example, due to theft of Government property; when losses occur due to a contractor's failure to provide adequate storage (contractor failed to repair a leaky roof); or due to "acts of God" (tornado damages a warehouse or stockroom). It should be noted that individual contracts may require additional or different reporting requirements for various kinds of property including, for example, sensitive property, including precious metals, arms, ammunitions and explosives, hazardous materials, or controlled substances.

13. What if the contractor does not meet the requirements of the Government clause, i.e., fails to properly control/manage Government property?

The Contracting Officer can revoke the Government's assumption of risk for loss, damage, destruction or theft; and/or exercise of other rights or remedies available to the Contracting Officer, such as reducing award fees, etc.

14. Are Material Management and Accounting Systems covered by the new FAR rule?

Material Management and Accounting Systems (MMAS) are not specifically cited in the new FAR rule. MMAS is one of many distinct programs and industry leading practices; the FAR rule does not differentiate between such programs and practices. DoD guidance on MMAS can be found at DFARS 242.7204. Federal agencies can publish supplemental guidance for MMAS if they deem it necessary.

15. Will the final rule result in changes to the DoD Instruction 5000.64?

Changes to the DoDI 5000.64 are not anticipated.

16. Who keeps the Government's "official" property records?

Only the Government can keep the Government's "official" records. Contractor property records of Government property are not the Government's records. The contractor's records belong to the contractor; are custodial in nature, and as such are no different in context from other records created and maintained by contractors (FAR Part 4.705-3 -- Acquisition and Supply Records).

17. Can the Property Administrator permit contractors to deviate from the stated property management data elements?

Yes, some contractors may have only small amounts of property, and so do not require complex or elaborate systems. The Property Administrator may allow the contractor to deviate from the list of data elements based on local circumstances, provided the contractor's overall property audit trail is adequate.

18. Please explain the two new data elements: 1) "Unique-item identifier or equivalent" and 2) "Date placed in service."

These two data elements would normally be used only when required by an industry standard such as SAE AS9100, or a Government contract. For example, "*Unique-item identifier or equivalent*" is a requirement specific to DoD (see http://www.acq.osd.mil/dpap/dars/dfars/changenotice/docs/20050422_files/2003-D081.txt.)

"*Date placed in service*" is a data element used when the contract terms and conditions require the contractor to establish and maintain cost-accounting information for equipment that meets an agency's capitalization threshold.

19. What are the requirements for Contracting Officer approval of a contractor's request for Government provision of property?

FAR 45.102, Policy, which requires assurance that Government property is provided to contractors only when clearly demonstrated: 1) to be in the Government's best interest; 2) that the overall benefit to the acquisition significantly outweighs the increased cost of administration, including ultimate property disposal; 3) that providing the property does not substantially increase the Government's assumption of risk; and that 4) Government requirements cannot otherwise be met.

20. Are all four determinations required?

Yes, all four of the aforementioned requirements must be met; taken together they provide sufficient means to allow a best value determination, i.e., the qualitative and quantitative analysis needed prior to allowing the provisioning of Government property to a contractor. A Determination and Findings (FAR 1.7) is sufficient documentation for this purpose, provided that all four requirements are included. The sufficiency of the analysis and documentation is subject to review by the cognizant DoD Component audit community or DoD Inspector General.

It should be noted that the four determinations do not supersede any cost and pricing data decisions that the contractor may have to make under the terms and conditions of the contract).

21. Do these requirements apply to items furnished to a contractor for repair or overhaul?

No, Government property provided to contractors for repair or overhaul is not subject to the aforementioned policy.

22. What protocols will Property Administrator's use to perform a contractor systems analysis?

Such audits will be in accordance with the DoD 4161.2-M, and consistent with Government Auditing Standards ("Yellow Book"), GAO-03-673G, latest edition. The broad principles of FAR Part 1 must also be considered when performing such analysis.

23. Who has overall responsibility for ensuring contractor compliance with the terms and conditions of the contract, to include contract property management?

The Contracting Officer has overall responsibility. However, the assigned Property Administrator is an appointed representative of the Contracting Officer, trained and responsible for conducting the necessary system analysis to ensure contractor performance and compliance with contract property terms and conditions.

24. In the absence of an assigned Property Administrator, who is responsible for ensuring contractor performance and compliance with contract property terms and conditions?

The Contractor Officer is responsible for ensuring contractor performance and compliance with contract property terms and conditions.

25. Will the final rule cause a reduction in agency staffing?

The final rule is “resource neutral.” That is, each agency should decide for themselves the appropriate staffing levels.

26. What is the prime contractor’s responsibility with respect to Government property located at sub-contractors?

Prime contractors are responsible for all Government property accountable to a contract, including property located at sub-contractors. The property clause requires prime contractors to perform periodically reviews of their sub contractors to determine the adequacy of the subcontractor’s property management system.

27. Please explain the flow down of liability on sub-contracts.

In general, the prime contractor should self-insure where it makes sense to do so, i.e., flowing down the limited risk of loss on cost-reimbursement, time and material; labor-hour; or fixed-price contracts awarded on the basis of submission of cost and pricing data. Other considerations such as risk and incentives may also be used.

28. Please explain the commingling requirement as it relates to Government-owned and contractor-owned property.

The concept of commingling applies only to the category of material (while it is still in the stockroom), which by its nature can easily lose its identify as Government-owned. The Property Administrator is required to approve all cases of commingling of material (in the case of DoD, for those situations not covered by an MMAS). The contractor may co-locate contractor-owned property with other types of Government-owned property (Special Tooling, Special test Equipment, Equipment) provide such property is properly identified and secured. Such “co-location” is not considered commingling within the context of the property clause.

29. Why is property control system approval no longer required?

System approvals imply static models of processes and procedures. Contractor property management systems, however, are anything but static; they are constantly changing, constantly in flux. Moreover, the “approval” of a contractor’s property control systems is incompatible with the expectation of continuous improvement.

Also, the FAR final rule is based on the presumption of compliance; it is assumed that the contractor has the means to properly account for and manage the

Government property provided under the contract. This concept is consistent with FAR Part 9, General Standards, required of responsible prospective contractors. In other words, the contractor property management system is considered “adequate” upon contract award. This status may change based on the findings of the systems’ analysis, i.e., the systems may then be deemed adequate or inadequate.

30. How does the absence of the Special Tooling (ST) or Special Test Equipment (STE) clauses effect title and ownership?

Per the language of FAR 52-245-1(2)(ii), title to each item of equipment, ST, and STE acquired by the contract for the Government delineates precise points in time for passage of time when title passes. This language should not be looked at in isolation; it must be associated with a contract deliverable (line item) for equipment, ST, or STE.

31. Will the DoD DFARS and DoD 4161.2-M documents be revised to reflect the requirements of the proposed rule?

Yes, that action is underway. We understand that other Federal agencies are also in the process of updating their own internal documents.

32. What about NASA 1018s?

The NASA 1018s is a NASA requirement, separate and apart from the requirements of the draft proposed rule.

33. Will the contractor be required to maintain written procedures?

A contractor must to be able to demonstrate compliance with the new property clause—even if it does not have written procedures. Only contractors with very small amounts of property with simple contracts fall into this category. It should be noted that written procedures are an ISO 9000 requirement, and are therefore a leading industry practice for property management.

34. What is a property plan and how is it used?

A property plan is a high-level strategic view of how the contractor expects to manage Government property. The plan is not a property control procedure; rather, it summarizes and explains how the contractor’s corporate policy aligns with the performance outcomes of the property clause.

35. Why is the requirement for a property plan included in the FAR clause?

A guiding principle of the development of the FAR final rule is to mirror as much as possible commercial or “industry-leading practices.” Accordingly, as an industry-leading practice, many large firms had property or strategic plans already in place—long before the property clause was finalized. It should be noted that such plans are a requirement under ISO 9000, which is a Voluntary Consensus Standard.

36. Is a property plan similar to a concept of operations?

Yes, they are very much the same thing, particularly when a one-size fits-all approach is not appropriate or does not provide best value.

37. Is there a Government prescribed format?

Just as there is no Government prescribed format for a property control procedure, there is no Government prescribed format for a property plan; it largely depends on the size of the contractor, its management structure and complexity of operations, and the terms and conditions of its contracts. Experience has shown that a good property plan need not be more than 3 to 5 pages long; however, property plans for small businesses with simple contracts can do well with only one page.

38. Does the property plan require Government approval? No, property plans do not require Government approval.

38. Do property plans need to be submitted to the Government?

Yes, the Contracting Officer is required to request the contractor’s property management plan as part of the solicitation (FAR 45.201). Property plans also need to be available to the assigned Property Administrator (PA) in order for the PA to understand the contractor's operations and develop the proper audit protocols necessary for a systems’ analysis.

39. Can the property plan be altered once it is completed?

Yes, the expectation is that contractor’s continuously seek to improve their operations. Also, new contract requirements may require changes to be made. For example, a contractor with a first-time award of cost-reimbursement contract, or a contract with Government-furnished sensitive property, would likely need to alter or amend its “legacy” property plan. This is similar to that of other FAR required “plans” such as Sub-Contracting and employee compensation plans.

40. Is the property plan contractually binding?

Yes, the development of the contractor's property management plan and its implementation through the contractor's property control system are contractually binding. Both plan and system may change as a result of continuous improvement strategies, learning curve, new or changed contract requirements, etc. The contractor must disclose any significant changes to their property management system (which is based on the plan) to the Government Property Administrator prior to implementation.

41. What is meant by the contractor requirement to establish and maintain Government accounting source data, as may be required by this contract, particularly in the areas of recognition of acquisitions and dispositions of material and equipment?

Accounting source data includes purchase requisitions, purchase orders, fabrication records, and disposal documents. This is a basic internal control requirement.

42. Is prime contractor approval still required for Government review of property located at sub-contractors?

Yes, consistent with the concept of privity of contract, prime contractor approval is still required.

43. Why has software been excluded from the property requirements of the final rule?

The final rule does not apply to intellectual property, i.e., software. Software is covered under FAR Part 27 – Patents, Data, and Copyrights.

44. What are "Facilities" contracts and why have they been eliminated?

Facilities contracts are contractual vehicles whereby Government equipment and/or real property is provided to a contractor for use in connection with performing one or more related contracts for supplies or services. Such contracts (many of which do not contain Facilities clauses) are common.

Although the final rule eliminates the various Facilities clauses (which are not necessary and largely duplicate the requirements of Part 45 and the Government property clause, Federal agencies can still develop these kinds of contracts by developing separate statements of work, solicitation requirements, etc.

Existing Facilities contracts remain in effect until contract completion or otherwise determined by the Contracting Officer.

45. Is the Government required to identify, as part of the solicitation requirements, property to be furnished "as is"?

Yes, FAR Part 45.201 makes clear that the Contracting Officer must provide a statement as to whether the property is to be furnished in an "as-is" condition (as well as instructions for physical inspection). Absent this up-front identification, the property is subject to the Government warranty of suitability of use (and timely delivery).

46. Under cost-reimbursement contracts, does the Government need to pre-approve the acquisition of contractor-acquired property?

No, assuming the contractor has an approved purchasing system, pre-approval of contractor-acquired property, is generally not required.

47. Is the DD Form 1662 going away?

Yes, The DD Form 1662, "DoD Property in the Custody of Contractors," is not suitable for meeting (Federal) financial accounting and reporting purposes, i.e., it provides only summary-level data; does not consider capitalization requirements or useful lives; and cannot be used for existence, completeness, or specific item valuation purposes. Information on the DD Form 1662 transition strategy can be found on the DoD DPAP home page at:

<http://www.acq.osd.mil/dpap/pdi/uid/index.html>

48. Are contractor generated (Government Property) reports still required?

Contractor generated reports are one of several required performance outcomes identified in the new Government Property Clause. However, in order to mitigate the cost of reporting and reduce concerns over format and content, the report requirement should be specifically identified by the Government during the solicitation and proposal phase, preferably as a deliverable in the Contract Data Requirements List. For example: "*the contractor shall deliver a report on the 15th of every month; it shall be e-mailed to xxxx; in XML format; with the following data elements, etc.*"