

Item IV—Federal Computer Network (FACNET) Architecture (FAR Case 2006–015)

This final rule amends the Federal Acquisition Regulation (FAR) to remove FACNET references and provide the opportunity to recognize the evolution of alternative technologies, processes, etc. that Federal agencies are using and will use to satisfy their acquisition needs without removing the use of FACNET for Federal agencies that may use the system. Where necessary in the FAR, the term has been replaced with a more appropriate term that incorporates various electronic data interchange systems. The proposed rule published February 1, 2007 is adopted as final without change.

Item V—Exemption of Certain Service Contracts from the Service Contract Act (SCA) (2001–004) (Interim)

This interim rule amends Federal Acquisition Regulation (FAR) Parts 4, 15, 17, 22, and 52 to implement the U.S. Department of Labor's (DoL) final rule issued January 18, 2001 (66 FR 5327) amending the regulations at 29 CFR part 4 to exempt certain contracts for services meeting specific criteria from coverage under the Service Contract Act. This rule imposes the DoL criteria and does not utilize the term "commercial services." The rule incorporates slight revisions to the current exemption for consistency with the current DoL regulations and clarification of appropriate course of action for the contracting officer.

Item VI—Local Community Recovery Act of 2006 (FAR Case 2006–014) (Interim)

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a second interim rule amending the Federal Acquisition Regulation (FAR) to implement legislative amendments to the Stafford Act at 42 U.S.C. 5150.

The first rule implemented The Local Community Recovery Act of 2006, Pub.L. 109–218, which addressed set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. This local area set-aside could be done along with a small business set-aside.

After the first rule was published for comments in August, 2006, Congress further amended the same area of the Stafford Act in the Department of Homeland Security Appropriations Act, 2007, Public Law 109–295. The

amended statute contains requirements for transitioning work to local firms in the geographic area affected by the disaster or emergency and for justifications for expenditures to entities outside the major disaster or emergency area. This second interim rule encompasses all of these changes.

Item VII—Labor Standards for Contracts Containing Construction Requirements-Contract Pricing Method References (FAR Case 2007–001)

This final rule amends the Federal Acquisition Regulation (FAR) to revise references to published pricing sources available to the contracting officer in FAR 22.404–12(c)(2). The rule removes the reference to "R.S. Means Cost Estimating System" as a commercial source for pricing data. The revision will provide greater flexibilities for contracting officers when selecting sources of pricing data.

Item VIII—Technical Amendments

Editorial changes are made at FAR 1.106, 25.003, 52.212–5, 52.219–9, 52.225–5, 52.225–17, 53.213, 53.302–347, and 53.302–348 in order to update references.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–21 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–21 is effective November 7, 2007, except for Items II, III, IV, and VII which are effective December 7, 2007.

Dated: October 26, 2007.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: October 26, 2007.

Molly A. Wilkinson,

Chief Acquisition Officer, Office of Chief Acquisition Officer, General Services Administration.

Dated: October 18, 2007.

Harold V. Jefferson,

Acting Assistant Administrator for Procurement, National Aeronautics and Space Administration.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52

[FAC 2005–21; FAR Case 2006–023; Item I; Docket 2007–0001, Sequence 8]

RIN 9000–AK75

Federal Acquisition Regulation; FAR Case 2006–023, SAFETY Act: Implementation of DHS Regulations

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

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the Department of Homeland Security (DHS) regulations on the SAFETY Act.

DATES: *Effective Date:* November 7, 2007.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before January 7, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–21, FAR case 2006–023, by any of the following methods:

- Federal eRulemaking Portal: *http://www.regulations.gov*. To search for any document, first select under "Step 1," "Documents with an Open Comment Period" and select under "Optional Step 2," "Federal Acquisition Regulation" as the agency of choice. Under "Optional Step 3," select "Rules". Under "Optional Step 4," from the drop down list, select "Document Title" and type the FAR case number "2006–023". Click the "Submit" button. Please include your name and company name (if any) inside the document.

You may also search for any document by clicking on the "Search for Documents" tab at the top of the screen. Select from the agency field "Federal Acquisition Regulation", and type "2006–023" in the "Document Title" field. Select the "Submit" button.

- Fax: 202–501–4067.
- Mail: General Services Administration, Regulatory Secretariat

(VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–21, FAR case 2006–023, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>. Please include your name and company name (if any) inside the document.

FOR FURTHER INFORMATION CONTACT Mr. Edward Loeb, Procurement Analyst, at (202) 501–0650 for clarification of content. Please cite FAC 2005–21, FAR case 2006–023. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

SUPPLEMENTARY INFORMATION:

A. Background

1. The SAFETY Act and the Department of Homeland Security Regulations.

As part of the Homeland Security Act of 2002, Public Law 107–296, Congress enacted liability protections for providers of certain anti-terrorism technologies. (The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441–444). The SAFETY Act provides incentives for the development and deployment of anti-terrorism technologies by creating a system of “risk management” and a system of “litigation management.” The purpose of the SAFETY Act is to ensure that the threat of liability does not deter potential manufacturers or sellers of anti-terrorism technologies from developing, deploying, and commercializing technologies that could save lives.

The Department of Homeland Security (DHS) published a final rule (71 FR 33147, June 8, 2006, effective July 10, 2006), at 6 CFR Part 25. Liability limitations are conferred by DHS issuing the seller either a “SAFETY Act designation” or “SAFETY Act certification” that their technology is Qualified Anti-Terrorism Technology (QATT). Sellers must submit an application to be considered by DHS.

The DHS SAFETY Act certification of a technology as an “approved product” (proven to be safe and effective) confers a critical additional benefit over SAFETY Act designation. It confers a rebuttable presumption that sellers are entitled to the “government contractor defense” (§ 442(d)). In essence, the “government contractor defense” means that any seller of an “approved product” cannot be held liable for design defects.

The SAFETY Act applies to a broad range of technologies, including

products, services, and software, or combinations thereof, as long as DHS determines that a technology merits Designation. DHS may designate a system containing many component technologies (including products and services) or may designate specific component technologies individually. Further, as the statutory criteria suggest, a QATT need not be newly developed - it may have already been employed (e.g., “prior United States government use”) or may be a new application of an existing technology.

In DHS’s final rule implementing the SAFETY Act, DHS established a streamlined review procedure for providing SAFETY Act coverage for qualified sellers of certain categories of technologies. Those designations or certifications are known as “block designations” or “block certifications.”

DHS also established another streamlined procedure where a contracting agency can seek a preliminary determination of SAFETY Act applicability, a “pre-qualification designation notice,” with respect to a technology to be procured by the Government.

2. FAR Subpart 50.1, Extraordinary contractual actions.

Existing Part 50 is renumbered as Subpart 50.1, with conforming changes in Parts 1, 18, 28, 32, 33, and 43. The additional coverage at 50.101–1(b) and 50.102–3(f) reflects the transfer and delegation of certain functions to, and other responsibilities vested in, the Secretary of DHS, including the DHS’s SAFETY Act responsibilities, based on E.O. 13286.

3. FAR Subpart 50.2, SAFETY Act.

The coverage for the SAFETY Act will be new Subpart 50.2.

Policy. One of the most significant sections is new section 50.204. This section provides the overarching policy for implementing the SAFETY Act in Government acquisitions. For example, paragraph (a) provides that agencies should—

- Determine whether the technology to be procured is appropriate for SAFETY Act protections;
- Encourage offerors to seek SAFETY Act protections for their offered technologies, even in advance of the issuance of a solicitation; and
- Not mandate SAFETY Act protections for acquisitions because applying for SAFETY Act protections for a particular technology is the choice of the offeror.

SAFETY Act considerations. New section 50.205–1 ensures that SAFETY Act considerations are made an integral part of each agency’s acquisition planning procedures, and that

contracting officers give adequate lead time in their acquisition plans to account for DHS’s review process of SAFETY Act applications. A reference to the SAFETY Act was also added at 7.105, Contents of written acquisition plan.

Block designation and block certification. In 50.205–1(a), this case includes coverage for block designations and block certifications. The requiring activity must check with DHS as to whether a block designation or block certification exists. If one does, then the requiring activity must inform the contracting officer. The contracting officer will then incorporate the block designations and block certifications, as applicable, in any solicitation or advanced public notice to inform potential offerors.

Pre-qualification designation notice.

In accordance with 50.205–2, if a block designation or block certification does not exist, then the requiring activity must request DHS to issue a pre-qualification designation notice and inform the contracting officer if DHS issues the notice. The contracting officer will then incorporate the pre-qualification designation notice in any solicitation or advanced public notice to inform potential offerors of the notice.

4. New provisions and clause.

Provisions and a clause have been added to assist agencies and contracting officers in interfacing with DHS on SAFETY Act matters, including coverage concerning block designations and block certifications, and pre-qualification designation notices.

SAFETY Act Coverage Not

Applicable. Contracting officers are required to insert FAR 52.250–2, SAFETY Act Coverage Not Applicable, if, after consultation with DHS, the agency has determined that SAFETY Act protection is not applicable for the acquisition, or DHS denies approval of a pre-qualification designation notice.

Basic Provisions. Contracting officers are required to insert 52.250–3, SAFETY Act Block Designation/ Certification, or 52.250–4, SAFETY Act Pre-qualification Designation Notice, in solicitations when DHS has issued a block designation/certification or a pre-qualification designation notice, respectively, for the solicited technologies. These provisions inform offerors of the terms of the block designation/block certification or pre-qualification designation notice. These basic provisions do not permit submission of offers contingent upon SAFETY Act designation or certification of the proposed product(s) or service(s).

Alternate I - Contingent Offers.

Alternate I of each basic provision

permits offerors to submit offers contingent on DHS issuing a SAFETY Act designation or certification. Under this first alternate, contracting officers may permit such contingent offers only if—

- DHS has issued, for offers contingent upon SAFETY Act designation, a pre-qualification designation notice or a block designation, or for offers contingent upon SAFETY Act certification, a block certification;

- The Government has not provided advance notice so that potential offerors could have obtained SAFETY Act designations/certifications for their offered technologies before release of any solicitation; and

- Market research shows that there will be insufficient competition without SAFETY Act protections or the subject technology would be sold to the Government only with SAFETY Act protections.

Offerors may also submit an alternate offer that is not contingent on obtaining SAFETY Act protections.

Alternate II - Presumption of SAFETY Act Protections After Award. Alternate II of each basic provision permits offerors to submit offers that presume that DHS will issue a SAFETY Act Designation or Certification after award. Contracting officers may only use this alternate if—

- All of the conditions for permitting contingent offers are met;

- The chief of the contracting office (or other official designated in agency procedures) approves the action; and

- The contracting officer advises DHS of the timelines for potential award and consults DHS as to when DHS could reasonably complete evaluations of offerors' applications for SAFETY Act designations or certifications.

If DHS does not issue a SAFETY Act designation or SAFETY Act certification to the successful offeror by the time of contract award, the contracting officer is then permitted to award the contract with the clause at 52.250-5, SAFETY Act-Equitable Adjustment, which allows for an equitable adjustment in the event DHS denies the contractor's SAFETY Act application.

If DHS has issued a SAFETY Act designation or certification to the successful offeror, then the contracting officer will award the contract without the clause at 52.250-5.

5. Public Meeting.

A decision has not been made whether to hold a public meeting. If you would like to request a meeting, please contact Mr. Edward Loeb at (202) 501-0650, within three weeks of the publication of this interim rule.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule imposes no burdens on businesses. Instead, it allows businesses to more easily take advantage of a Department of Homeland Security regulation published June 8, 2006, at 6 CFR 25. The Department of Homeland Security certified in their rule that there would be no significant impact on a substantial number of small entities. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2005-21, FAR case 2006-023), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Numbers 1640-0001 through 1640-0006, under applications made to OMB by the Department of Homeland Security.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the SAFETY Act was signed into law on November 25, 2002 (Pub. L. 107-296). The primary implementing regulations were promulgated by the Department of Homeland Security on June 8, 2006, effective July 10, 2006 (71 FR 33147). Unless DHS's final rule is integrated into the Federal acquisition system and the SAFETY Act's benefits are made available to contractors, the Government will not be able to procure the necessary

technologies to protect the nation from acts of terrorism. These amendments to the Federal Acquisition Regulation are therefore necessary to integrate the benefits of the SAFETY Act into the Federal acquisition system and promote effective acquisition of anti-terrorism technologies and services.

However, pursuant to Public Law 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 1, 7, 18, 28, 32, 33, 43, 50, and 52

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 7, 18, 28, 32, 33, 43, 50, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 7, 18, 28, 32, 33, 43, 50, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.602 [Amended]

■ 2. Amend section 1.602-3 by removing from paragraph (d) "part 50" and adding "Subpart 50.1" in its place.

PART 7—ACQUISITION PLANNING

■ 3. Amend section 7.105 by revising paragraph (b)(19) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(19) *Other considerations.* Discuss, as applicable:

(i) Standardization concepts;

(ii) The industrial readiness program;

(iii) The Defense Production Act;

(iv) The Occupational Safety and Health Act;

(v) Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act) (see Subpart 50.2);

(vi) Foreign sales implications; and

(vii) Any other matters germane to the plan not covered elsewhere.

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PART 18—EMERGENCY ACQUISITIONS

18.121 [Amended]

■ 4. Amend section 18.121 by removing "Part 50" and adding "Subpart 50.1" in its place.

18.126 [Amended]

- 5. Amend section 18.126 by—
- a. Removing from the introductory text “Part 50” and adding “Subpart 50.1” in its place;
- b. Removing from paragraph (a) “50.302–1” and adding “50.103–2(a)” in its place;
- c. Removing from paragraph (b) “50.302–2” and adding “50.103–2(b)” in its place; and
- d. Removing from paragraph (c) “50.302–3” and adding “50.103–2(c)” in its place.

PART 28—BONDS AND INSURANCE**28.308 [Amended]**

- 6. Amend section 28.308 by removing from paragraph (e) “50.403” and adding “50.104–3” in its place.

PART 32—CONTRACT FINANCING**32.401 [Amended]**

- 7. Amend section 32.401 by removing from paragraph (c) “part 50 of the Federal Acquisition Regulation (FAR)” and adding “Subpart 50.1” in its place.

32.402 [Amended]

- 8. Amend section 32.402 by—
- a. Removing from paragraph (a) “FAR 50.203(b)(4)” and adding “50.102–3(b)(4)” in its place;
- b. Removing from paragraph (e)(1) “50.201(b)” and adding “50.102–1(b)” in its place; and
- c. Removing from paragraph (f) “FAR 50.307” and adding “50.103–7” in its place.

32.405 [Amended]

- 9. Amend section 32.405 by removing from paragraph (a) “50.101(a)” and adding “50.101–1(a)” in its place.

PART 33—PROTESTS, DISPUTES, AND APPEALS

- 10. Amend section 33.205 by removing from paragraphs (a) and (c) “part 50” and adding “Subpart 50.1”, each time it appears (three times), in its place.

PART 43—CONTRACT MODIFICATIONS**43.000 [Amended]**

- 11. Amend section 43.000 by removing from paragraph (b) “part 50” and adding “Subpart 50.1” in its place.
- 12. Revise Part 50 to read as follows:

PART 50—EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

Sec.
50.000 Scope of part.

Subpart 50.1—Extraordinary Contractual Actions

- 50.100 Definitions.
- 50.101 General.
 - 50.101–1 Authority.
 - 50.101–2 Policy.
 - 50.101–3 Records.
- 50.102 Delegation of and limitations on exercise of authority.
 - 50.102–1 Delegation of authority.
 - 50.102–2 Contract adjustment boards.
 - 50.102–3 Limitations on exercise of authority.
- 50.103 Contract adjustments.
 - 50.103–1 General.
 - 50.103–2 Types of contract adjustment.
 - 50.103–3 Contract adjustment.
 - 50.103–4 Facts and evidence.
 - 50.103–5 Processing cases.
 - 50.103–6 Disposition.
 - 50.103–7 Contract requirements.
- 50.104 Residual powers.
 - 50.104–1 Standards for use.
 - 50.104–2 General.
 - 50.104–3 Special procedures for unusually hazardous or nuclear risks.
 - 50.104–4 Contract clause.

Subpart 50.2—Support Anti-terrorism by Fostering Effective Technologies Act of 2002

- 50.200 Scope of subpart.
- 50.201 Definitions.
- 50.202 Authorities.
- 50.203 General.
- 50.204 Policy.
- 50.205 Procedures.
 - 50.205–1 SAFETY Act considerations.
 - 50.205–2 Pre-qualification designation notice.
 - 50.205–3 Authorization of offers contingent upon SAFETY Act designation or certification before contract award.
 - 50.205–4 Authorization of awards made presuming SAFETY Act designation or certification after contract award.
- 50.206 Solicitation provisions and contract clause.

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

50.000 Scope of part.

This part—
(a)(1) Prescribes policies and procedures for entering into, amending, or modifying contracts in order to facilitate the national defense under the extraordinary emergency authority granted by Public Law 85–804 (50 U.S.C. 1431–1434) and Executive Order 10789, dated November 14, 1958. It does not cover advance payments (see Subpart 32.4); and

(2) Implements indemnification authority granted by Pub. L. 85–804 and paragraph 1A of E.O. 10789 with respect to any matter that has been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology as defined in the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act); and

(b) Implements SAFETY Act liability protections to promote development and use of anti-terrorism technologies.

Subpart 50.1—Extraordinary Contractual Actions**50.100 Definitions.**

As used in this part—
Approving authority means an agency official or contract adjustment board authorized to approve actions under Pub. L. 85–804 and E.O. 10789.

Secretarial level means a level at or above the level of a deputy assistant agency head, or a contract adjustment board.

50.101 General.**50.101–1 Authority.**

(a) Pub. L. 85–804 empowers the President to authorize agencies exercising functions in connection with the national defense to enter into, amend, and modify contracts, without regard to other provisions of law related to making, performing, amending, or modifying contracts, whenever the President considers that such action would facilitate the national defense.

(b) E.O. 10789 authorizes the heads of the following agencies to exercise the authority conferred by Pub. L. 85–804 and to delegate it to other officials within the agency: the Government Printing Office; the Department of Homeland Security; the Tennessee Valley Authority; the National Aeronautics and Space Administration; the General Services Administration; the Defense, Army, Navy, Air Force, Treasury, Interior, Agriculture, Commerce, and Transportation Departments; the Department of Energy for functions transferred to that Department from other authorized agencies; and any other agency that may be authorized by the President.

50.101–2 Policy.

(a) The authority conferred by Pub. L. 85–804 may not—

(1) Be used in a manner that encourages carelessness and laxity on the part of persons engaged in the defense effort; or

(2) Be relied upon when other adequate legal authority exists within the agency.

(b) Actions authorized under Pub. L. 85–804 shall be accomplished as expeditiously as practicable, consistent with the care, restraint, and exercise of sound judgment appropriate to the use of such extraordinary authority.

(c) Certain kinds of relief previously available only under Pub. L. 85–804; e.g., rescission or reformation for mutual mistake, are now available under the

authority of the Contract Disputes Act of 1978. In accordance with paragraph (a)(2) of this subsection, Part 33 must be followed in preference to Subpart 50.1 for such relief. In case of doubt as to whether Part 33 applies, the contracting officer should seek legal advice.

50.101-3 Records.

Agencies shall maintain complete records of all actions taken under this Subpart 50.1. For each request for relief processed, these records shall include, as a minimum—

- (a) The contractor's request;
- (b) All relevant memorandums, correspondence, affidavits, and other pertinent documents;
- (c) The Memorandum of Decision (see 50.103-6 and 50.104-2); and
- (d) A copy of the contractual document implementing an approved request.

50.102 Delegation of and limitations on exercise of authority.

50.102-1 Delegation of authority.

An agency head may delegate in writing authority under Pub. L. 85-804 and E.O. 10789, subject to the following limitations:

- (a) Authority delegated shall be to a level high enough to ensure uniformity of action.
- (b) Authority to approve requests to obligate the Government in excess of \$55,000 may not be delegated below the secretarial level.
- (c) Regardless of dollar amount, authority to approve any amendment without consideration that increases the contract price or unit price may not be delegated below the secretarial level, except in extraordinary cases or classes of cases when the agency head finds that special circumstances clearly justify such delegation.
- (d) Regardless of dollar amount, authority to indemnify against unusually hazardous or nuclear risks, including extension of such indemnification to subcontracts, shall be exercised only by the Secretary or Administrator of the agency concerned, the Public Printer, or the Chairman of the Board of Directors of the Tennessee Valley Authority (see 50.104-3).

50.102-2 Contract adjustment boards.

An agency head may establish a contract adjustment board with authority to approve, authorize, and direct appropriate action under this Subpart 50.1 and to make all appropriate determinations and findings. The decisions of the board shall not be subject to appeal; however, the board may reconsider and modify, correct, or reverse its previous

decisions. The board shall determine its own procedures and have authority to take all action necessary or appropriate to conduct its functions.

50.102-3 Limitations on exercise of authority.

- (a) Pub. L. 85-804 is not authority for—
 - (1) Using a cost-plus-a-percentage-of-cost system of contracting;
 - (2) Making any contract that violates existing law limiting profit or fees;
 - (3) Providing for other than full and open competition for award of contracts for supplies or services; or
 - (4) Waiving any bid bond, payment bond, performance bond, or other bond required by law.

(b) No contract, amendment, or modification shall be made under Pub. L. 85-804's authority—

- (1) Unless the approving authority finds that the action will facilitate the national defense;
- (2) Unless other legal authority within the agency concerned is deemed to be lacking or inadequate;

(3) Except within the limits of the amounts appropriated and the statutory contract authorization (however, indemnification agreements authorized by an agency head (50.104-3) are not limited to amounts appropriated or to contract authorization); and

(4) That will obligate the Government for any amount over \$28.5 million, unless the Senate and House Committees on Armed Services are notified in writing of the proposed obligation and 60 days of continuous session of Congress have passed since the transmittal of such notification. However, this paragraph (b)(4) does not apply to indemnification agreements authorized under 50.104-3.

(c) No contract shall be amended or modified unless the contractor submits a request before all obligations (including final payment) under the contract have been discharged. No amendment or modification shall increase the contract price to an amount higher than the lowest rejected bid of any responsible bidder, if the contract was negotiated under 10 U.S.C. 2304(a)(15) or 41 U.S.C. 252(c)(14), or FAR 14.404-1(f).

(d) No informal commitment shall be formalized unless—

(1) The contractor submits a written request for payment within 6 months after furnishing, or arranging to furnish, supplies or services in reliance upon the commitment; and

(2) The approving authority finds that, at the time the commitment was made, it was impracticable to use normal contracting procedures.

(e) The exercise of authority by officials below the secretarial level is subject to the following additional limitations:

- (1) The action shall not—
 - (i) Release a contractor from performance of an obligation over \$55,000;
 - (ii) Result in an increase in cost to the Government over \$55,000;
 - (iii) Deal with, or directly affect, any matter that has been submitted to the Government Accountability Office; or
 - (iv) Involve disposal of Government surplus property.
- (2) Mistakes shall not be corrected by an action obligating the Government for over \$1,000, unless the contracting officer receives notice of the mistake before final payment.

(3) The correction of a contract because of a mistake in its making shall not increase the original contract price to an amount higher than the next lowest responsive offer of a responsible offeror.

(f) No executive department or agency shall exercise the indemnification authority granted under paragraph 1A of E.O. 10789 with respect to any supply or service that has been, or could be, designated by the Secretary of Homeland Security as a qualified anti-terrorism technology unless—

(1) For the Department of Defense, the Secretary of Defense has determined that the exercise of authority under E.O. 10789 is necessary for the timely and effective conduct of the United States military or intelligence activities, after consideration of the authority provided under the SAFETY Act (Subtitle G of title VIII of the Homeland Security Act of 2002, 6 U.S.C. 441-444); or

(2) For other departments and agencies that have authority under E.O. 10789—

(i) The Secretary of Homeland Security has advised whether the use of the authority under the SAFETY Act would be appropriate; and

(ii) The Director of the Office of Management and Budget has approved the exercise of authority under the Executive order.

50.103 Contract adjustments.

This section prescribes standards and procedures for processing contractors' requests for contract adjustment under Pub. L. 85-804 and E.O. 10789.

50.103-1 General.

The fact that losses occur under a contract is not sufficient basis for exercising the authority conferred by Pub. L. 85-804. Whether appropriate action will facilitate the national defense is a judgment to be made on the

basis of all of the facts of the case. Although it is impossible to predict or enumerate all the types of cases in which action may be appropriate, examples are included in 50.103-2. Even if all of the factors in any of the examples are present, other considerations may warrant denying a contractor's request for contract adjustment. The examples are not intended to exclude other cases in which the approving authority determines that the circumstances warrant action.

50.103-2 Types of contract adjustment.

(a) *Amendments without consideration.* (1) When an actual or threatened loss under a defense contract, however caused, will impair the productive ability of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is found to be essential to the national defense, the contract may be amended without consideration, but only to the extent necessary to avoid such impairment to the contractor's productive ability.

(2) When a contractor suffers a loss (not merely a decrease in anticipated profits) under a defense contract because of Government action, the character of the action will generally determine whether any adjustment in the contract will be made, and its extent. When the Government directs its action primarily at the contractor and acts in its capacity as the other contracting party, the contract may be adjusted in the interest of fairness. Thus, when Government action, while not creating any liability on the Government's part, increases performance cost and results in a loss to the contractor, fairness may make some adjustment appropriate.

(b) *Correcting mistakes.* (1) A contract may be amended or modified to correct or mitigate the effect of a mistake. The following are examples of mistakes that may make such action appropriate:

(i) A mistake or ambiguity consisting of the failure to express, or express clearly, in a written contract, the agreement as both parties understood it.

(ii) A contractor's mistake so obvious that it was or should have been apparent to the contracting officer.

(iii) A mutual mistake as to a material fact.

(2) Amending contracts to correct mistakes with the least possible delay normally will facilitate the national defense by expediting the contracting program and assuring contractors that mistakes will be corrected expeditiously and fairly.

(c) *Formalizing informal commitments.* Under certain circumstances, informal commitments may be formalized to permit payment to persons who have taken action without a formal contract; for example, when a person, responding to an agency official's written or oral instructions and relying in good faith upon the official's apparent authority to issue them, has furnished or arranged to furnish supplies or services to the agency, or to a defense contractor or subcontractor, without formal contractual coverage. Formalizing commitments under such circumstances normally will facilitate the national defense by assuring such persons that they will be treated fairly and paid expeditiously.

50.103-3 Contract adjustment.

(a) *Contractor requests.* A contractor seeking a contract adjustment shall submit a request in duplicate to the contracting officer or an authorized representative. The request, normally a letter, shall state as a minimum—

- (1) The precise adjustment requested;
- (2) The essential facts, summarized chronologically in narrative form;
- (3) The contractor's conclusions based on these facts, showing, in terms of the considerations set forth in 50.103-1 and 50.103-2, when the contractor considers itself entitled to the adjustment; and
- (4) Whether or not—
 - (i) All obligations under the contracts involved have been discharged;
 - (ii) Final payment under the contracts involved has been made;
 - (iii) Any proceeds from the request will be subject to assignment or other transfer, and to whom; and
 - (iv) The contractor has sought the same, or a similar or related, adjustment from the Government Accountability Office or any other part of the Government, or anticipates doing so.

(b) *Contractor certification.* A contractor seeking a contract adjustment that exceeds the simplified acquisition threshold shall, at the time the request is submitted, submit a certification by a person authorized to certify the request on behalf of the contractor that—

- (1) The request is made in good faith; and
- (2) The supporting data are accurate and complete to the best of that person's knowledge and belief.

50.103-4 Facts and evidence.

(a) *General.* When it is appropriate, the contracting officer or other agency official shall request the contractor to support any request made under 50.103-3(a) with any of the following information:

- (1) A brief description of the contracts involved, the dates of execution and

amendments, the items being acquired, the price or prices, the delivery schedules, and any special contract provisions relevant to the request.

(2) A history of performance indicating when work under the contracts or commitments began, the progress made to date, an exact statement of the contractor's remaining obligations, and the contractor's expectations regarding completion.

(3) A statement of payments received, due, and yet to be received or to become due, including advance and progress payments; amounts withheld by the Government; and information as to any obligations of the Government yet to be performed under the contracts.

(4) A detailed analysis of the request's monetary elements, including precisely how the actual or estimated dollar amount was determined and the effect of approval or denial on the contractor's profits before Federal income taxes.

(5) A statement of the contractor's understanding of why the request's subject matter cannot now, and could not at the time it arose, be disposed of under the contract terms.

(6) The best supporting evidence available to the contractor, including contemporaneous memorandums, correspondence, and affidavits.

(7) Relevant financial statements, cost analyses, or other such data, preferably certified by a certified public accountant, as necessary to support the request's monetary elements.

(8) A list of persons connected with the contracts who have factual knowledge of the subject matter, including, when possible, their names, offices or titles, addresses, and telephone numbers.

(9) A statement and evidence of steps taken to reduce losses and claims to a minimum.

(10) Any other relevant statements or evidence that may be required.

(b) *Amendments without consideration—essentiality a factor.* When a request involves possible amendment without consideration, and essentiality to the national defense is a factor (50.103-2(a)(1)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit.

(2) A statement and evidence of the contractor's present estimate of total costs under the contracts involved if it is enabled to complete them, broken down between costs accrued to date and

completion costs, and between costs paid and those owed.

(3) A statement and evidence of the contractor's estimate of the final price of the contracts, taking into account all known or contemplated escalation, changes, extras, and the like.

(4) A statement of any claims known or contemplated by the contractor against the Government involving the contracts, other than those stated in response to paragraph (b)(3) of this subsection.

(5) An estimate of the contractor's total profit or loss under the contracts if it is enabled to complete them at the estimated final contract price, broken down between profit or loss to date and completion profit or loss.

(6) An estimate of the contractor's total profit or loss from other Government business and all other sources, from the date of the first contract involved to the estimated completion date of the last contract involved.

(7) A statement of the amount of any tax refunds to date, and an estimate of those anticipated, for the period from the date of the first contract involved to the estimated completion date of the last contract involved.

(8) A detailed statement of efforts the contractor has made to obtain funds from commercial sources to enable contract completion.

(9) A statement of the minimum amount the contractor needs as an amendment without consideration to enable contract completion, and the detailed basis for that amount.

(10) A estimate of the time required to complete each contract if the request is granted.

(11) A statement of the factors causing the loss under the contracts involved.

(12) A statement of the course of events anticipated if the request is denied.

(13) Balance sheets, preferably certified by a certified public accountant, (i) for the contractor's fiscal year immediately preceding the date of the first contract, (ii) for each subsequent fiscal year, (iii) as of the request date, and (iv) projected as of the completion date of all the contracts involved (assuming the contractor is enabled to complete them at the estimated final prices), together with income statements for annual periods subsequent to the date of the first balance sheet. Balance sheets and income statements should be both consolidated and broken down by affiliates. They should show all transactions between the contractor and its affiliates, stockholders, and partners, including loans to the contractor

guaranteed by any stockholder or partner.

(14) A list of all salaries, bonuses, and other compensation paid or furnished to the principal officers or partners, and of all dividends and other withdrawals, and of all payments to stockholders in any form since the date of the first contract involved.

(c) *Amendments without consideration—essentiality not a factor.* When a request involves possible amendment without consideration because of Government action, and essentiality to the national defense is not a factor (50.103-2(a)(2)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) A clear statement of the precise Government action that the contractor considers to have caused a loss under the contract, with evidence to support each essential fact.

(2) A statement and evidence of the contractor's original breakdown of estimated costs, including contingency allowances, and profit.

(3) The estimated total loss under the contract, with detailed supporting analysis.

(4) The estimated loss resulting specifically from the Government action, with detailed supporting analysis.

(d) *Correcting mistakes.* When a request involves possible correction of a mistake (50.103-2(b)), the contractor may be asked to furnish, in addition to the facts and evidence listed in paragraph (a) of this subsection, any of the following information:

(1) A statement and evidence of the precise error made, ambiguity existing, or misunderstanding arising, showing what it consists of, how it occurred, and the intention of the parties.

(2) A statement explaining when the mistake was discovered, when the contracting officer was given notice of it, and whether this notice was given before completion of work under, or the effective termination date of, the contract.

(3) An estimate of profit or loss under the contract, with detailed supporting analysis.

(4) An estimate of the increase in cost to the Government resulting from the adjustment requested, with detailed supporting analysis.

(e) *Formalizing informal commitments.* When a request involves possible formalizing of an informal commitment (50.103-2(c)), the contractor may be asked to furnish, in addition to the facts and evidence listed

in paragraph (a) of this subsection, any of the following information:

(1) Copies of any written instructions or assurances (or a sworn statement of any oral instructions or assurances) given the contractor, and identification of the Government official who gave them.

(2) A statement as to when the contractor furnished or arranged to furnish the supplies or services involved, and to whom.

(3) Evidence that the contractor relied upon the instructions or assurances, with a full description of the circumstances that led to this reliance.

(4) Evidence that, when performing the work, the contractor expected to be compensated directly for it by the Government and did not anticipate recovering the costs in some other way.

(5) A cost breakdown supporting the amount claimed as fair compensation for the work performed.

(6) A statement and evidence of the impracticability of providing, in an appropriate contractual instrument, for the work performed.

50.103-5 Processing cases.

(a) In response to a contractor request made in accordance with 50.103-3(a), the contracting officer or an authorized representative shall make a thorough investigation to establish the facts necessary to decide a given case. Facts and evidence, including signed statements of material facts within the knowledge of individuals when documentary evidence is lacking, and audits if considered necessary to establish financial or cost facts, shall be obtained from contractor and Government personnel.

(b) When a case involves matters of interest to more than one Government agency, the interested agencies should maintain liaison with each other to determine whether joint action should be taken.

(c) When additional funds are required from another agency, the contracting agency may not approve adjustment requests before receiving advice that the funds will be available. The request for this advice shall give the contractor's name, the contract number, the amount of proposed relief, a brief description of the contract, and the accounting classification or fund citation. If the other agency makes additional funds available, the agency considering the adjustment request shall be solely responsible for any action taken on the request.

(d) When essentiality to the national defense is an issue (50.103-2(a)(1)), agencies considering requests for amendment without consideration

involving another agency shall obtain advice on the issue from the other agency before making the final decision. When this advice is received, the agency considering the request for amendment without consideration shall be responsible for taking whatever action is appropriate.

50.103-6 Disposition.

When approving or denying a contractor's request made in accordance with 50.103-3(a), the approving authority shall sign and date a Memorandum of Decision containing—

(a) The contractor's name and address, the contract identification, and the nature of the request;

(b) A concise description of the supplies or services involved;

(c) The decision reached and the actual cost or estimated potential cost involved, if any;

(d) A statement of the circumstances justifying the decision;

(e) Identification of any of the foregoing information classified "Confidential" or higher (instead of being included in the memorandum, such information may be set forth in a separate classified document referenced in the memorandum); and

(f) If some adjustment is approved, a statement in substantially the following form: "I find that the action authorized herein will facilitate the national defense." The case files supporting this statement will show the derivation and rationale for the dollar amount of the award. When the dollar amount exceeds the amounts supported by audit or other independent reviews, the approving authority will further document the rationale for deviating from the recommendation.

50.103-7 Contract requirements.

(a) Pub. L. 85-804 and E.O. 10789 require that every contract entered into, amended, or modified under this Subpart 50.1 shall contain—

(1) A citation of Pub. L. 85-804 and E.O. 10789;

(2) A brief statement of the circumstances justifying the action; and

(3) A recital of the finding that the action will facilitate the national defense.

(b) The authority in 50.101-1(a) shall not be used to omit from contracts, when otherwise required, the clauses at 52.203-5, Covenant Against Contingent Fees; 52.215-2, Audit and Records—Negotiation; 52.222-4, Contract Work Hours and Safety Standards Act—Overtime Compensation; 52.222-6, Davis-Bacon Act; 52.222-10, Compliance With Copeland Act Requirements; 52.222-20, Walsh-Healey

Public Contracts Act; 52.222-26, Equal Opportunity; and 52.232-23, Assignment of Claims.

50.104 Residual powers.

This section prescribes standards and procedures for exercising residual powers under Pub. L. 85-804. The term "residual powers" includes all authority under Pub. L. 85-804 except—

(a) That covered by section 50.103; and

(b) The authority to make advance payments (see Subpart 32.4).

50.104-1 Standards for use.

Subject to the limitations in 50.102-3, residual powers may be used in accordance with the policies in 50.101-2 when necessary and appropriate, all circumstances considered. In authorizing the inclusion of the clause at 52.250-1, Indemnification Under Public Law 85-804, in a contract or subcontract, an agency head may require the indemnified contractor to provide and maintain financial protection of the type and amount determined appropriate. In deciding whether to approve use of the indemnification clause, and in determining the type and amount of financial protection the indemnified contractor is to provide and maintain, an agency head shall consider such factors as self-insurance, other proof of financial responsibility, workers' compensation insurance, and the availability, cost, and terms of private insurance. The approval and determination shall be final.

50.104-2 General.

(a) When approving or denying a proposal for the exercise of residual powers, the approving authority shall sign and date a Memorandum of Decision containing substantially the same information called for by 50.103-6.

(b) Every contract entered into, amended, or modified under residual powers shall comply with the requirements of 50.103-7.

50.104-3 Special procedures for unusually hazardous or nuclear risks.

(a) *Indemnification requests.* (1) Contractor requests for the indemnification clause to cover unusually hazardous or nuclear risks should be submitted to the contracting officer and shall include the following information:

(i) Identification of the contract for which the indemnification clause is requested.

(ii) Identification and definition of the unusually hazardous or nuclear risks for which indemnification is requested,

with a statement indicating how the contractor would be exposed to them.

(iii) A statement, executed by a corporate official with binding contractual authority, of all insurance coverage applicable to the risks to be defined in the contract as unusually hazardous or nuclear, including—

(A) Names of insurance companies, policy numbers, and expiration dates;

(B) A description of the types of insurance provided (including the extent to which the contractor is self-insured or intends to self-insure), with emphasis on identifying the risks insured against and the coverage extended to persons or property, or both;

(C) Dollar limits per occurrence and annually, and any other limitation, for relevant segments of the total insurance coverage;

(D) Deductibles, if any, applicable to losses under the policies;

(E) Any exclusions from coverage under such policies for unusually hazardous or nuclear risks; and

(F) Applicable workers' compensation insurance coverage.

(iv) The controlling or limiting factors for determining the amount of financial protection the contractor is to provide and maintain, with information regarding the availability, cost, and terms of additional insurance or other forms of financial protection.

(v) Whether the contractor's insurance program has been approved or accepted by any Government agency; and whether the contractor has an indemnification agreement covering similar risks under any other Government program, and, if so, a brief description of any limitations.

(vi) If the contractor is a division or subsidiary of a parent corporation—

(A) A statement of any insurance coverage of the parent corporation that bears on the risks for which the contractor seeks indemnification; and

(B) A description of the precise legal relationship between parent and subsidiary or division.

(2) If the dollar value of the contractor's insurance coverage varies by 10 percent or more from that stated in an indemnification request submitted in accordance with paragraph (a)(1) of this subsection, or if other significant changes in insurance coverage occur after submission and before approval, the contractor shall immediately submit to the contracting officer a brief description of the changes.

(b) *Action on indemnification requests.* (1) The contracting officer, with assistance from legal counsel and cognizant program office personnel, shall review the indemnification request

and ascertain whether it contains all required information. If the contracting officer, after considering the facts and evidence, denies the request, the contracting officer shall notify the contractor promptly of the denial and of the reasons for it. If recommending approval, the contracting officer shall forward the request (as modified, if necessary, by negotiation) through channels to the appropriate official specified in 50.102-1(d). The contracting officer's submission shall include all information submitted by the contractor and—

(i) All pertinent information regarding the proposed contract or program, including the period of performance, locations, and facilities involved;

(ii) A definition of the unusually hazardous or nuclear risks involved in the proposed contract or program, with a statement that the parties have agreed to it;

(iii) A statement by responsible authority that the indemnification action would facilitate the national defense;

(iv) A statement that the contract will involve unusually hazardous or nuclear risks that could impose liability upon the contractor in excess of financial protection reasonably available;

(v) A statement that the contractor is complying with applicable Government safety requirements;

(vi) A statement of whether the indemnification should be extended to subcontractors; and

(vii) A description of any significant changes in the contractor's insurance coverage (see 50.104-3(a)(2)) occurring since submission of the indemnification request.

(2) Approval of a request to include the indemnification clause in a contract shall be by a Memorandum of Decision executed by the appropriate official specified in 50.102-1(d).

(3) When use of the indemnification clause is approved under paragraph (b)(2) of this subsection, the definition of unusually hazardous or nuclear risks (see paragraph (b)(1)(ii) of this subsection) shall be incorporated into the contract, along with the clause.

(4) When approval is—

(i) Authorized in the Memorandum of Decision; and

(ii) Justified by the circumstances, the contracting officer may approve the contractor's written request to provide for indemnification of subcontractors, using the same procedures as those required for contractors.

50.104-4 Contract clause.

The contracting officer shall insert the clause at 52.250-1, Indemnification

Under Public Law 85-804, in contracts whenever the approving official determines that the contractor shall be indemnified against unusually hazardous or nuclear risks (also see 50.104-3(b)(3)). In cost-reimbursement contracts, the contracting officer shall use the clause with its Alternate I.

Subpart 50.2—Support Anti-terrorism by Fostering Effective Technologies Act of 2002

50.200 Scope of subpart.

This subpart implements the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act) liability protections to promote development and use of anti-terrorism technologies.

50.201 Definitions.

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Pre-qualification designation notice means a notice in a procurement solicitation or other publication by the Government stating that the technology to be procured either affirmatively or presumptively satisfies the technical criteria necessary to be deemed a qualified anti-terrorism technology. A pre-qualification designation notice authorizes successful offeror(s) to submit streamlined SAFETY Act applications for SAFETY Act designation and receive expedited processing of those applications.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product,

equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by Department of Homeland Security (DHS) pursuant to 6 U.S.C. 442, as further delineated in 6 CFR 25.8 and 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended. "Block certification" refers to a technology class that DHS has determined to be an approved class of approved products for homeland security.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 443, as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act. "Block designation" refers to a technology class that DHS has determined to be a QATT.

50.202 Authorities.

The following authorities apply:

(a) Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441-444.

(b) Executive Order 13286 of February 28, 2003, Amendment of Executive Orders, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security.

(c) Executive Order 10789 of November 14, 1958, Contracting Authority of Government Agencies in Connection with National Defense Functions.

(d) 6 CFR Part 25.

50.203 General.

(a) As part of the Homeland Security Act of 2002, Pub. L. 107-296, Congress enacted the SAFETY Act to—

(1) Encourage the development and use of anti-terrorism technologies that will enhance the protection of the nation; and

(2) Provide risk management and litigation management protections for sellers of QATTs and others in the supply and distribution chain.

(b) The SAFETY Act's liability protections are complementary to the Terrorism Risk Insurance Act of 2002.

(c) Questions concerning the SAFETY Act may be directed to DHS Office of

SAFETY Act Implementation (OSAI). Additional information about the SAFETY Act may be found at <http://www.SAFETYAct.gov>.

50.204 Policy.

(a) Agencies should—

(1) Determine whether the technology to be procured is appropriate for SAFETY Act protections;

(2) Encourage offerors to seek SAFETY Act protections for their offered technologies, even in advance of the issuance of a solicitation; and

(3) Not mandate SAFETY Act protections for acquisitions because applying for SAFETY Act protections for a particular technology is the choice of the offeror.

(b) Agencies shall not solicit offers contingent upon SAFETY Act designation or certification before contract award unless authorized in accordance with 50.205-3.

(c) Agencies shall not solicit offers or award contracts presuming DHS will issue a SAFETY Act designation or certification after contract award unless authorized in accordance with 50.205-4.

(d) The DHS determination to extend SAFETY Act protections for a particular technology is not a determination that the technology meets, or fails to meet, the requirements of a solicitation.

50.205 Procedures.

50.205-1 SAFETY Act Considerations.

(a) *SAFETY Act applicability.* Requiring activities shall review requirements to identify potential technologies that prevent, detect, identify, or deter acts of terrorism or limit the harm such acts might cause, and may be appropriate for SAFETY Act protections. In questionable cases, the agency shall consult with DHS. For acquisitions involving such technologies, the requiring activity should address through preliminary discussions with DHS whether a block designation or block certification exists for the technology being acquired.

(1) If one does exist, the requiring activity shall inform the contracting officer to notify offerors.

(2) If one does not exist, see 50.205-2, Pre-qualification designation notice.

(b) *Early consideration of the SAFETY Act.* Acquisition officials shall consider SAFETY Act issues as early in the acquisition cycle as possible. Normally, this would be at the point where the required capabilities or performance characteristics are addressed. This is important because the processing times for issuing determinations on all types of SAFETY Act applications vary

depending on many factors, including the influx of applications to DHS and the technical complexity of individual applications.

(c) *Industry outreach.* When applicable, acquisition officials should include SAFETY Act considerations in all industry outreach efforts including, but not limited to, requests for information, draft requests for proposal, and industry conferences.

(d) *Reciprocal waiver of claims.* For purposes of 6 CFR 25.5(e), the Government is not a customer from which a contractor must request a reciprocal waiver of claims.

50.205-2 Pre-qualification designation notice.

(a) *Requiring activity responsibilities.* (1) If the requiring activity determines that the technology to be acquired may qualify for SAFETY Act protection, the requiring activity is responsible for requesting a pre-qualification designation notice from DHS. DHS will then determine whether the technology identified in the request either affirmatively or presumptively satisfies the technical criteria for SAFETY Act designation. An affirmative determination means the technology described in the pre-qualification designation notice satisfies the technical criteria for SAFETY Act designation as a QATT. A presumptive determination means that the technology is a good candidate for SAFETY Act designation as a QATT. In either case, the notice will authorize offerors to—

(i) Submit a streamlined application for SAFETY Act designation; and

(ii) Receive expedited review of their application for SAFETY Act designation.

(2) The requiring activity shall make requests using the procurement pre-qualification request form available at <http://www.SAFETYAct.gov>. The website includes instructions for completing and submitting the form.

(3) The requiring activity shall provide a copy of the request, as well as a copy of the resulting pre-qualification designation notice or DHS denial, to the contracting officer.

(b) *Contracting officer responsibilities.* Upon receipt of the documentation specified in paragraph (a)(3) of this subsection, the contracting officer shall—

(1) Include in any pre-solicitation notice (Subpart 5.2) that a pre-qualification designation notice has been—

(i) Requested and is under review by DHS;

(ii) Denied by DHS; or

(iii) Issued and a copy will be included with the solicitation; and

(2) Incorporate the pre-qualification designation notice into the solicitation.

50.205-3 Authorization of offers contingent upon SAFETY Act designation or certification before contract award.

(a) Contracting officers may authorize such contingent offers, only if—

(1) DHS has issued—

(i) For offers contingent upon SAFETY Act designation, a pre-qualification designation notice or a block designation; or

(ii) For offers contingent upon SAFETY Act certification, a block certification;

(2) To the contracting officer's knowledge, the Government has not provided advance notice so that potential offerors could have obtained SAFETY Act designations/ certifications for their offered technologies before release of any solicitation; and

(3) Market research shows that there will be insufficient competition without SAFETY Act protections or the subject technology would be sold to the Government only with SAFETY Act protections.

(b) Contracting officers shall not authorize offers contingent upon obtaining a SAFETY Act certification (as opposed to a SAFETY Act designation), unless a block certification applies to the solicitation.

50.205-4 Authorization of awards made presuming SAFETY Act designation or certification after contract award.

(a) When necessary to award a contract prior to DHS issuing SAFETY Act protections, contracting officers may award contracts presuming that DHS will issue a SAFETY Act designation/ certification to the contractor after contract award only if—

(1) The criteria of 50.205-3(a) are met;

(2) The chief of the contracting office (or other official designated in agency procedures) approves the action; and

(3) The contracting officer advises DHS of the timelines for potential award and consults DHS as to when DHS could reasonably complete evaluations of offerors' applications for SAFETY Act designations or certifications.

(b) Contracting officers shall not authorize offers presuming that SAFETY Act certification will be obtained (as opposed to a SAFETY Act designation), unless a block certification applies to the solicitation.

50.206 Solicitation provisions and contract clause.

(a) Insert the provision at 52.250-2, SAFETY Act Coverage Not Applicable, in solicitations if—

(1) The agency consulted with DHS on a questionable case of SAFETY Act

applicability to an acquisition in accordance with 50.205-1(a), and after the consultation, the agency has determined that SAFETY Act protection is not applicable for the acquisition; or

(2) DHS has denied approval of a pre-qualification designation notice.

(b)(1) Insert the provision at 52.250-3, SAFETY Act Block Designation/Certification, in a solicitation when DHS has issued a block designation/certification for the solicited technologies.

(2) Use the provision at 52.250-3 with its Alternate I when contingent offers are authorized in accordance with 50.205-3.

(3) Use the provision at 52.250-3 with its Alternate II when offers presuming SAFETY Act designation or certification are authorized in accordance with 50.205-4. If this alternate is used, the contracting officer may alter the number of days within which offerors must submit their SAFETY Act designation or certification application.

(c)(1) Insert the provision at 52.250-4, SAFETY Act Pre-qualification Designation Notice, in a solicitation for which DHS has issued a pre-qualification designation notice.

(2) Use the provision at 52.250-4 with its Alternate I when contingent offers are authorized in accordance with 50.205-3.

(3) Use the provision at 52.250-4 with its Alternate II when offers presuming SAFETY Act designation or certification are authorized in accordance with 50.205-4. If this alternate is used, the contracting officer may alter the number of days within which offerors must submit their SAFETY Act designation or certification application.

(d) Insert the clause at 52.250-5, SAFETY Act—Equitable Adjustment—

(1) In the solicitation, if the provision at 52.250-3 or 52.250-4 is used with its Alternate II; and

(2) In any resultant contract, if DHS has not issued SAFETY Act designation or certification to the successful offeror before contract award.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 13. Amend section 52.250-1 by revising the introductory paragraph to read as follows:

52.250-1 Indemnification Under Public Law 85-804.

As prescribed in 50.104-4, insert the following clause:

* * * * *

■ 14. Add sections 52.250-2 through 52.250-5 to read as follows:

52.250-2 SAFETY Act Coverage Not Applicable.

As prescribed in 50.206(a), insert the following provision:

SAFETY ACT COVERAGE NOT APPLICABLE (Nov 2007)

The Government has determined that the product(s) or service(s) being acquired by this action is not an anti-terrorism technology as that term is defined by the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441-444. Proposals in which either acceptance or pricing is made contingent upon SAFETY Act designation as a qualified anti-terrorism technology or SAFETY Act certification as an approved product for homeland security of the proposed product or service will not be considered for award. See FAR Subpart 50.2.

(End of provision)

52.250-3 SAFETY Act Block Designation/Certification.

As prescribed in 50.206(b)(1), insert the following provision:

SAFETY ACT BLOCK DESIGNATION/CERTIFICATION (Nov 2007)

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

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing.

Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by Department of Homeland Security (DHS) pursuant to 6 U.S.C. 442, as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended. "Block certification" refers to a technology class that DHS has determined to be an approved class of approved products for homeland security.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 443, as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act. "Block designation" refers to a technology class that DHS has determined to be a QATT.

(b) The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441-444, creates certain liability limitations for claims arising out of, relating to, or resulting from an act of terrorism where QATTs have been deployed. It also confers other important benefits. SAFETY Act designation and SAFETY Act certification are designed to support effective technologies aimed at preventing, detecting, identifying, or deterring acts of terrorism, or limiting the harm that such acts might otherwise cause, and which also meet other prescribed criteria. For some classes of technologies, DHS may issue a block designation/certification in order to lessen the burdens for filing for SAFETY Act designation or SAFETY Act certifications by not requiring applicants to provide certain information otherwise required and in order to offer expedited review of any application submitted pursuant to a block designation/certification. Block designations/certifications will be issued only for technologies that rely on established performance standards or defined technical characteristics.

(c)(1) DHS has issued a block designation or block certification for the technology to be acquired under this solicitation.

(2) This block designation or block certification is attached to this solicitation and contains essential information, including—

(i) A detailed description of and specification for the technology covered by the block designation or block certification;

(ii) A listing of those portions of the SAFETY Act application kit that must be completed and submitted by applicants;

(iii) The date of its expiration; and

(iv) Any other terms and conditions.

(3) Offerors should read this block designation or block certification carefully to make sure they comply with its terms if they plan to take advantage of SAFETY Act coverage for their technology(ies).

(d) A determination by DHS to issue a SAFETY Act designation or SAFETY Act certification based on this block designation/certification is not a determination that the technology meets, or fails to meet, the requirements of this solicitation. All determinations by DHS are based on factors set forth in the SAFETY Act, and are made independent of, and without regard to, the specific terms, conditions, specifications, statements of work, or evaluation factors set forth in the solicitation.

(e) Neither SAFETY Act designation nor certification is in any way a requirement of this action. Whether to seek the benefits of the SAFETY Act for a proposed product or service is entirely up to the offeror. Additional information about the SAFETY Act and this block designation/certification may be found at the SAFETY Act website at <http://www.SAFETYAct.gov> or requests may be mailed to: Directorate of Science and Technology, SAFETY Act/room 4320, Department of Homeland Security, Washington, DC 20528.

(f) Proposals in which pricing or any other terms or conditions are offered contingent upon SAFETY Act designation or SAFETY Act certification of the proposed product(s) or service(s) will not be considered for award.

(End of provision)

Alternate I (Nov 2007). As prescribed in 50.206(b)(2), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit proposals made contingent upon SAFETY Act designation (or SAFETY Act certification, if a block certification exists) before award. When an offer is made contingent upon SAFETY Act designation or certification, the offeror also may submit an alternate offer without the contingency.

(2) The Government may award a contract based on a contingent offer only if the offeror demonstrates that DHS has issued a SAFETY Act designation (or SAFETY Act certification, if a block certification exists) for the offeror's proposed technology prior to contract award.

(3) The Government reserves the right to award the contract prior to DHS resolution of

the offeror's application for SAFETY Act designation (or SAFETY Act certification, if a block certification exists).

Alternate II (Nov 2007). As prescribed in 50.206(b)(3), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit offers presuming that SAFETY Act designation (or SAFETY Act certification, if a block certification exists) will be obtained before or after award.

(2) An offeror is eligible for award only if the offeror—

(i) Files a SAFETY Act designation (or SAFETY Act certification) application, limited to the scope of the applicable block designation (or block certification), within 15 days after submission of the proposal;

(ii) Pursues its SAFETY Act designation (or SAFETY Act certification) application in good faith; and

(iii) Agrees to obtain the amount of insurance DHS requires for issuing any SAFETY Act designation (or SAFETY Act certification).

(3) If DHS has not issued a SAFETY Act designation (or SAFETY Act certification) to the successful offeror before contract award, the contracting officer will include the clause at 52.250-5 in the resulting contract.

52.250-4 SAFETY Act Pre-qualification Designation Notice.

As prescribed in 50.206(c)(1), insert the following provision:

SAFETY ACT PRE-QUALIFICATION DESIGNATION NOTICE (Nov 2007)

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

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Pre-qualification designation notice means a notice in a procurement solicitation or other publication by the Government stating that the technology to be procured either affirmatively or presumptively satisfies the technical criteria necessary to be deemed a qualified anti-terrorism technology. A pre-qualification designation notice authorizes successful offeror(s) to submit streamlined SAFETY Act

applications for SAFETY Act designation and receive expedited processing of those applications.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by Department of Homeland Security (DHS) pursuant to 6 U.S.C. 442, as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, i.e., it will perform as intended, conforms to the seller's specifications, and is safe for use as intended. "Block certification" refers to a technology class that DHS has determined to be an approved class of approved products for homeland security.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 443, as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act. "Block designation" refers to a technology class that DHS has determined to be a QATT.

(b) The Support Anti-terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act), 6 U.S.C. 441-444, creates certain liability limitations for claims arising out of, relating to, or resulting from an act of terrorism where QATTs have been deployed. It also confers other important benefits. SAFETY Act designation and SAFETY Act certification are designed to support effective technologies aimed at preventing, detecting, identifying, or deterring acts of terrorism, or limiting the harm that such acts might otherwise cause, and which also meet other prescribed criteria.

(c)(1) DHS has issued a SAFETY Act pre-qualification designation notice for the technology to be acquired under this solicitation.

(2) This notice is attached to this solicitation and contains essential information, including—

(i) A detailed description of and specification for the technology covered by the notice;

(ii) A statement that the technology described and specified in the notice satisfies the technical criteria to be deemed a QATT and the offeror's proposed technology either may presumptively or will qualify for the issuance of a designation provided the offeror complies with terms and conditions in the notice and its application is approved;

(iii) The period of time within which DHS will take action upon submission of a SAFETY Act application submitted pursuant to the notice;

(iv) A listing of those portions of the application that must be completed and submitted by selected awardees and the time periods for such submissions;

(v) The date of expiration of the notice; and

(vi) Any other terms and conditions concerning the notice.

(3) Offerors should read this notice carefully to make sure they comply with the terms of the notice if they plan on taking advantage of SAFETY Act coverage for their technologies.

(d) A determination by DHS to designate, or not designate, a particular technology as a QATT is not a determination that the technology meets, or fails to meet, the requirements of this solicitation. All determinations by DHS are based on factors set forth in the SAFETY Act, and are made independent of, and without regard to, the specific terms, conditions, specifications, statements of work, or evaluation factors set forth in the solicitation.

(e) Neither SAFETY Act designation nor certification is in any way a requirement of this action. Whether to seek the benefits of the SAFETY Act for a proposed product or service is entirely up to the offeror. Additional information about the SAFETY Act may be found at the SAFETY Act website at <http://www.SAFETYAct.gov>.

(f) Proposals in which pricing or any other terms or conditions are offered contingent upon SAFETY Act designation or certification of the proposed product(s) or service(s) will not be considered for award.

(End of provision)

Alternate I (Nov 2007). As prescribed in 50.206(c)(2), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit proposals made contingent upon SAFETY Act designation before award. When an offer is made contingent upon SAFETY Act

designation, the offeror also may submit an alternate offer without the contingency.

(2) The Government may award a contract based on a contingent offer only if the offeror demonstrates that DHS has issued a SAFETY Act designation for the offeror's proposed technology prior to contract award.

(3) The Government reserves the right to award the contract prior to DHS resolution of the offeror's application for SAFETY Act designation.

Alternate II (Nov 2007). As prescribed in 50.206(c)(3), substitute the following paragraph (f):

(f)(1) Offerors are authorized to submit proposals presuming SAFETY Act designation before or after award.

(2) An offeror is eligible for award only if the offeror—

(i) Files a SAFETY Act designation application, limited to the scope of the applicable prequalification designation notice, within 15 days after submission of the proposal;

(ii) Pursues its SAFETY Act designation application in good faith; and

(iii) Agrees to obtain the amount of insurance DHS requires for issuing any SAFETY Act designation.

(3) If DHS has not issued a SAFETY Act designation to the successful offeror before contract award, the contracting officer will include the clause at 52.250-5 in the resulting contract.

52.250-5 SAFETY Act—Equitable Adjustment.

As prescribed in 50.206(d), insert the following clause:

SAFETY ACT—EQUITABLE ADJUSTMENT (Nov 2007)

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

Act of terrorism means any act determined to have met the following requirements or such other requirements as defined and specified by the Secretary of Homeland Security:

(1) Is unlawful.

(2) Causes harm, including financial harm, to a person, property, or entity, in the United States, or in the case of a domestic United States air carrier or a United States-flag vessel (or a vessel based principally in the United States on which United States income tax is paid and whose insurance coverage is subject to regulation in the United States), in or outside the United States.

(3) Uses or attempts to use instrumentalities, weapons or other methods designed or intended to cause mass destruction, injury or other loss to citizens or institutions of the United States.

Qualified Anti-Terrorism Technology (QATT) means any technology designed, developed, modified, procured, or sold for the purpose of preventing, detecting, identifying, or deterring acts of terrorism or limiting the harm such acts might otherwise

cause, for which a SAFETY Act designation has been issued. For purposes of defining a QATT, technology means any product, equipment, service (including support services), device, or technology (including information technology) or any combination of the foregoing. Design services, consulting services, engineering services, software development services, software integration services, threat assessments, vulnerability studies, and other analyses relevant to homeland security may be deemed a technology.

SAFETY Act certification means a determination by Department of Homeland Security (DHS) pursuant to 6 U.S.C. 442, as further delineated in 6 CFR 25.9, that a QATT for which a SAFETY Act designation has been issued is an approved product for homeland security, *i.e.*, it will perform as intended, conforms to the seller's specifications, and is safe for use as intended. "Block certification" refers to a technology class that DHS has determined to be an approved class of approved products for homeland security.

SAFETY Act designation means a determination by DHS pursuant to 6 U.S.C. 443, as further delineated in 6 CFR 25.4, that a particular Anti-Terrorism Technology constitutes a QATT under the SAFETY Act. "Block designation" refers to a technology class that DHS has determined to be a QATT.

(b) Prices for the items covered by the pre-qualification designation notice, block designation, or block certification in the contract were established presuming DHS will issue a SAFETY Act designation (or SAFETY Act certification) for those items.

(c) In order to qualify for an equitable adjustment in accordance with paragraph (d) of this clause the Contractor shall in good faith pursue obtaining—

(1) SAFETY Act designation (or SAFETY Act certification); and

(2) The amount of insurance DHS requires for issuing any SAFETY Act designation (or SAFETY Act certification).

(d)(1) If DHS denies the Contractor's SAFETY Act designation (or certification) application, the Contractor may submit a request for an equitable adjustment within 30 days of DHS's notification of denial.

(2) The Contracting Officer shall either—

(i) Make an equitable adjustment to the contract price based on evidence of the resulting increase or decrease in the Contractor's costs and/or an equitable adjustment to other terms and

conditions based on lack of SAFETY Act designation (or certification); or

(ii) At the sole option of the Government, terminate this contract for the convenience of the Government in place of an equitable adjustment.

(3) A failure of the parties to agree on the equitable adjustment will be considered to be a dispute in accordance with the "Disputes" clause of this contract.

(4) Unless first terminated, the Contractor shall continue contract performance during establishment of any equitable adjustment.

(End of clause)

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52

[FAC 2005-21; FAR Case 2004-032; Item II; Docket 2006-020; Sequence 13]

RIN 9000-AK65

Federal Acquisition Regulation; FAR Case 2004-032, Biobased Products Preference Program

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement 7 U.S.C. 8102, as enacted by section 9002 of the Farm Security and Rural Investment Act of 2002 (FSRIA) (Pub. L. 107-171), and amended by sections 205 and 943 of the Energy Policy Act of 2005 (Pub. L. 109-58). Entitled "Federal Procurement of Biobased Products," 7 U.S.C. 8102 requires that a procurement preference be afforded biobased products within items designated by the Secretary of Agriculture.

DATES: *Effective Date:* December 7, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. William Clark, Procurement Analyst, at (202) 219-1813 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

Please cite FAC 2005-21, FAR case 2004-032.

SUPPLEMENTARY INFORMATION:

A. Background

The United States Department of Agriculture (USDA) published regulations at 7 CFR 2902: 70 FR 1792, January 11, 2005; 71 FR 13686, March 16, 2006; 71 FR 42572, July 27, 2006; and 71 FR 67031, November 20, 2006.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 71 FR 77360, December 26, 2006. The comment period closed on February 26, 2007. Six respondents submitted comments on the proposed rule. The comments are available at <http://www.regulations.gov>. A discussion of the comments and the changes made to the rule are provided below.

Public Comments

Provide coverage for products that use biobased products.

Comment: One respondent recommends that the FAR should include a preference for products that use biobased products. The example proffered was diesel engine generator sets that perform with biobased fuels.

Response: Extending coverage as suggested would exceed the congressional mandate, codified at 7 U.S.C. 8102, to procure designated biobased items. The comment is therefore beyond the scope of this case. It applies to the scope of the biobased product program, which was established by Congress.

Interface between the proposed contract clause and the order of precedence clause.

Comment: One respondent expresses concern with the interface between the contract clause and the order of precedence clause (FAR 52.215-8). The subject proposed rule includes a requirement to use a contract clause, specifically FAR 52.223-XX (now FAR 52.223-2), to make maximum use of biobased products in contracts for services, rather than the normal needs analysis and specification process embodied in Part 11, Describing Agency Needs. The subject clause is proposed to go into all service contracts (as well as construction), unless the contract will not involve the use of USDA-designated items. The respondent believes this unusual approach to describing contractual requirements is inappropriate in contracts for services because it creates a potential ambiguity. The respondent is concerned that in the order of precedence clause, contract clauses take precedence over specifications. As stated by the respondent, "It is not clear that the

exemption in the clause regarding 'meeting contract performance requirements' in paragraph (a)(2) applies to named products such as those on qualified product lists (QPLs), because of the order of precedence clause, 52.215-8, that already goes into all negotiated contracts." The respondent is concerned that, according to this rule of interpretation, the clause requirement to use a designated biobased hydraulic fluid or lubricant, for example, might be required over a QPL or other contractually specified product. This is a matter of concern to the respondent when acquiring services in support of complex systems, engineering services, and other contracts for services when multi-tiered subcontracting is involved.

The respondent suggests two alternatives—

- Include the requirement for biobased products in FAR Part 11 rather than in a contract clause; or
- Exempt products on QPLs.

Response: Review of the proposed contract clause and FAR 52.215-8 reveals that the two clauses can be harmonized in a manner that furthers the Congressional objective when read together. In accordance with the proposed contract clause and the provisions of 7 U.S.C. 8102, any entity contracting with any Federal agency is required to use designated biobased items (absent one of the statutory exemptions) in performance of the contract. As mandated in 7 U.S.C. 8102(d), Federal agencies have one year after designation of a product to modify specifications which they have the responsibility for drafting or reviewing, in order to ensure that such specifications require the use of biobased products unless an exemption applies. The proposed alternatives are addressed as follows:

- *Put the requirement in Part 11.* Regardless of where the requirement is incorporated into the FAR, the requirement must be incorporated into the contract to bind a contractor. The statute mandates: "Except as provided in subsection (c), each procuring agency shall comply with the requirements set forth in this section and any regulations issued under this section..." (7 U.S.C. 8102(a)). "Procuring agency" is defined in 7 U.S.C. 8101(4) as—

—Any Federal agency that is using Federal funds for procurement; or
—Any person contracting with any Federal agency with respect to work performed under the contract.

To implement 7 U.S.C. 8102, a contract clause is required. Absent a contract clause, the contractor is not bound to follow the mandates of 7

U.S.C. 8102. For a performance-based contract, there may be no specifications.

- **Exemption for Products on QPLs.**

The exemptions are listed in the proposed and final rules at FAR 23.404(b), 23.405(b), and in the clause at 52.223-2(a). There is an exemption that covers situations in which the product fails to meet performance requirements. If there is a qualification requirement applicable to an acquisition, it will be unknown whether a product meets performance requirements until it has been evaluated for addition to the QPL. Either the product will meet the requirements and be added to the QPL, or the product will not meet the requirements, and need not be purchased. In any case, the QPL will control until the product is tested. Federal agencies should, however, expedite the qualification process. Congress has directed Federal agencies to revise specifications which they are responsible for drafting or reviewing within one year after the date of publication of the guidelines on designated products. Therefore, such exclusion for all products on QPLs would be inconsistent with 7 U.S.C. 8102(d).

- **Include a categorical exemption for spacecraft or combat systems in the clause.**

Comment: One respondent expressed concern that "...fabricators and operators working under large mission support services contracts, especially at the component subcontract level, might not be aware that spacecraft are exempt from some biobased requirements unless that specific exception is added to paragraph (a) of the clause."

Response: The USDA designation of some items (e.g., mobile equipment hydraulic fluids, diesel fuel additives, and penetrating lubricants, see 7 CFR 2902.10 *et seq.*) provides exemption from the preferred procurement requirement for the application of the designated item to one or both of the following:

- (i) Spacecraft system and launch support equipment.
- (ii) Military equipment: Product or system designed or procured for combat or combat-related missions.

These exemptions were initiated in response to public comments on the USDA proposed rule designating the first 6 biobased items for Federal procurement (70 FR 38612, July 5, 2005 and 71 FR 13685, March 16, 2006). USDA believed that the situations described were of sufficient concern that it was appropriate to provide specific exemptions for certain designated items when used in military equipment in combat or combat-related

missions and spacecraft and their launch support equipment where failures could have catastrophic consequences.

The Councils have included these exemptions with the other exemptions at FAR 23.404(b) and in the clause at FAR 52.223-2, because these exemptions may impact more than just one agency. The clause prescription has not been modified, because an exemption may apply to one USDA-designated item to be used in the performance of the contract, but not other USDA-designated items, or even the same item with a different application.

- **Inconsistent with performance-based service contracting policy.**

Comment: One respondent comments that the proposed contract clause approach is unnecessary and inconsistent with performance-based service contracting policy.

Response: Requiring a preference for biobased products does not impinge upon a contractor's discretion of determining work processes. Rather, once a contractor delineates a process, the contract clause only requires that if the process selected by the contractor involves the use of USDA-designated products, the contractor shall use biobased products, absent an applicable exception. The contractor may select another process that does not involve the use of any USDA-designated products.

- **Limit the use of the clause to contracts for commercial services with an estimated value in excess of \$100,000.**

Comment: One respondent recommends that the purpose of the new clause can still be achieved if the prescription were not as inclusive. Having a narrower prescription would balance the needs of USDA with the requirements of the rest of the procurement community. The respondent recommends limiting the use of the clause to contracts for commercial type services with an estimated value above \$100,000.

Response: Such action would be inconsistent with 7 U.S.C. 8102(a). That statutory provision requires compliance where the purchase price of the item exceeds \$10,000 or "where the quantity of such items or of functionally equivalent items purchased or acquired in the course of the preceding fiscal year was \$10,000 or more."

- **Delete coverage for micro-purchases.**

Comment: One respondent suggests deletion of coverage for micro-purchases at FAR 13.201(f). Justification for this recommendation is to enhance the simplicity of awarding micro-purchases,

reduce the burden on agencies for training individuals executing such purchases, and the decreased time for processing associated paperwork.

Response: The requirements of 7 U.S.C. 8102 are specifically applicable to any purchase once the statutory threshold has been met (i.e., the quantity of such items purchased by the agency the preceding year was \$10,000 or more).

- **Continue to meet contract performance requirements.**

Comment: One respondent suggests a change to proposed FAR clause 52.223-XX (now 52.223-2). The respondent suggests that (a)(2) of the proposed clause be changed from "meeting contract performance requirements; or" to "and continue to meet contract performance requirements; or."

Response: Absent a change in specification, a product that meets contract specifications at time of award will continue to meet such specifications subsequent to contract award. Therefore, no change to the proposed clause is required.

- **Include the certification in ORCA.**

Comment: Include the certification in Online Representations and Certifications Application (ORCA).

Response: The Councils agree with this comment and have added the FAR clause 52.223-1 to the list of clauses at FAR 4.1202.

- **Objection to requirement for minimum biobased contents for lubricants.**

Comment: One respondent objects "to the USDA's proposal requiring minimum biobased contents in order for lubricants to qualify for Federal agency procurement preference." A variety of reasons are provided, including cost and performance.

Response: With respect to the comments involving cost or performance, Federal agencies are not required to procure such products if the product cannot be procured at a reasonable price or it does not meet requirements. The remaining comments relating to USDA's designation of products are beyond the scope of this case and need to be directed to the USDA.

- **Project officers will need to be trained.**

Comment: One respondent comments that contracting officer technical representatives (project officers) will need to be trained.

Response: Program training will need to be conducted on an individual Federal agency basis, since preference programs are Federal agency specific. Therefore, training is most appropriately

addressed in conjunction with each Federal agency's procurement program.

Life-cycle cost information will be prohibitive for small businesses.

Comment: One respondent states that Life-cycle cost information will be prohibitive for many small businesses and should not be routinely requested from vendors since price, availability and functionality are generally the most important factors in most acquisition.

Response: The rule does not require routine collection of this data from vendors. It is permissive ("may request"), and is necessary to implement 7 CFR 2902.8, which requires that manufacturers and vendors must provide information on life cycle costs and environmental and health benefit tests, when requested by Federal agencies.

Need for Budget Object Code.

Comment: The respondent also comments that it will be difficult for agencies to capture data regarding affected procurements and a Budget Object Code is needed.

Response: This comment is outside the scope of this case.

Other Revisions to the Proposed Rule.

- **Definitions.** The proposed rule cited the statutory definition of "Biobased product" (7 U.S.C. 8101(2)), however, the definition conflicts with the intent of the rule that biobased products from certain designated countries must be treated by procuring agencies as eligible for the procurement preference under FSRIA. The revised definition deletes the statutory reference and encompasses biobased products composed of renewable agricultural materials or forestry materials from "designated countries," as defined in FAR 25.003. Therefore, provided that those products otherwise meet all requirements for participation in the preference program, they will be entitled to receive the procurement preference.

- **Certification.** The Councils concluded that the certification in the proposed rule was unnecessarily burdensome, requiring submission of a separate signed certification. This certification was erroneously patterned after FAR clause 52.223-9, Estimate of Recovered Material Content for EPA-Designated Products, Alternate I, which is a requirement for a certification at the end of the contract performance. The more appropriate model is the pre-award Recovered Material Certification at FAR 52.223-4, in which the offeror provides certification by signing the offer. In this way, the estimated paperwork burden associated with the proposed rule is eliminated. In addition, the wording "other than biobased products that are not purchased by the

offeror as a direct result of this contract" has been included in the certification to implement 7 CFR 2902.3(c), as amended by the USDA interim final rule of 71 FR 42572, July 27, 2006, which clarified the USDA intent to exclude from the preferred procurement program biobased products that are merely incidental to Federal funding. This clarification was necessary after the definition of "procuring agency" was expanded to include contractors.

- **Duplication of exemptions.** The proposed rule duplicated the statement of exemptions at FAR 23.404(b) and 23.405(b). The Councils provide a cross-reference at FAR 23.405(b) to 23.404(b), rather than a restatement of the exemptions.

- **Title of 52.223-9.** The Councils corrected the title of FAR 52.223-9 in the clause prescription at FAR 23.406(d) in the final rule.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it implements in the FAR the USDA rule at 7 CFR Part 2902. Furthermore, USDA has certified that its designation of biobased items will not have a significant economic impact on a substantial number of small entities (71 FR 13685 at 13704, March 16, 2006). In support of this certification, USDA stated in the **Federal Register** that it anticipates that this program will affect entities, both large and small, that manufacture or sell biobased products. For example, the designation of items for preferred procurement will provide additional opportunities for businesses to manufacture and sell biobased products to Federal agencies and their contractors. Similar opportunities will be provided for entities that supply biobased materials to manufacturers. Conversely, the biobased procurement program may decrease opportunities for businesses that manufacture or sell non-biobased products or provide components for the manufacturing of such products. However, this rule will not affect existing purchase orders and it will not preclude procuring agencies

from continuing to purchase non-biobased items under certain conditions relating to the availability, performance, or cost of biobased items. This rule will also not preclude businesses from modifying their product lines to meet new specifications or solicitation requirements for these products containing biobased materials. Because biobased products represent a small emerging market, only a small percentage of all manufacturers, large or small, are expected to develop and market biobased products. Thus, the number of small businesses affected is not expected to be substantial. The only comment received with regard to impact of the proposed rule on small business is addressed in the response to public comments.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.* The estimated burden of 18,000 hours per year associated with the proposed rule provision at FAR 52.223-1, has been eliminated in the final rule.

List of Subjects in 48 CFR Parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 7, 11, 12, 13, 23, 42, 45, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition "Biobased product" to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Biobased product means a product determined by the U.S. Department of Agriculture to be a commercial or industrial product (other than food or feed) that is composed, in whole or in significant part, of biological products, including renewable domestic agricultural materials (including plant,

animal, and marine materials) or forestry materials.
* * * *

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.1202 by redesignating paragraphs (r) through (z) as (s) through (aa) respectively, and adding a new paragraph (r) to read as follows:

4.1202 Solicitation provision and contract clause.

* * * * *
(r) 52.223–1, Biobased Product Certification.
* * * *

PART 7—ACQUISITION PLANNING

■ 4. Amend section 7.103 by revising paragraph (n)(2) to read as follows:

7.103 Agency-head responsibilities.

* * * * *
(n) * * *
(2) Comply with the policy in 11.002(d) regarding procurement of biobased products, products containing recovered materials, and environmentally preferable and energy-efficient products and services.
* * * *

PART 11—DESCRIBING AGENCY NEEDS

■ 5. Amend section 11.002 by revising paragraph (d) to read as follows:

11.002 Policy.

* * * * *
(d)(1) When agencies acquire products and services, various statutes and executive orders (identified in Part 23) require consideration of—
(i) Energy-efficient products and services (Subpart 23.2);
(ii) Products and services that utilize renewable energy technologies (Subpart 23.2);
(iii) Products containing energy-efficient standby power devices (Subpart 23.2);
(iv) Products containing recovered materials (Subpart 23.4);
(v) Biobased products (Subpart 23.4); and
(vi) Environmentally preferable products and services (Subpart 23.7).
(2) Executive agencies shall consider maximum practicable use of products and services listed in paragraph (d)(1) of this section when—
(i) Developing, reviewing, or revising Federal and military specifications, product descriptions (including commercial item descriptions) and standards;

(ii) Describing Government requirements for products and services; and
(iii) Developing source-selection factors.
* * * *

11.101 [Amended]

■ 6. Amend section 11.101 by removing paragraph (b) and redesignating paragraph (c) as (b).

■ 7. Amend section 11.302 by revising paragraph (c) to read as follows:

11.302 Policy.

* * * * *
(c)(1) When the contracting officer needs additional information to determine whether supplies meet minimum recovered material or biobased standards stated in the solicitation, the contracting officer may require offerors to submit additional information on the recycled or biobased content or related standards. The request for the information must be included in the solicitation. When acquiring commercial items, limit the information to the maximum extent practicable to that available under normal commercial practices.

(2) For biobased products, the contracting officer may require vendors to provide information on life cycle costs and environmental and health benefits in accordance with 7 CFR 2902.8.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 8. Amend section 12.301 by revising paragraph (e)(3) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *
(e) * * *
(3) The contracting officer may use the provisions and clauses contained in Part 23 regarding the use of recovered material and biobased products when appropriate for the item being acquired.
* * * *

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

■ 9. Amend section 13.201 by revising paragraph (f) to read as follows:

13.201 General.

* * * * *
(f) The procurement requirements in Subparts 23.2, 23.4, and 23.7 apply to purchases at or below the micro-purchase threshold.
* * * *

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 10. Amend section 23.000 by revising paragraph (d) to read as follows:

23.000 Scope.

* * * * *
(d) Acquiring energy-efficient and water-efficient products and services, environmentally preferable products, products that use recovered materials, and biobased products; and
* * * *

■ 11. Revise Subpart 23.4 to read as follows:

Subpart 23.4—Use of Recovered Materials and Biobased Products

Sec.	
23.400	Scope of subpart.
23.401	Definitions.
23.402	Authorities.
23.403	Policy.
23.404	Agency affirmative procurement programs.
23.405	Procedures.
23.406	Solicitation provisions and contract clauses.

23.400 Scope of subpart.

(a) The procedures in this subpart apply to all agency acquisitions of an Environmental Protection Agency (EPA) or United States Department of Agriculture (USDA)-designated item, if—

- (1) The price of the designated item exceeds \$10,000; or
- (2) The aggregate amount paid for designated items, or for functionally equivalent designated items, in the preceding fiscal year was \$10,000 or more.

(b) While micro-purchases are included in determining the aggregate amount paid under paragraph (a)(2) of this section, it is not recommended that an agency track micro-purchases when—

- (1) The agency anticipates the aggregate amount paid will exceed \$10,000; or
- (2) The agency intends to establish or continue an affirmative procurement program in the following fiscal year.

23.401 Definitions.

As used in this subpart—
(a) *EPA-designated item* means a product that is or can be made with recovered material—

- (1) That is listed by EPA in a procurement guideline (40 CFR part 247); and
- (2) For which EPA has provided purchasing recommendations in a

related Recovered Materials Advisory Notice (RMAN).

(b) *USDA-designated item* means a generic grouping of products that are or can be made with biobased materials—

(1) That is listed by USDA in a procurement guideline (7 CFR part 2902, subpart B); and

(2) For which USDA has provided purchasing recommendations.

23.402 Authorities.

(a) The Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. 6962.

(b) The Farm Security and Rural Investment Act of 2002 (FSRIA), 7 U.S.C. 8102.

(c) Executive Order 13101 of September 14, 1998, Greening the Government Through Waste Prevention, Recycling, and Federal Acquisition.

(d) The Energy Policy Act of 2005, Public Law 109–58.

23.403 Policy.

Government policy on the use of products containing recovered materials and biobased products considers cost, availability of competition, and performance. Agencies shall assure the use of products containing recovered materials and biobased products to the maximum extent practicable without jeopardizing the intended use of the product while maintaining a satisfactory level of competition at a reasonable price. Such products shall meet the reasonable performance standards of the agency and be acquired competitively, in a cost-effective manner. Except as provided at FAR 23.404(b), virgin material shall not be required by the solicitation (see 11.302).

23.404 Agency affirmative procurement programs.

(a) An agency must establish an affirmative procurement program for EPA and USDA-designated items if the agency's purchases of designated items exceed the threshold set forth in 23.400.

(1) Agencies have a period of 1 year to revise their procurement program(s) after the designation of any new item by EPA or USDA.

(2) Technical or requirements personnel and procurement personnel are responsible for the preparation, implementation, and monitoring of affirmative procurement programs.

(3) Agency affirmative procurement programs must include—

(i) A recovered materials and biobased products preference program;

(ii) An agency promotion program;

(iii) For EPA-designated items only, a program for requiring reasonable estimates, certification, and verification

of recovered material used in the performance of contracts. Both the recovered material content and biobased programs require preaward certification that the products meet EPA or USDA recommendations. A second certification is required at contract completion for recovered material content; and

(iv) Annual review and monitoring of the effectiveness of the program.

(b) *Exemptions.* (1) Agency affirmative procurement programs must require that 100 percent of purchases of EPA or USDA-designated items contain recovered material or biobased content, respectively, unless the item cannot be acquired—

(i) Competitively within a reasonable time frame;

(ii) Meeting reasonable performance standards; or

(iii) At a reasonable price.

(2) EPA and USDA may provide categorical exemptions for items that they designate, when procured for a specific purpose. For example, some USDA-designated items such as mobile equipment hydraulic fluids, diesel fuel additives, and penetrating lubricants (see 7 CFR 2902.10 *et seq.*) are excluded from the preferred procurement requirement for the application of the USDA-designated item to one or both of the following:

(i) Spacecraft system and launch support equipment.

(ii) Military equipment, *i.e.*, a product or system designed or procured for combat or combat-related missions.

(c) Agency affirmative procurement programs must provide guidance for purchases of EPA-designated items at or below the micro-purchase threshold.

(d) Agencies may use their own specifications or commercial product descriptions when procuring products containing recovered materials or biobased products. When using either, the contract should specify—

(1) For products containing recovered materials, that the product is composed of the—

(i) Highest percent of recovered materials practicable; or

(ii) Minimum content standards in accordance with EPA's Recovered Materials Advisory Notices; and

(2) For biobased products, that the product is composed of—

(i) The highest percentage of biobased material practicable; or

(ii) USDA's recommended minimum contents standards.

(e) Agencies shall treat as eligible for the preference for biobased products, products from "designated countries," as defined in 25.003, provided that those products—

(1) Meet the criteria for the definition of biobased product, except that the products need not meet the requirement that renewable agricultural materials (including plant, animal, and marine materials) or forestry materials in such product must be domestic; and

(2) Otherwise meet all requirements for participation in the preference program.

23.405 Procedures.

(a) *Designated items and procurement guidelines.*

(1) *Recovered Materials.* Contracting officers should refer to EPA's list of EPA-designated items (available via the Internet at <http://www.epa.gov/cpg/>) and to their agencies' affirmative procurement program when purchasing products that contain recovered material, or services that could include the use of products that contain recovered material.

(2) *Biobased products.* Contracting officers should refer to USDA's list of USDA-designated items (available through the Internet at <http://www.usda.gov/bioprefered>) and to their agencies' affirmative procurement program when purchasing supplies that contain biobased material or when purchasing services that could include supplies that contain biobased material.

(b) *Procurement exemptions.*

(1) Once an item has been designated by either EPA or USDA, agencies shall purchase conforming products unless an exemption applies (see 23.404(b)).

(2) When an exemption is used for an EPA-designated item or the procurement of a product containing recovered material does not meet or exceed the EPA recovered material content guidelines, the contracting officer shall place a written justification in the contract file.

(c) *Program priorities.* When both the USDA-designated item and the EPA-designated item will be used for the same purposes, and both meet the agency's needs, the agency shall purchase the EPA-designated item.

23.406 Solicitation provisions and contract clauses.

(a) Insert the provision at 52.223–1, Biobased Product Certification, in solicitations that—

(1) Require the delivery or specify the use of USDA-designated items; or

(2) Include the clause at 52.223–2.

(b) Insert the clause at 52.223–2, Affirmative Procurement of Biobased Products Under Service and Construction Contracts, in service or construction solicitations and contracts unless the contract will not involve the use of USDA-designated items at <http://>

www.usda.gov/biopreferred or 7 CFR Part 2902.

(c) Insert the provision at 52.223-4, Recovered Material Certification, in solicitations that are for, or specify the use of, EPA-designated items.

(d) Insert the clause at 52.223-9, Estimate of Percentage of Recovered Material Content for EPA-Designated Products, in solicitations and contracts exceeding \$100,000 that are for, or specify the use of, EPA-designated products containing recovered materials. If technical personnel advise that estimates can be verified, use the clause with its Alternate I.

23.701 [Removed]

■ 12. Remove and reserve section 23.701.

■ 13. Amend section 23.702 by adding paragraph (g) to read as follows:

23.702 Authorities.

* * * * *

(g) Farm Security and Rural Investment Act of 2002 (FSRIA) (7 U.S.C. 8102).

■ 14. Amend section 23.703 by revising paragraph (b)(7); and adding paragraph (b)(8) to read as follows:

23.703 Policy.

* * * * *

(b) * * *
(7) Promote the use of biobased products.

(8) Purchase only plastic ring carriers that are degradable (7 USC 8102(c)(1), 40 CFR part 238).

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 15. Amend section 42.302 by revising paragraph (a)(68)(ii) to read as follows:

42.302 Contract administration functions.

(a) * * *

(68) * * *

(ii) Monitoring contractor compliance with specifications or other contractual requirements requiring the delivery or use of environmentally preferable products, energy-efficient products, products containing recovered materials, and biobased products. This must occur as part of the quality assurance procedures set forth in Part 46; and

* * * * *

PART 45—GOVERNMENT PROPERTY

45.103 [Amended]

■ 16. Amend section 45.103 by removing from paragraph (a)(1) “11.101(c)” and adding “11.101(b)” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 17. Add sections 52.223-1 and 52.223-2 to read as follows:

52.223-1 Biobased Product Certification.

As prescribed in 23.406(a), insert the following provision:

BIOBASED PRODUCT CERTIFICATION [December 7, 2007]

As required by the Farm Security and Rural Investment Act of 2002 and the Energy Policy Act of 2005 (7 U.S.C. 8102(c)(3)), the offeror certifies, by signing this offer, that biobased products (within categories of products listed by the United States Department of Agriculture in 7 CFR part 2902, subpart B) to be used or delivered in the performance of the contract, other than biobased products that are not purchased by the offeror as a direct result of this contract, will comply with the applicable specifications or other contractual requirements.

(End of provision)

52.223-2 Affirmative Procurement of Biobased Products Under Service and Construction Contracts.

As prescribed in 23.406(b), insert the following clause:

AFFIRMATIVE PROCUREMENT OF BIOBASED PRODUCTS UNDER SERVICE AND CONSTRUCTION CONTRACTS [December 7, 2007]

(a) In the performance of this contract, the contractor shall make maximum use of biobased products that are United States Department of Agriculture (USDA)-designated items unless—

- (1) The product cannot be acquired—
 - (i) Competitively within a time frame providing for compliance with the contract performance schedule;
 - (ii) Meeting contract performance requirements; or
 - (iii) At a reasonable price.
- (2) The product is to be used in an application covered by a USDA categorical exemption (see 7 CFR 2902.10 *et seq.*). For example, some USDA-designated items such as mobile equipment hydraulic fluids, diesel fuel additives, and penetrating lubricants are excluded from the preferred procurement requirement for the application of the USDA-designated item to one or both of the following:
 - (i) Spacecraft system and launch support equipment.
 - (ii) Military equipment, *i.e.*, a product or system designed or procured for combat or combat-related missions.

(b) Information about this requirement and these products is available at <http://www.usda.gov/biopreferred>.

(End of clause)

52.223-4 [Amended]

■ 18. Amend section 52.223-4 by removing from the prescription “23.406(a)” and adding “23.406(c)” in its place.

52.223-9 [Amended]

■ 19. Amend section 52.223-9 by removing from the prescription and Alternate I “23.406(b)” and adding “23.406(d)” respectively, in its place. [FR Doc. 07-5478 Filed 11-6-07; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, 12, 15, 18, 19, 27, 33, and 52

[FAC 2005-21; FAR Case 1999-402; Item III; Docket 2007-0001; Sequence 7]

RIN 9000-AJ64

Federal Acquisition Regulation; FAR Case 1999-402, FAR Part 27 Rewrite in Plain Language

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify, streamline, and update text and clauses on Patents, Data, and Copyrights (FAR Part 27).

DATES: *Effective Date:* December 7, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-21, FAR case 1999-402.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule is a “plain language” rewrite of FAR Part 27 and its associated clauses in Part 52. Part 27 implements a number of statutes and executive orders pertaining to patents, data, and copyrights. This effort focused on clarifying, streamlining, and updating the text, with the ultimate goal of making the policies and procedures

more understandable to the reader. For example, the materials have been edited to conform to the FAR Drafting Guide (available at <http://www.arnet.gov/far/draftingguide.htm>). This rewrite was not intended to include substantive changes to Part 27 policies or procedures, except where necessary to comply with current statutory or regulatory requirements, or to resolve internal inconsistencies within FAR Part 27 and its associated clauses.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 68 FR 31790, May 28, 2003 with public comments due by July 28, 2003. The background information published with the proposed rule provided an overview of the rewrite effort, and highlighted examples of both plain language edits and additional substantive changes deemed within the scope of the revision. Accordingly, the remainder of the discussion below focuses on analysis of the public responses to the proposed rule, and the subsequent revisions to the proposed rule in response to those comments. Several of the public comments indicated general support for the plain language rewrite effort, or for specific revisions in the proposed rule, but these comments will not be discussed individually. The remainder of the comments was organized into three categories:

Category 1: Revisions Based on Plain Language Rules.

The first category included comments directed to the application of plain language rules, and thus fell clearly within the scope of the rewrite effort. These suggested edits or changes were evaluated based on the application of plain language rules (e.g., the FAR Drafting Guide), as follows:

The definitions of “computer database” and “technical data” were moved from 27.401 to 2.101 because these terms appear in multiple FAR Parts. The definition of “computer database” was further revised to replace the term “data” with the term “recorded information” to avoid any confusion regarding the specialized use of the term “data” as it is defined at 27.401.

The definition of “computer software” at 2.101 was conformed to the definition of that term as included in 27.401 of the proposed rule (and the definition at 27.401 was removed) to ensure consistent use of the term throughout the FAR.

A definition of “computer software documentation” has been added at FAR 2.101.

The heading for Subpart 27.2 was revised to refer to copyrights as well as patents.

In 27.201–1(a), the phrase “on behalf of the Government” was clarified to specify that this determination depends on whether the Government has provided its “authorization or consent.”

In 27.201–2(c)(2)(i), the undefined term “noncommercial item” was clarified as “items that are not commercial items.”

In 27.302(i), the revisions clarify the guidance for contracting officers’ review and approval of a contractor’s request to transfer that contractor’s license rights.

In 27.304–1(h), redundant language that repeated (with only minor paraphrasing) the text from the associated clause was replaced with a cross-reference to the appropriate clause paragraph.

In 52.227–1(b), 52.227–2(c), and 52.227–10(e), clause flow down language was conformed to FAR drafting conventions.

In 52.227–13(c)(1)(ii) and 52.227–13(h), the language was conformed to the plain language describing the same requirements at 52.227–11(h), and 52.227–11(g), respectively.

In 52.227–11(k) and 52.227–13(i), the guidance regarding flow down of the clauses to subcontractors was relocated to be the final paragraph in each clause, conformed to FAR drafting conventions, and clarified regarding the modification of clauses to identify the parties when flowed down to lower tiers.

In 52.227–14(d)(1), the language was clarified to reference prohibitions by any Federal law or regulation, with export control and national security being examples rather than an all-inclusive listing.

In 52.227–19, the requirement to place a notice on delivered software was highlighted by relocation from the end of paragraph (b)(3) to its own new paragraph (c).

One respondent argued against the use of the defined term “made” instead of the phrase “conceived or first actually reduced to practice” within the definition of “subject invention” at 27.301 and associated clauses. This suggestion is not adopted. The combined revisions to the definitions “made” and “subject invention” are more consistent with the plain language guidelines.

One respondent recommended that the phrase “to the Government” should be added to the end of the FAR 27.102(e) to clarify where the data is to be delivered. This suggestion is adopted.

The final rule also incorporates a number of minor editorial, typographical, or grammatical corrections noted in the public comments.

Category 2: Additional Revisions Within the Scope of This Case.

The second category of comments raised issues or suggested changes that go beyond mere “plain language” conversions, but which the Councils determined were necessary for compliance with clear statutory or regulatory requirements, or otherwise mandated to resolve internal inconsistencies in the FAR Part 27 coverage. These suggestions are discussed below.

A number of comments stated that the proposed definition of “commercial computer software” at FAR 2.101 restricts the scope of software that is to be treated as a commercial item under FAR 12.212, and is therefore inconsistent with the requirements of the Federal Acquisition Streamlining Act (“FASA”), Pub. L. No. 103–355, 108 Stat. 3243 (1994). The comments recommended either the elimination or redrafting of the proposed definition. The final rule resolves this issue by redefining commercial computer software as the intersection of two defined categories of items: “computer software” and “commercial item.”

Two respondents recommended that the term “computer software documentation” be defined in a manner generally consistent with the definition of that term in the Defense Federal Acquisition Regulation Supplement (DFARS) at 252.227–7014(a)(5). The term has been defined at 2.101 using the DFARS definition.

One respondent noted that the time periods associated with the restrictive markings challenge procedures in the clause at 52.227–14(e) are inconsistent with the time periods specified in 41 U.S.C. 253d. The commenter recommended changing the 30-day contractor response period to 60 days, and eliminating the 90-day limit. These corrections are implemented at 52.227–14(e)(1)(i) and (ii), respectively.

The phrase “without unduly encumbering future research and discovery” has been added to 27.302(a)(3) and 27.304–1(c)(2) to reflect changes to 35 U.S.C. 200 made in 2000.

Two respondents stated that the revision of the definition of “computer software” to exclude “computer databases” and the revision of the definition of “technical data” to include “computer databases” were substantive changes and beyond the scope of this rulemaking. They recommended that databases be treated as computer software. These recommendations are not adopted. The definition of “computer database” is consistent with the policy and intent of 27.404–2(c)(3) (formerly 27.404(d)(3)), and 52.227–

14(g)(2) (formerly (g)(1)). Similarly, this approach is consistent with the treatment of computer databases under the Defense Federal Acquisition Regulation Supplement (DFARS) (see DFARS 252.227-7014(a)(2)). The individual elements of recorded information that are stored or formatted for delivery as a database must be distinguished from the computer software that may be required to view or manipulate the content of the database using a computer.

One respondent suggested that the term "commercial computer software" had been substituted for "restricted computer software" in FAR 27.405-3 and 52.227-19, and that these revised sections change acquisition policy by discouraging use of commercial terms and conditions for the acquisition of computer software, which is inconsistent with FAR 12.212. There has been no change in policy from that expressed in FAR 12.212. Under the preexisting Part 27 scheme, the clause at 52.227-19 was prescribed for use with "existing computer software," which was defined at former 27.405(b)(2) as software that was normally vended commercially. Thus, the term "restricted computer software" in that clause was applied only to "existing computer software" which was intended to mean commercial computer software. Furthermore, the revised 27.405-3 expressly states that commercial computer software shall be acquired under licenses customarily provided to the public to the extent the license is consistent with Federal law and otherwise satisfies the Government's needs, and refers to 12.212 for further guidance in acquiring commercial computer software. Similarly, 12.212(b) has been revised to reference 27.405-3 for guidance when negotiating licenses for commercial computer software (e.g., when the standard commercial license is inconsistent with federal law or does not meet the Government's needs). The use of the clause 52.227-19 is discussed further in the Category 3 comments below.

One respondent noted that the reference to the "date of determination defined at 7 U.S.C. 2401(d)" within the definition of "subject invention" at 27.301 and the associated clauses is improper because the cited section of the Plant Variety Protection Act (PVPA) has been deleted, and recommended that the citation be deleted. This suggestion is partially adopted. Although the statutory citation is outdated, the concept of a "date of determination" is still relevant and required under the statutory scheme

(see 35 U.S.C. 201) to define the inventive event that connects the invention of a plant variety to a particular Federal contract. Accordingly, the substance of the previously codified definition of "date of determination" has been incorporated into the definition of the term "made," at 27.301 and the associated clauses, as it applies to plant varieties. Additionally, further changes were made to the clause language to remove ambiguities regarding the contractor's ability to pursue PVPA protection as an alternative to patent protection (e.g., where the nomenclature that is used to reference patent requirements could have been mistakenly interpreted to exclude the equivalent under PVPA).

One commenter argued that the flowdown provisions at 52.227-13(i) are potentially inconsistent with the Bayh-Dole Act (BDA) when that clause is used in a subcontract with a small business or nonprofit organization that is otherwise entitled to the standard BDA terms and conditions. These flowdown provisions are revised to conform to the BDA requirements.

After the publication of the proposed rule, and the expiration of the public comment period, the BDA implementing regulations at 37 CFR Part 401 were revised (69 FR 17299) to provide an alternate version of the patent rights clause for contractors supporting works under cooperative research and development agreements. Thus, a change is necessary to implement this modification in the regulatory implementation of the BDA. The alternate language from 37 CFR 401.14(c) as prescribed by 37 CFR 401.3(c) is incorporated as a new Alternate V to the basic clause at FAR 52.227-11, with appropriate prescriptive language at 27.303(b)(7).

Additional revisions were made to the coverage for Small Business Innovation Research (SBIR), to accommodate changes in the relevant SBIR statute (Pub. L. 106-554) and the Small Business Administration's SBIR Program Policy Directive (67 FR 60071). It was clarified that SBIR data rights also apply to phase three awards, and that the minimum four-year protection period can be extended in appropriate circumstances. See 27.409(h), and 52.227-20(d).

Category 3: Recommendations for Substantive Changes Beyond the Scope of This Case.

The third category included comments suggesting edits that were substantive in nature, but which the Councils determined were not required to implement statutory or regulatory requirements. Accordingly, regardless of

the merits of any individual recommendation, none of these comments were eligible for inclusion in the final rule because they exceeded the scope of the rulemaking effort. However, the Councils recognize that several of these comments raising substantive issues may be appropriate for further rulemaking efforts in the future. The following is an overview of the comments in this category:

Two respondents suggested that 27.404 and its clauses be modified to state more clearly that the Government's unlimited rights license in technical data that is funded exclusively at Government expense is applicable only when delivery of that data is required as an element of performance and is necessary to ensure the competitive acquisition of supplies or services in substantial quantities in the future, citing 41 U.S.C. 418a(b)(1). One responder suggested further that the Part 27 materials should implement the concept of "government purpose rights for mixed funding," citing 41 U.S.C. 418a(b)(2). Neither comment recommends specific language. The Councils note that Part 27 addresses delivery requirements independently of the license rights in those deliverables, and that there is no mention of a "mixed funding" criteria in the cited statute. In any case, the Part 27 implementation of the cited statutory requirements is well established, and any significant change in the overall scheme for specifying delivery requirements or license rights is beyond the scope of this plain language rewrite.

Several respondents suggested that the clause at 52.227-19 be eliminated in favor of using the vendor's standard commercial computer software license, arguing that this is the policy stated at FAR 12.212. Elimination of the clause is unnecessary; the policies and procedures at 12.212 and 27.405-3 are entirely consistent and have been revised to cross-reference one another. As stated at 27.405-3, the clause at 52.227-19 is provided as one optional solution when the standard commercial computer software license is inadequate under the criteria specified at 12.212 (e.g., when the standard commercial license is inconsistent with federal law or otherwise does not satisfy agency needs).

One respondent recommended that the final rule further limit an agency's ability to restrict the publication or release of data first produced in the performance of the contract.

One respondent recommended revising the policies and procedures regarding the delivery of data without restrictive markings at 52.227-14(f).

One respondent recommended using the term “may” rather than “should” at 27.102(c). These terms are not equivalent, and thus the change is more than a plain language edit.

Two respondents recommended eliminating the requirement to obtain the contracting officer’s permission before asserting copyright in data first produced in the performance of the contract.

One respondent suggested further broadening the government’s acceptance of standard commercial terms and conditions.

Two respondents recommended modification of the government’s license rights in restricted computer software to more closely resemble commercial licenses.

One respondent recommended the elimination of portions of the Rights in Data—General clause at FAR 52.227–14.

One respondent recommended harmonizing the patent, data, and copyright sections of the FAR and DFARS.

One respondent recommended adding coverage to specifically address the use or delivery of “open source” software.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most changes in the rule are plain language changes and the other changes have minimal economic impact.

* The changes to the policies, procedures, and contract clauses pertaining to patents that were necessary to reflect current patent law and the current practices at the U.S. Patent and Trademark Office, do not impose any significant economic burden on small businesses.

* The changes to implement the “Small Business Innovation Research Program Policy Directive” of the Small Business Administration allow the small business contractor to extend the period during which it is allowed to treat data and software as proprietary. Small business entities are entirely free to choose whether to utilize this new and enhanced capability. The

procedures for extension of the protection period are set forth in the Small Business Innovation Research Program Policy Directive, not this FAR rule, which just references the policy directive.

There were no public comments from small entities in response to the statement in the **Federal Register** notice for the proposed rule that the Councils did not expect the proposed rule to have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act applies because, as discussed in the preamble to the proposed rule, the clause 52.227–12 is being removed from the FAR and will be incorporated into the Defense Federal Acquisition Regulation Supplement (DFARS). The current paperwork burden associated with Part 27 of the FAR has already been cleared under OMB Control Numbers 9000–0090 and 9000–0095. OMB clearance 9000–0095 covers the burdens associated with FAR patent rights clauses 52.227–11, 52.227–12, and 52.227–13. We estimate that removal of the clause at 52.227–12 will reduce the approved FAR burden by 21,528 hours (from 45,630 hours to 24,102 hours), but there will be a corresponding increase under another case in the estimated burden hours under OMB clearance 0704–0369. There will be no change to OMB clearance 9000–0090, which covers FAR data rights clauses (52.227–14 through 52.227–23), and is currently approved at 2,970 hours. As a result, these changes to the FAR do not impose additional information collection requirements to the previously approved paperwork burden.

List of Subjects in 48 CFR Parts 2, 3, 12, 15, 18, 19, 27, 33, and 52

Government procurement.

Dated: October 31, 2007.

Al Matera,
Director, Contract Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 3, 12, 15, 18, 19, 27, 33, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 3, 12, 15, 18, 19, 27, 33, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

- 2. Amend section 2.101 in paragraph (b)(2) by—
- a. Adding the definitions “Commercial computer software” and “Computer database”;

- b. Revising the definition “Computer software”;
- c. Adding the definitions “Computer software documentation”, “Small business concern”, and “Technical data”, and
- d. Amending the definition “United States”, by redesignating paragraph (6) as paragraph (7), and adding a new paragraph (6).
- The added and revised text reads as follows:

2.101 Definitions.

* * * * *
(b) * * *
(2) * * *

Commercial computer software means any computer software that is a commercial item.

* * * * *

Computer database or database means a collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software—(1) Means (i) Computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(ii) Recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled.

(2) Does not include computer databases or computer software documentation.

Computer software documentation means owner’s manuals, user’s manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

* * * * *

Small business concern means a concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it is bidding on Government contracts, and qualified as a small business under the criteria and size standards in 13 CFR part 121 (see 19.102). Such a concern is “not dominant in its field of operation” when it does not exercise a controlling or major influence on a national basis in a kind of business activity in which a number of business concerns are primarily engaged. In determining

whether dominance exists, consideration must be given to all appropriate factors, including volume of business, number of employees, financial resources, competitive status or position, ownership or control of materials, processes, patents, license agreements, facilities, sales territory, and nature of business activity. (See 15 U.S.C. 632.)

* * * * *

Technical data means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. The term includes recorded information of a scientific or technical nature that is included in computer databases (See 41 U.S.C. 403(8)).

* * * * *

United States * * *

(6) For use in Part 27, see the definition at 27.001.

* * * * *

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3.104-4 [Amended]

■ 3. Amend section 3.104-4 in paragraph (d)(3) by removing “27.404(h)” and adding “27.404-5” in its place.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Amend section 12.212 by adding a sentence to the end of paragraph (b) to read as follows:

12.212 Computer software.

* * * * *

(b) * * * For additional guidance regarding the use and negotiation of license agreements for commercial computer software, see 27.405-3.

PART 15—CONTRACTING BY NEGOTIATION

15.408 [Amended]

■ 5. Amend section 15.408 in Table 15-2, “II. Cost Elements” which follows paragraph (m)(4), by removing from paragraph “E(10)” “FAR 27.204” and adding “FAR 27.202” in its place.

PART 18—EMERGENCY ACQUISITIONS

18.119 [Amended]

■ 6. Amend section 18.119 by removing “See 27.208” and adding “See 27.204-1” in its place.

PART 19—SMALL BUSINESS PROGRAMS

19.001 [Amended]

■ 7. Amend section 19.001 by removing the definition “Small business concern”.

■ 8. Revise Part 27 to read as follows:

PART 27—PATENTS, DATA, AND COPYRIGHTS

Sec.

27.000 Scope of part.

27.001 Definition.

Subpart 27.1—General

27.101 Applicability.

27.102 General guidance.

Subpart 27.2—Patents and Copyrights

27.200 Scope of subpart.

27.201 Patent and copyright infringement liability.

27.201-1 General.

27.201-2 Contract clauses.

27.202 Royalties.

27.202-1 Reporting of royalties.

27.202-2 Notice of Government as a licensee.

27.202-3 Adjustment of royalties.

27.202-4 Refund of royalties.

27.202-5 Solicitation provisions and contract clause.

27.203 Security requirements for patent applications containing classified subject matter.

27.203-1 General.

27.203-2 Contract clause.

27.204 Patented technology under trade agreements.

27.204-1 Use of patented technology under the North American Free Trade Agreement.

27.204-2 Use of patented technology under the General Agreement on Tariffs and Trade (GATT).

Subpart 27.3—Patent Rights under Government Contracts

27.300 Scope of subpart.

27.301 Definitions.

27.302 Policy.

27.303 Contract clauses.

27.304 Procedures.

27.304-1 General.

27.304-2 Contracts placed by or for other Government agencies.

27.304-3 Subcontracts.

27.304-4 Appeals.

27.305 Administration of patent rights clauses.

27.305-1 Goals.

27.305-2 Administration by the Government.

27.305-3 Securing invention rights acquired by the Government.

27.305-4 Protection of invention disclosures.

27.306 Licensing background patent rights to third parties.

Subpart 27.4—Rights in Data and Copyrights

27.400 Scope of subpart.

27.401 Definitions.

27.402 Policy.

27.403 Data rights—General.

27.404 Basic rights in data clause.

27.404-1 Unlimited rights data.

27.404-2 Limited rights data and restricted computer software.

27.404-3 Copyrighted works.

27.404-4 Contractor's release, publication, and use of data.

27.404-5 Unauthorized, omitted, or incorrect markings.

27.404-6 Inspection of data at the contractor's facility.

27.405 Other data rights provisions.

27.405-1 Special works.

27.405-2 Existing works.

27.405-3 Commercial computer software.

27.405-4 Other existing data.

27.406 Acquisition of data.

27.406-1 General.

27.406-2 Additional data requirements.

27.406-3 Major system acquisition.

27.407 Rights to technical data in successful proposals.

27.408 Cosponsored research and development activities.

27.409 Solicitation provisions and contract clauses.

Subpart 27.5—Foreign License and Technical Assistance Agreements

27.501 General.

27.000 Scope of part.

This part prescribes the policies, procedures, solicitation provisions, and contract clauses pertaining to patents, data, and copyrights.

27.001 Definition.

United States, as used in this part, means the 50 States and the District of Columbia, U.S. territories and possessions, Puerto Rico, and the Northern Mariana Islands.

Subpart 27.1—General

27.101 Applicability.

This part applies to all agencies. However, agencies are authorized to adopt alternative policies, procedures, solicitation provisions, and contract clauses to the extent necessary to meet the specific requirements of laws, executive orders, treaties, or international agreements. Any agency adopting alternative policies, procedures, solicitation provisions, and contract clauses should include them in the agency's published regulations.

27.102 General guidance.

(a) The Government encourages the maximum practical commercial use of

inventions made under Government contracts.

(b) Generally, the Government will not refuse to award a contract on the grounds that the prospective contractor may infringe a patent. The Government may authorize and consent to the use of inventions in the performance of certain contracts, even though the inventions may be covered by U.S. patents.

(c) Generally, contractors providing commercial items should indemnify the Government against liability for the infringement of U.S. patents.

(d) The Government recognizes rights in data developed at private expense, and limits its demands for delivery of that data. When such data is delivered, the Government will acquire only those rights essential to its needs.

(e) Generally, the Government requires that contractors obtain permission from copyright owners before including copyrighted works, owned by others, in data to be delivered to the Government.

Subpart 27.2—Patents and Copyrights

27.200 Scope of subpart.

This subpart prescribes policies and procedures with respect to—

(a) Patent and copyright infringement liability;

(b) Royalties;

(c) Security requirements for patent applications containing classified subject matter; and

(d) Patented technology under trade agreements.

27.201 Patent and copyright infringement liability.

27.201–1 General.

(a) Pursuant to 28 U.S.C. 1498, the exclusive remedy for patent or copyright infringement by or on behalf of the Government is a suit for monetary damages against the Government in the Court of Federal Claims. There is no injunctive relief available, and there is no direct cause of action against a contractor that is infringing a patent or copyright with the authorization or consent of the Government (*e.g.*, while performing a contract).

(b) The Government may expressly authorize and consent to a contractor's use or manufacture of inventions covered by U.S. patents by inserting the clause at 52.227–1, Authorization and Consent.

(c) Because of the exclusive remedies granted in 28 U.S.C. 1498, the Government requires notice and assistance from its contractors regarding any claims for patent or copyright infringement by inserting the clause at 52.227–2, Notice and Assistance,

Regarding Patent and Copyright Infringement.

(d) The Government may require a contractor to reimburse it for liability for patent infringement arising out of a contract for commercial items by inserting the clause at FAR 52.227–3, Patent Indemnity.

27.201–2 Contract clauses.

(a)(1) Insert the clause at 52.227–1, Authorization and Consent, in solicitations and contracts except that use of the clause is—

(i) Optional when using simplified acquisition procedures; and

(ii) Prohibited when both complete performance and delivery are outside the United States.

(2) Use the clause with its Alternate I in all R&D solicitations and contracts for which the primary purpose is R&D work, except that this alternate shall not be used in construction and architect-engineer contracts unless the contract calls exclusively for R&D work.

(3) Use the clause with its Alternate II in solicitations and contracts for communication services with a common carrier and the services are unregulated and not priced by a tariff schedule set by a regulatory body.

(b) Insert the clause at 52.227–2, Notice and Assistance Regarding Patent and Copyright Infringement, in all solicitations and contracts that include the clause at 52.227–1, Authorization and Consent.

(c)(1) Insert the clause at 52.227–3, Patent Indemnity, in solicitations and contracts that may result in the delivery of commercial items, unless—

(i) Part 12 procedures are used;

(ii) The simplified acquisition procedures of Part 13 are used;

(iii) Both complete performance and delivery are outside the United States; or

(iv) The contracting officer determines after consultation with legal counsel that omission of the clause would be consistent with commercial practice.

(2) Use the clause with either its Alternate I (identification of excluded items) or II (identification of included items) if—

(i) The contract also requires delivery of items that are not commercial items; or

(ii) The contracting officer determines after consultation with legal counsel that limitation of applicability of the clause would be consistent with commercial practice.

(3) Use the clause with its Alternate III if the solicitation or contract is for communication services and facilities where performance is by a common carrier, and the services are unregulated

and are not priced by a tariff schedule set by a regulatory body.

(d)(1) Insert the clause at 52.227–4, Patent Indemnity—Construction Contracts, in solicitations and contracts for construction or that are fixed-price for dismantling, demolition, or removal of improvements. Do not insert the clause in contracts solely for architect-engineer services.

(2) If the contracting officer determines that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods that are nonstandard, noncommercial, or special, the contracting officer may expressly exclude them from the patent indemnification by using the clause with its Alternate I. Note that this exclusion is for items, as distinguished from identified patents (see paragraph (e) of this subsection).

(e) It may be in the Government's interest to exempt specific U.S. patents from the patent indemnity clause. Exclusion from indemnity of identified patents, as distinguished from items, is the prerogative of the agency head. Upon written approval of the agency head, the contracting officer may insert the clause at 52.227–5, Waiver of Indemnity, in solicitations and contracts in addition to the appropriate patent indemnity clause.

(f) If a patent indemnity clause is not prescribed, the contracting officer may include one in the solicitation and contract if it is in the Government's interest to do so.

(g) The contracting officer shall not include in any solicitation or contract any clause whereby the Government agrees to indemnify a contractor for patent infringement.

27.202 Royalties.

27.202–1 Reporting of royalties.

(a) To determine whether royalties anticipated or actually paid under Government contracts are excessive, improper, or inconsistent with Government patent rights the solicitation provision at 52.227–6 requires prospective contractors to furnish royalty information. The contracting officer shall take appropriate action to reduce or eliminate excessive or improper royalties.

(b) If the response to a solicitation includes a charge for royalties, the contracting officer shall, before award of the contract, forward the information to the office having cognizance of patent matters for the contracting activity. The cognizant office shall promptly advise the contracting officer of appropriate action.

(c) The contracting officer, when considering the approval of a subcontract, shall require royalty information if it is required under the prime contract. The contracting officer shall forward the information to the office having cognizance of patent matters. However, the contracting officer need not delay consent while awaiting advice from the cognizant office.

(d) The contracting officer shall forward any royalty reports to the office having cognizance of patent matters for the contracting activity.

27.202-2 Notice of Government as a licensee.

(a) When the Government is obligated to pay a royalty on a patent because of an existing license agreement and the contracting officer believes that the licensed patent will be applicable to a prospective contract, the Government should furnish the prospective offerors with—

- (1) Notice of the license;
- (2) The number of the patent; and
- (3) The royalty rate cited in the license.

(b) When the Government is obligated to pay such a royalty, the solicitation should also require offerors to furnish information indicating whether or not each offeror is the patent owner or a licensee under the patent. This information is necessary so that the Government may either—

- (1) Evaluate an offeror's price by adding an amount equal to the royalty; or
- (2) Negotiate a price reduction with an offeror when the offeror is licensed under the same patent at a lower royalty rate.

27.202-3 Adjustment of royalties.

(a) If at any time the contracting officer believes that any royalties paid, or to be paid, under a contract or subcontract are inconsistent with Government rights, excessive, or otherwise improper, the contracting officer shall promptly report the facts to the office having cognizance of patent matters for the contracting activity concerned.

(b) In coordination with the cognizant office, the contracting officer shall promptly act to protect the Government against payment of royalties—

- (1) With respect to which the Government has a royalty-free license;
- (2) At a rate in excess of the rate at which the Government is licensed; or
- (3) When the royalties in whole or in part otherwise constitute an improper charge.

(c) In appropriate cases, the contracting officer in coordination with

the cognizant office shall demand a refund pursuant to any refund of royalties clause in the contract (see 27.202-4) or negotiate for a reduction of royalties.

(d) For guidance in evaluating information furnished pursuant to 27.202-1, see 31.205-37. See also 31.109 regarding advance understandings on particular cost items, including royalties.

27.202-4 Refund of royalties.

The clause at 52.227-9, Refund of Royalties, establishes procedures to pay the contractor royalties under the contract and recover royalties not paid by the contractor when the royalties were included in the contractor's fixed price.

27.202-5 Solicitation provisions and contract clause.

(a)(1) Insert a solicitation provision substantially the same as the provision at 52.227-6, Royalty Information, in—

(i) Any solicitation that may result in a negotiated contract for which royalty information is desired and for which cost or pricing data are obtained under 15.403; or

(ii) Sealed bid solicitations only if the need for such information is approved at a level above the contracting officer as being necessary for proper protection of the Government's interests.

(2) If the solicitation is for communication services and facilities by a common carrier, use the provision with its Alternate I.

(b) If the Government is obligated to pay a royalty on a patent involved in the prospective contract, insert in the solicitation a provision substantially the same as the provision at 52.227-7, Patents—Notice of Government Licensee. If the clause at 52.227-6 is not included in the solicitation, the contracting officer may require offerors to provide information sufficient to provide this notice to the other offerors.

(c) Insert the clause at 52.227-9, Refund of Royalties, in negotiated fixed-price solicitations and contracts when royalties may be paid under the contract. If a fixed-price incentive contract is contemplated, change "price" to "target cost and target profit" wherever it appears in the clause. The clause may be used in cost-reimbursement contracts where agency approval of royalties is necessary to protect the Government's interests.

27.203 Security requirements for patent applications containing classified subject matter.

27.203-1 General.

(a) Unauthorized disclosure of classified subject matter, whether in patent applications or resulting from the issuance of a patent, may be a violation of 18 U.S.C. 792, *et seq.* (Chapter 37—Espionage and Censorship), and related statutes, and may be contrary to the interests of national security.

(b) Upon receipt of a patent application under paragraph (a) or (b) of the clause at 52.227-10, Filing of Patent Applications—Classified Subject Matter, the contracting officer shall ascertain the proper security classification of the patent application. If the application contains classified subject matter, the contracting officer shall inform the contractor how to transmit the application to the United States Patent Office in accordance with procedures provided by legal counsel. If the material is classified "Secret" or higher, the contracting officer shall make every effort to notify the contractor within 30 days of the Government's determination, pursuant to paragraph (a) of the clause.

(c) Upon receipt of information furnished by the contractor under paragraph (d) of the clause at 52.227-10, the contracting officer shall promptly submit that information to legal counsel in order that the steps necessary to ensure the security of the application will be taken.

(d) The contracting officer shall act promptly on requests for approval of foreign filing under paragraph (c) of the clause at 52.227-10 in order to avoid the loss of valuable patent rights of the Government or the contractor.

27.203-2 Contract clause.

Insert the clause at 52.227-10, Filing of Patent Applications—Classified Subject Matter, in all classified solicitations and contracts and in all solicitations and contracts where the nature of the work reasonably might result in a patent application containing classified subject matter.

27.204 Patented technology under trade agreements.

27.204-1 Use of patented technology under the North American Free Trade Agreement.

(a) The requirements of this section apply to the use of technology covered by a valid patent when the patent holder is from a country that is a party to the North American Free Trade Agreement (NAFTA).

(b) Article 1709(10) of NAFTA generally requires a user of technology covered by a valid patent to make a reasonable effort to obtain authorization prior to use of the patented technology. However, NAFTA provides that this requirement for authorization may be waived in situations of national emergency or other circumstances of extreme urgency, or for public noncommercial use.

(c) Section 6 of Executive Order 12889, "Implementation of the North American Free Trade Act," of December 27, 1993, waives the requirement to obtain advance authorization for an invention used or manufactured by or for the Federal Government. However, the patent owner shall be notified in advance whenever the agency or its contractor knows or has reasonable grounds to know, without making a patent search, that an invention described in and covered by a valid U.S. patent is or will be used or manufactured without a license. In cases of national emergency or other circumstances of extreme urgency, this notification need not be made in advance, but shall be made as soon as reasonably practicable.

(d) The contracting officer, in consultation with the office having cognizance of patent matters, shall ensure compliance with the notice requirements of NAFTA Article 1709(10) and Executive Order 12889. A contract award should not be suspended pending notification to the patent owner.

(e) Section 6(c) of Executive Order 12889 provides that the notice to the patent owner does not constitute an admission of infringement of a valid privately-owned patent.

(f) When addressing issues regarding compensation for the use of patented technology, Government personnel should be advised that NAFTA uses the term "adequate remuneration." Executive Order 12889 equates "remuneration" to "reasonable and entire compensation" as used in 28 U.S.C. 1498, the statute that gives jurisdiction to the U.S. Court of Federal Claims to hear patent and copyright cases involving infringement by the Government.

(g) When questions arise regarding the notice requirements or other matters relating to this section, the contracting officer should consult with legal counsel.

27.204-2 Use of patented technology under the General Agreement on Tariffs and Trade (GATT).

Article 31 of Annex 1C, Agreement on Trade-Related Aspects of Intellectual

Property Rights, to GATT (Uruguay Round) addresses situations where the law of a member country allows for use of a patent without authorization, including use by the Government.

Subpart 27.3—Patent Rights under Government Contracts

27.300 Scope of subpart.

This subpart prescribes policies, procedures, solicitation provisions, and contract clauses pertaining to inventions made in the performance of work under a Government contract or subcontract for experimental, developmental, or research work. Agency policies, procedures, solicitation provisions, and contract clauses may be specified in agency supplemental regulations as permitted by law, including 37 CFR 401.1.

27.301 Definitions.

As used in this subpart—

Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*)

Made means—

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, means that the contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

Practical application means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the contractor made in the performance of work under a Government contract.

27.302 Policy.

(a) *Introduction.* In accordance with chapter 18 of title 35, U.S.C. (as implemented by 37 CFR part 401), Presidential Memorandum on Government Patent Policy to the Heads of Executive Departments and Agencies dated February 18, 1983, and Executive Order 12591, Facilitating Access to Science and Technology dated April 10, 1987, it is the policy and objective of the Government to—

(1) Use the patent system to promote the use of inventions arising from federally supported research or development;

(2) Encourage maximum participation of industry in federally supported research and development efforts;

(3) Ensure that these inventions are used in a manner to promote free competition and enterprise without unduly encumbering future research and discovery;

(4) Promote the commercialization and public availability of the inventions made in the United States by United States industry and labor;

(5) Ensure that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions; and

(6) Minimize the costs of administering patent policies.

(b) *Contractor right to elect title.* (1) Generally, pursuant to 35 U.S.C. 202 and the Presidential Memorandum and Executive order cited in paragraph (a) of this section, each contractor may, after required disclosure to the Government, elect to retain title to any subject invention.

(2) A contract may require the contractor to assign to the Government title to any subject invention—

(i) When the contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government (see 27.303(e)(1)(i));

(ii) In exceptional circumstances, when an agency determines that restriction or elimination of the right to retain title in any subject invention will better promote the policy and objectives of chapter 18 of title 35, U.S.C. and the Presidential Memorandum;

(iii) When a Government authority, that is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities, determines that the restriction or elimination of the right to retain title to any subject invention is necessary to protect the security of such activities;

(iv) When the contract includes the operation of a Government-owned,

contractor-operated facility of the Department of Energy (DOE) primarily dedicated to the Department's naval nuclear propulsion or weapons related programs and all funding agreement limitations under 35 U.S.C. 202(a)(iv) for agreements with small business concerns and nonprofit organizations are limited to inventions occurring under the above two programs; or

(v) Pursuant to statute or in accordance with agency regulations.

(3) When the Government has the right to acquire title to a subject invention, the contractor may, nevertheless, request greater rights to a subject invention (see 27.304-1(c)).

(4) Consistent with 37 CFR part 401, when a contract with a small business concern or nonprofit organization requires assignment of title to the Government based on the exceptional circumstances enumerated in paragraph (b)(2)(ii) or (iii) of this section for reasons of national security, the contract shall still provide the contractor with the right to elect ownership to any subject invention that—

(i) Is not classified by the agency; or

(ii) Is not limited from dissemination by the DOE within 6 months from the date it is reported to the agency.

(5) Contracts in support of DOE's naval nuclear propulsion program are exempted from this paragraph (b).

(6) When a contract involves a series of separate task orders, an agency may structure the contract to apply the exceptions at paragraph (b)(2)(ii) or (iii) of this section to individual task orders.

(c) *Government license.* The Government shall have at least a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on behalf of the United States, any subject invention throughout the world. The Government may require additional rights in order to comply with treaties or other international agreements. In such case, these rights shall be made a part of the contract (see 27.303).

(d) *Government right to receive title.*

(1) In addition to the right to obtain title to subject inventions pursuant to paragraph (b)(2)(i) through (v) of this section, the Government has the right to receive title to an invention—

(i) If the contractor has not disclosed the invention within the time specified in the clause; or

(ii) In any country where the contractor—

(A) Does not elect to retain rights or fails to elect to retain rights to the invention within the time specified in the clause;

(B) Has not filed a patent or plant variety protection application within the time specified in the clause;

(C) Decides not to continue prosecution of a patent or plant variety protection application, pay maintenance fees, or defend in a reexamination or opposition proceeding on the patent; or

(D) No longer desires to retain title.

(2) For the purposes of this paragraph, filing in a European Patent Office Region or under the Patent Cooperation Treaty constitutes election in the countries selected in the application(s).

(e) *Utilization reports.* The Government has the right to require periodic reporting on how any subject invention is being used by the contractor or its licensees or assignees. In accordance with 35 U.S.C. 202(c)(5) and 37 CFR part 401, agencies shall not disclose such utilization reports to persons outside the Government without permission of the contractor. Contractors should mark as confidential/proprietary any utilization report to help prevent inadvertent release outside the Government.

(f) *March-in rights.* (1) Pursuant to 35 U.S.C. 203, agencies have certain march-in rights that require the contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to responsible applicants, upon terms that are reasonable under the circumstances. If the contractor, assignee or exclusive licensee of a subject invention refuses to grant such a license, the agency can grant the license itself. March-in rights may be exercised only if the agency determines that this action is necessary—

(i) Because the contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in the field(s) of use;

(ii) To alleviate health or safety needs that are not reasonably satisfied by the contractor, assignee, or their licensees;

(iii) To meet requirements for public use specified by Federal regulations and these requirements are not reasonably satisfied by the contractor, assignee, or licensees; or

(iv) Because the agreement required by paragraph (g) of this section has neither been obtained nor waived, or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of its agreement obtained pursuant to paragraph (g) of this section.

(2) The agency shall not exercise its march-in rights unless the contractor has been provided a reasonable time to present facts and show cause why the

proposed agency action should not be taken. The agency shall provide the contractor an opportunity to dispute or appeal the proposed action, in accordance with 27.304-1(g).

(g) *Preference for United States industry.* In accordance with 35 U.S.C. 204, no contractor that receives title to any subject invention and no assignee of the contractor shall grant to any person the exclusive right to use or sell any subject invention in the United States unless that person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for this agreement may be waived by the agency upon a showing by the contractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(h) *Special conditions for nonprofit organizations' preference for small business concerns.* (1) Nonprofit organization contractors are expected to use reasonable efforts to attract small business licensees (see paragraph (i)(4) of the clause at 52.227-11, Patent Rights—Ownership by the Contractor). What constitutes reasonable efforts to attract small business licensees will vary with the circumstances and the nature, duration, and expense of efforts needed to bring the invention to the market.

(2) Small business concerns that believe a nonprofit organization is not meeting its obligations under the clause may report the matter to the Secretary of Commerce. To the extent deemed appropriate, the Secretary of Commerce will undertake informal investigation of the matter, and may discuss or negotiate with the nonprofit organization ways to improve its efforts to meet its obligations under the clause. However, in no event will the Secretary of Commerce intervene in ongoing negotiations or contractor decisions concerning the licensing of a specific subject invention. These investigations, discussions, and negotiations involving the Secretary of Commerce will be in coordination with other interested agencies, including the Small Business Administration. In the case of a contract for the operation of a Government-owned, contractor-operated research or production facility, the Secretary of Commerce will coordinate with the agency responsible for the facility prior

to any discussions or negotiations with the contractor.

(i) *Minimum rights to contractor.* (1) When the Government acquires title to a subject invention, the contractor is normally granted a revocable, nonexclusive, paid-up license to that subject invention throughout the world. The contractor's license extends to any of its domestic subsidiaries and affiliates within the corporate structure of which the contractor is a part and includes the right to grant sublicenses to the extent the contractor was legally obligated to do so at the time of contract award. The contracting officer shall approve or disapprove, in writing, any contractor request to transfer its licenses. No approval is necessary when the transfer is to the successor of that part of the contractor's business to which the subject invention pertains.

(2) In response to a third party's proper application for an exclusive license, the contractor's domestic license may be revoked or modified to the extent necessary to achieve expeditious practical application of the subject invention. The application shall be submitted in accordance with the applicable provisions in 37 CFR part 404 and agency licensing regulations. The contractor's license will not be revoked in that field of use or the geographical areas in which the contractor has achieved practical application and continues to make the benefits of the subject invention reasonably accessible to the public. The license in any foreign country may be revoked or modified to the extent the contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that country. (See the procedures at 27.304–1(f).)

(j) *Confidentiality of inventions.* Publishing information concerning an invention before a patent application is filed on a subject invention may create a bar to a valid patent. To avoid this bar, agencies may withhold information from the public that discloses any invention in which the Government owns or may own a right, title, or interest (including a nonexclusive license) (see 35 U.S.C. 205 and 37 CFR part 401). Agencies may only withhold information concerning inventions for a reasonable time in order for a patent application to be filed. Once filed in any patent office, agencies are not required to release copies of any document that is a part of a patent application for those subject inventions. (See also 27.305–4.)

27.303 Contract clauses.

(a)(1) Insert a patent rights clause in all solicitations and contracts for

experimental, developmental, or research work as prescribed in this section.

(2) This section also applies to solicitations or contracts for construction work or architect-engineer services that include—

(i) Experimental, developmental, or research work;

(ii) Test and evaluation studies; or

(iii) The design of a Government facility that may involve novel structures, machines, products, materials, processes, or equipment (including construction equipment).

(3) The contracting officer shall not include a patent rights clause in solicitations or contracts for construction work or architect-engineer services that call for or can be expected to involve only “standard types of construction.” “Standard types of construction” are those involving previously developed equipment, methods, and processes and in which the distinctive features include only—

(i) Variations in size, shape, or capacity of conventional structures; or

(ii) Purely artistic or aesthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, whether or not they qualify for design patent protection.

(b)(1) Unless an alternative patent rights clause is used in accordance with paragraph (c), (d), or (e) of this section, insert the clause at 52.227–11, Patent Rights—Ownership by the Contractor.

(2) To the extent the information is not required elsewhere in the contract, and unless otherwise specified by agency supplemental regulations, the contracting officer may modify 52.227–11(e) or otherwise supplement the clause to require the contractor to do one or more of the following:

(i) Provide periodic (but not more frequently than annually) listings of all subject inventions required to be disclosed during the period covered by the report.

(ii) Provide a report prior to the closeout of the contract listing all subject inventions or stating that there were none.

(iii) Provide the filing date, serial number, title, patent number and issue date for any patent application filed on any subject invention in any country or, upon request, copies of any patent application so identified.

(iv) Furnish the Government an irrevocable power to inspect and make copies of the patent application file when a Government employee is a co-inventor.

(3) Use the clause with its Alternate I if the Government must grant a foreign government a sublicense in subject inventions pursuant to a specified treaty or executive agreement. The contracting officer may modify Alternate I, if the agency head determines, at contract award, that it would be in the national interest to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement. When necessary to effectuate a treaty or agreement, Alternate I may be appropriately modified.

(4) Use the clause with its Alternate II in contracts that may be affected by existing or future treaties or agreements.

(5) Use the clause with its Alternate III in contracts with nonprofit organizations for the operation of a Government-owned facility.

(6) If the contract is for the operation of a Government-owned facility, the contracting officer may use the clause with its Alternate IV.

(7) If the contract is for the performance of services at a Government owned and operated laboratory or at a Government owned and contractor operated laboratory directed by the Government to fulfill the Government's obligations under a Cooperative Research and Development Agreement (CRADA) authorized by 15 U.S.C. 3710a, the contracting officer may use the clause with its Alternate V. Since this provision is considered an exercise of an agency's “exceptional circumstances” authority, the contracting officer must comply with 37 CFR 401.3(e) and 401.4.

(c) Insert a patent rights clause in accordance with the procedures at 27.304–2 if the solicitation or contract is being placed on behalf of another Government agency.

(d) Insert a patent rights clause in accordance with agency procedures if the solicitation or contract is for DoD, DOE, or NASA, and the contractor is other than a small business concern or nonprofit organization.

(e)(1) Except as provided in paragraph (e)(2) of this section, and after compliance with the applicable procedures in 27.304–1(b), the contracting officer may insert the clause at 52.227–13, Patent Rights—Ownership by the Government, or a clause prescribed by agency supplemental regulations, if—

(i) The contractor is not located in the United States or does not have a place of business located in the United States or is subject to the control of a foreign government;

(ii) There are exceptional circumstances and the agency head

determines that restriction or elimination of the right to retain title to any subject invention will better promote the policy and objectives of chapter 18 of title 35 of the United States Code;

(iii) A Government authority that is authorized by statute or executive order to conduct foreign intelligence or counterintelligence activities, determines that restriction or elimination of the right to retain any subject invention is necessary to protect the security of such activities; or

(iv) The contract includes the operation of a Government-owned, contractor-operated facility of DOE primarily dedicated to that Department's naval nuclear propulsion or weapons related programs.

(2) An agency exercises the exceptions at paragraph (e)(1)(ii) or (iii) of this section in a contract with a small business concern or a nonprofit organization, the contracting officer shall use the clause at 52.227-11 with only those modifications necessary to address the exceptional circumstances and shall include in the modified clause greater rights determinations procedures equivalent to those at 52.227-13(b)(2).

(3) When using the clause at 52.227-13, Patent Rights—Ownership by the Government, the contracting officer may supplement the clause to require the contractor to—

(i) Furnish a copy of each subcontract containing a patent rights clause (but if a copy of a subcontract is furnished under another clause, a duplicate shall not be requested under the patent rights clause);

(ii) Submit interim and final invention reports listing subject inventions and notifying the contracting officer of all subcontracts awarded for experimental, developmental, or research work;

(iii) Provide the filing date, serial number, title, patent number, and issue date for any patent application filed on any subject invention in any country or, upon specific request, copies of any patent application so identified; and

(iv) Submit periodic reports on the utilization of a subject invention.

(4) Use the clause at 52.227-13 with its Alternate I if—

(i) The Government must grant a foreign government a sublicense in subject inventions pursuant to a treaty or executive agreement; or

(ii) The agency head determines, at contract award, that it would be in the national interest to sublicense foreign governments or international organizations pursuant to any existing or future treaty or agreement. If other rights are necessary to effectuate any

treaty or agreement, Alternate I may be appropriately modified.

(5) Use the clause at 52.227-13 with its Alternate II in the contract when necessary to effectuate an existing or future treaty or agreement.

27.304 Procedures.

27.304-1 General.

(a) *Status as small business concern or nonprofit organization.* If an agency has reason to question the size or nonprofit status of the prospective contractor, the agency may require the prospective contractor to furnish evidence of its nonprofit status or may file a size protest in accordance with FAR 19.302.

(b) *Exceptions.* (1) Before using any of the exceptions under 27.303(e)(1) in a contract with a small business concern or a nonprofit organization and before using the exception of 27.303(e)(1)(ii) for any contractor, the agency shall follow the applicable procedures at 37 CFR 401.

(2) A small business concern or nonprofit organization is entitled to an administrative review of the use of the exceptions at 27.303(e)(1)(i) through (e)(1)(iv) in accordance with agency procedures and 37 CFR part 401.

(c) *Greater rights determinations.* Whenever the contract contains the clause at 52.227-13, Patent Rights—Ownership by the Government, or a patent rights clause modified pursuant to 27.303(e)(2), the contractor (or an employee-inventor of the contractor after consultation with the contractor) may request greater rights to an identified invention within the period specified in the clause. The contracting officer may grant requests for greater rights if the contracting officer determines that the interests of the United States and the general public will be better served. In making these determinations, the contracting officer shall consider at least the following objectives (see 37 CFR 401.3(b) and 401.15):

(1) Promoting the utilization of inventions arising from federally supported research and development.

(2) Ensuring that inventions are used in a manner to promote full and open competition and free enterprise without unduly encumbering future research and discovery.

(3) Promoting public availability of inventions made in the United States by United States industry and labor.

(4) Ensuring that the Government obtains sufficient rights in federally supported inventions to meet the needs of the Government and protect the public against nonuse or unreasonable use of inventions.

(d) *Retention of rights by inventor.* If the contractor elects not to retain title to a subject invention, the agency may consider and, after consultation with the contractor, grant requests for retention of rights by the inventor. Retention of rights by the inventor will be subject to the conditions in paragraphs (d) (except paragraph (d)(1)(i)), (e)(4), (f), (g), and (h) of the clause at 52.227-11, Patent Rights—Ownership by the Contractor.

(e) *Government assignment to contractor of rights in Government employees' inventions.* When a Government employee is a co-inventor of an invention made under a contract with a small business concern or nonprofit organization, the agency employing the co-inventor may license or assign whatever rights it may acquire in the subject invention from its employee to the contractor, subject at least to the conditions of 35 U.S.C. 202-204.

(f) *Revocation or modification of contractor's minimum rights.* Before revoking or modifying the contractor's license in accordance with 27.302(i)(2), the contracting officer shall furnish the contractor a written notice of intention to revoke or modify the license. The agency shall allow the contractor at least 30 days (or another time as may be authorized for good cause by the contracting officer) after the notice to show cause why the license should not be revoked or modified. The contractor has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and agency licensing regulations, any decisions concerning the revocation or modification.

(g) *Exercise of march-in rights.* When exercising march-in rights, agencies shall follow the procedures set forth in 37 CFR 401.6.

(h) *Licenses and assignments under contracts with nonprofit organizations.* If the contractor is a nonprofit organization, paragraph (i) of the clause at 52.227-11 provides that certain contractor actions require agency approval.

27.304-2 Contracts placed by or for other Government agencies.

The following procedures apply unless an interagency agreement provides otherwise:

(a) When a Government agency requests another Government agency to award a contract on its behalf, the request should explain any special circumstances surrounding the contract and specify the patent rights clause to be used. The clause should be selected and modified, if necessary, in accordance with the policies and procedures of this subpart. If, however,

the request states that a clause of the requesting agency is required (*e.g.*, because of statutory requirements, a deviation, or exceptional circumstances), the awarding agency shall use that clause rather than those of this subpart.

(1) If the request states that an agency clause is required and the work to be performed under the contract is not severable and is funded wholly or in part by the requesting agency, then include the requesting agency clause and no other patent rights clause in the contract.

(2) If the request states that an agency clause is required, and the work to be performed under the contract is severable, then the contracting officer shall assure that the requesting agency clause applies only to that severable portion of the work and that the work for the awarding agency is subject to the appropriate patent rights clause.

(3) If the request states that a requesting agency clause is not required in any resulting contract, the awarding agency shall use the appropriate patent rights clause, if any.

(b) Any action requiring an agency determination, report, or deviation involved in the use of the requesting agency's clause is the responsibility of the requesting agency unless the agencies agree otherwise. However, the awarding agency may not alter the requesting agency's clause without prior approval of the requesting agency.

(c) The requesting agency may require, and provide instructions regarding, the forwarding or handling of any invention disclosures or other reporting requirements of the specified clauses. Normally, the requesting agency is responsible for the administration of any subject inventions. This responsibility shall be established in advance of awarding any contracts.

27.304-3 Subcontracts.

(a) The policies and procedures in this subpart apply to all subcontracts at any tier.

(b) Whenever a prime contractor or a subcontractor considers including a particular clause in a subcontract to be inappropriate or a subcontractor refuses to accept the clause, the contracting officer, in consultation with counsel, shall resolve the matter.

(c) It is Government policy that contractors shall not use their ability to award subcontracts as economic leverage to acquire rights for themselves in inventions resulting from subcontracts.

27.304-4 Appeals.

(a) The designated agency official shall provide the contractor with a written statement of the basis, including any relevant facts, for taking any of the following actions:

(1) A refusal to grant an extension to the invention disclosure period under paragraph (c)(4) of the clause at 52.227-11;

(2) A demand for a conveyance of title to the Government under 27.302(d)(1)(i) and (ii);

(3) A refusal to grant a waiver under 27.302(g), Preference for United States industry; or

(4) A refusal to approve an assignment under 27.304-1(h).

(b) Each agency may establish and publish procedures under which any of these actions may be appealed. These appeal procedures should include administrative due process procedures and standards for fact-finding. The resolution of any appeal shall consider both the factual and legal basis for the action and its consistency with the policy and objectives of 35 U.S.C. 200-206 and 210.

(c) To the extent that any of the actions described in paragraph (a) of this section are subject to appeal under the Contract Disputes Act, the procedures under that Act will satisfy the requirements of paragraph (b).

27.305 Administration of patent rights clauses.

27.305-1 Goals.

(a) Contracts having a patent rights clause should be so administered that—

(1) Inventions are identified, disclosed, and reported as required by the contract, and elections are made;

(2) The rights of the Government in subject inventions are established;

(3) When patent protection is appropriate, patent applications are timely filed and prosecuted by contractors or by the Government;

(4) The rights of the Government in filed patent applications are documented by formal instruments such as licenses or assignments; and

(5) Expeditious commercial utilization of subject inventions is achieved.

(b) If a subject invention is made under a contract funded by more than one agency, at the request of the contractor or on their own initiative, the agencies shall designate one agency as responsible for administration of the rights of the Government in the invention.

27.305-2 Administration by the Government.

(a) Agencies should establish and maintain appropriate follow-up procedures to protect the Government's interest and to check that subject inventions are identified and disclosed, and when appropriate, patent applications are filed, and that the Government's rights therein are established and protected. Follow-up activities for contracts that include a clause referenced in 27.304-2 should be coordinated with the appropriate agency.

(b)(1) The contracting officer administering the contract (or other representative specifically designated in the contract for this purpose) is responsible for receiving invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information submitted by the contractor pursuant to a patent rights clause.

(i) For other than confirmatory instruments, if the contractor fails to furnish documents or information as called for by the clause within the time required, the contracting officer shall promptly request the contractor to supply the required documents or information. If the failure persists, the contracting officer shall take appropriate action to secure compliance.

(ii) If the contractor does not furnish confirmatory instruments within 6 months after filing each patent application, or within 6 months after submitting the invention disclosure if the application has been previously filed, the contracting officer shall request the contractor to supply the required documents.

(2) The contracting officer shall promptly furnish all invention disclosures, reports, confirmatory instruments, notices, requests, and other documents and information relating to patent rights clauses to legal counsel.

(c) Contracting activities should establish appropriate procedures to detect and correct failures by the contractor to comply with its obligations under the patent rights clauses, such as failures to disclose and report subject inventions, both during and after contract performance. Government effort to review and correct contractor compliance with its patent rights obligations should be directed primarily toward contracts that are more likely to result in subject inventions significant in number or quality. These contracts include contracts of a research, developmental, or experimental nature; contracts of a large dollar amount; and any other contracts when there is reason to believe the contractor may not be

complying with its contractual obligations. Other contracts may be reviewed using a spot-check method, as feasible. Appropriate follow-up procedures and activities may include the investigation or review of selected contracts or contractors by those qualified in patent and technical matters to detect failures to comply with contract obligations.

(d) Follow-up activities should include, where appropriate, use of Government patent personnel—

(1) To interview agency technical personnel to identify novel developments made in contracts;

(2) To review technical reports submitted by contractors with cognizant agency technical personnel;

(3) To check the Official Gazette of the United States Patent and Trademark Office and other sources for patents issued to the contractor in fields related to its Government contracts; and

(4) To have cognizant Government personnel interview contractor personnel regarding work under the contract involved, observe the work on site, and inspect laboratory notebooks and other records of the contractor related to work under the contract.

(e) If a contractor or subcontractor does not have a clear understanding of its obligations under the clause, or its procedures for complying with the clause are deficient, the contracting officer should explain to the contractor its obligations. The withholding of payments provision (if any) of the patent rights clause may be invoked if the contractor fails to meet the obligations required by the patent rights clause. Significant or repeated failures by a contractor to comply with the patent rights obligation in its contracts shall be documented and made a part of the general file (see 4.801(c)(3)).

27.305-3 Securing invention rights acquired by the Government.

(a) Agencies are responsible for implementing procedures necessary to protect the Government's interest in subject inventions. When the Government acquires the entire right, title, and interest in an invention by contract, the chain of title from the inventor to the Government shall be clearly established. This is normally accomplished by an assignment either from each inventor to the contractor and from the contractor to the Government, or from the inventor to the Government with the consent of the contractor. When the Government's rights are limited to a license, there should be a confirmatory instrument to that effect.

(b) Agencies may, by supplemental instructions, develop suitable assignments, licenses, and other papers evidencing any rights of the Government in patents or patents applications. These instruments should be recorded in the U.S. Patent and Trademark Office (see Executive Order 9424, Establishing in the United States Patent Office a Register of Government Interests in Patents and Applications for Patents, (February 18, 1944).

27.305-4 Protection of invention disclosures.

(a) The Government will, to the extent authorized by 35 U.S.C. 205, withhold from disclosure to the public any invention disclosures reported under the patent rights clauses of 52.227-11 or 52.227-13 for a reasonable time in order for patent applications to be filed. The Government will follow the policy in 27.302(j) regarding protection of confidentiality.

(b) The Government should also use reasonable efforts to withhold from disclosure to the public for a reasonable time other information disclosing a subject invention. This information includes any data delivered pursuant to contract requirements provided that the contractor notifies the agency as to the identity of the data and the subject invention to which it relates at the time of delivery of the data. This notification shall be provided to both the contracting officer and to any patent representative to which the invention is reported, if other than the contracting officer.

(c) For more information on protection of invention disclosures, also see 37 CFR 401.13.

27.306 Licensing background patent rights to third parties.

(a) A contract with a small business concern or nonprofit organization shall not contain a provision allowing the Government to require the licensing to third parties of inventions owned by the contractor that are not subject inventions unless the agency head has approved and signed a written justification in accordance with paragraph (b) of this section. The agency head may not delegate this authority and may exercise the authority only if it is determined that the—

(1) Use of the invention by others is necessary for the practice of a subject invention or for the use of a work object of the contract; and

(2) Action is necessary to achieve the practical application of the subject invention or work object.

(b) Any determination will be on the record after an opportunity for a hearing, and the agency shall notify the

contractor of the determination by certified or registered mail. The notification shall include a statement that the contractor must bring any action for judicial review of the determination within 60 days after the notification.

Subpart 27.4—Rights in Data and Copyrights

27.400 Scope of subpart.

This subpart sets forth policies and procedures regarding rights in data and copyrights, and acquisition of data. The policy statement in 27.402 applies to all executive agencies. The remainder of the subpart applies to all executive agencies except the Department of Defense.

27.401 Definitions.

As used in this subpart—

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

Form, fit, and function data means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it means data identifying source, functional characteristics, and performance requirements, but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.

Limited rights means the rights of the Government in limited rights data as set forth in a Limited Rights Notice.

Limited rights data means data, other than computer software, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications. (Agencies may, however, adopt the following alternate definition: Limited rights data means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged (see 27.404-2(b)).

Restricted computer software means computer software developed at private expense and that is a trade secret, is commercial or financial and

confidential or privileged, or is copyrighted computer software, including minor modifications of the computer software.

Restricted rights means the rights of the Government in restricted computer software as set forth in a Restricted Rights Notice.

Unlimited rights means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

27.402 Policy.

(a) To carry out their missions and programs, agencies acquire or obtain access to many kinds of data produced during or used in the performance of their contracts. Agencies require data to—

(1) Obtain competition among suppliers;

(2) Fulfill certain responsibilities for disseminating and publishing the results of their activities;

(3) Ensure appropriate utilization of the results of research, development, and demonstration activities including the dissemination of technical information to foster subsequent technological developments;

(4) Meet other programmatic and statutory requirements; and

(5) Meet specialized acquisition needs and ensure logistics support.

(b) Contractors may have proprietary interests in data. In order to prevent the compromise of these interests, agencies shall protect proprietary data from unauthorized use and disclosure. The protection of such data is also necessary to encourage qualified contractors to participate in and apply innovative concepts to Government programs. In light of these considerations, agencies shall balance the Government's needs and the contractor's legitimate proprietary interests.

27.403 Data rights—General.

All contracts that require data to be produced, furnished, acquired, or used in meeting contract performance requirements, must contain terms that delineate the respective rights and obligations of the Government and the contractor regarding the use, reproduction, and disclosure of that data. Data rights clauses do not specify the type, quantity or quality of data that is to be delivered, but only the respective rights of the Government and the contractor regarding the use, disclosure, or reproduction of the data. Accordingly, the contract shall specify the data to be delivered.

27.404 Basic rights in data clause.

This section describes the operation of the clause at 52.227–14, Rights in Data—General, and also the use of the provision at 52.227–15, Representation of Limited Rights Data and Restricted Computer Software.

27.404–1 Unlimited rights data.

The Government acquires unlimited rights in the following data except for copyrighted works as provided in 27.404–3:

(a) Data first produced in the performance of a contract (except to the extent the data constitute minor modifications to data that are limited rights data or restricted computer software).

(b) Form, fit, and function data delivered under contract.

(c) Data (except as may be included with restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under a contract.

(d) All other data delivered under the contract other than limited rights data or restricted computer software (see 27.404–2).

27.404–2 Limited rights data and restricted computer software.

(a) *General.* The basic clause at 52.227–14, Rights in Data—General, enables the contractor to protect qualifying limited rights data and restricted computer software by withholding the data from the Government and instead delivering form, fit, and function data.

(b) *Alternate definition of limited rights data.* For contracts that do not require the development, use, or delivery of items, components, or processes that are intended to be acquired by or for the Government, an agency may adopt the alternate definition of limited rights data set forth in Alternate I to the clause at 52.227–14. The alternate definition does not require that the data pertain to items, components, or processes developed at private expense; but rather that the data were developed at private expense and embody a trade secret or are commercial or financial and confidential or privileged.

(c) *Protection of limited rights data specified for delivery.* (1) The clause at 52.227–14 with its Alternate II enables the Government to require delivery of limited rights data rather than allow the contractor to withhold the data. To obtain delivery, the contract may identify and specify data to be

delivered, or the contracting officer may require, by written request during contract performance, the delivery of data that has been withheld or identified to be withheld under paragraph (g)(1) of the clause. In addition, the contract may specifically identify data that are not to be delivered under Alternate II or which, if delivered, will be delivered with limited rights. The limited rights obtained by the Government are set forth in the Limited Rights Notice contained in paragraph (g)(3) of Alternate II. Agencies shall not, without permission of the contractor, use limited rights data for purposes of manufacture or disclose the data outside the Government except as set forth in the Notice. Any disclosure by the Government shall be subject to prohibition against further use and disclosure by the recipient. The following are examples of specific purposes that may be adopted by an agency in its supplement and added to the Limited Rights Notice of paragraph (g)(3) of Alternate II of the clause:

(i) Use (except for manufacture) by support service contractors.

(ii) Evaluation by nongovernment evaluators.

(iii) Use (except for manufacture) by other contractors participating in the Government's program of which the specific contract is a part.

(iv) Emergency repair or overhaul work.

(v) Release to a foreign government, or its instrumentalities, if required to serve the interests of the U.S. Government, for information or evaluation, or for emergency repair or overhaul work by the foreign government.

(2) The provision at 52.227–15, Representation of Limited Rights Data and Restricted Computer Software, helps the contracting officer to determine whether the clause at 52.227–14 should be used with its Alternate II. This provision requests that an offeror state whether limited rights data are likely to be delivered. Where limited rights data are expected to be delivered, use Alternate II. Where negotiations are based on an unsolicited proposal, the need for Alternate II of the clause at 52.227–14 should be addressed during negotiations or discussions, and if Alternate II was not included initially it may be added by modification, if needed, during contract performance.

(3) If data that would otherwise qualify as limited rights data is delivered as a computer database, the data shall be treated as limited rights data, rather than restricted computer software, for the purposes of paragraph (g) of the clause at 52.227–14.

(d) *Protection of restricted computer software specified for delivery.* (1) Alternate III of the clause at 52.227–14, enables the Government to require delivery of restricted computer software rather than allow the contractor to withhold such restricted computer software. To obtain delivery of restricted computer software the contracting officer shall—

(i) Identify and specify the deliverable computer software in the contract; or

(ii) Require by written request during contract performance, the delivery of computer software that has been withheld or identified to be withheld under paragraph (g)(1) of the clause.

(2) In considering whether to use Alternate III, contracting officers should note that, unlike other data, computer software is also an end item in itself. Thus, the contracting officer shall use Alternate III if delivery of restricted computer software is required to meet agency needs.

(3) Unless otherwise agreed (see paragraph (d)(4) of this subsection), the restricted rights obtained by the Government are set forth in the Restricted Rights Notice contained in paragraph (g)(4) (Alternate III). Such restricted computer software will not be used or reproduced by the Government, or disclosed outside the Government, except that the computer software may be—

(i) Used or copied for use with the computers for which it was acquired, including use at any Government installation to which the computers may be transferred;

(ii) Used or copied for use with a backup computer if any computer for which it was acquired is inoperative;

(iii) Reproduced for safekeeping (archives) or backup purposes;

(iv) Modified, adapted, or combined with other computer software, *provided* that the modified, adapted, or combined portions of the derivative software incorporating any of the delivered, restricted computer software shall be subject to the same restricted rights;

(v) Disclosed to and reproduced for use by support service contractors or their subcontractors, in accordance with paragraphs (3)(i) through (iv) of this section; and

(vi) Used or copied for use with a replacement computer.

(4) The restricted rights set forth in paragraph (d)(3) of this subsection are the minimum rights the Government normally obtains with restricted computer software and will automatically apply when such software is acquired under the Restricted Rights Notice of paragraph (g)(4) of Alternate III of the clause at 52.227–14. However,

the contracting officer may specify different rights in the contract, consistent with the purposes and needs for which the software is to be acquired.

For example, the contracting officer should consider any networking needs or any requirements for use of the computer software from remote terminals. Also, in addressing such needs, the scope of the restricted rights may be different for the documentation accompanying the computer software than for the programs and databases.

Any additions to, or limitations on, the restricted rights set forth in the Restricted Rights Notice of paragraph (g)(4) of Alternate III of the clause at 52.227–14 shall be expressly stated in the contract or in a collateral agreement incorporated in and made part of the contract, and the notice modified accordingly.

(5) The provision at 52.227–15, Representation of Limited Rights Data and Restricted Computer Software, helps the contracting officer determine whether to use the clause at 52.227–14 with its Alternate III. This provision requests that an offeror state whether restricted computer software is likely to be delivered under the contract. In addition, the need for Alternate III should be addressed during negotiations or discussions with an offeror, particularly where negotiations are based on an unsolicited proposal. However, if Alternate III is not used initially, it may be added by modification, if needed, during contract performance.

27.404–3 Copyrighted works.

(a) *Data first produced in the performance of a contract.* (1) Generally, the contractor must obtain permission of the contracting officer prior to asserting rights in any copyrighted work containing data first produced in the performance of a contract. However, contractors are normally authorized, without prior approval of the contracting officer, to assert copyright in technical or scientific articles based on or containing such data that is published in academic, technical or professional journals, symposia proceedings and similar works.

(2) The contractor must make a written request for permission to assert its copyright in works containing data first produced under the contract. In its request, the contractor should identify the data involved or furnish copies of the data for which permission is requested, as well as a statement as to the intended publication or dissemination media or other purpose for which the permission is requested. Generally, a contracting officer should

grant the contractor's request when copyright protection will enhance the appropriate dissemination or use of the data unless the—

(i) Data consist of a report that represents the official views of the agency or that the agency is required by statute to prepare;

(ii) Data are intended primarily for internal use by the Government;

(iii) Data are of the type that the agency itself distributes to the public under an agency program;

(iv) Government determines that limitation on distribution of the data is in the national interest; or

(v) Government determines that the data should be disseminated without restriction.

(3) Alternate IV of the clause at 52.227–14 provides a substitute paragraph (c)(1) granting permission for contractors to assert copyright in any data first produced in the performance of the contract without the need for any further requests. Except for contracts for management or operation of Government facilities and contracts and subcontracts in support of programs being conducted at those facilities or where international agreements require otherwise, Alternate IV shall be used in all contracts for basic or applied research to be performed solely by colleges and universities. Alternate IV shall not be used in contracts with colleges and universities if a purpose of the contract is for development of computer software for distribution to the public (including use in solicitations) by or on behalf of the Government. In addition, Alternate IV may be used in other contracts if an agency determines that it is not necessary for a contractor to request further permission to assert copyright in data first produced in performance of the contract. The contracting officer may exclude any data, or items or categories of data, from the provisions of Alternate IV by expressly so providing in the contract or by adding a paragraph (d)(4) to the clause, consistent with 27.404–4(b).

(4) Pursuant to paragraph (c)(1) of the clause at 52.227–14, the contractor grants the Government a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute to the public, perform publicly and display publicly by or on behalf of the Government, for all data (other than computer software) first produced in the performance of a contract. For computer software, the scope of the Government's license includes all of the above rights except the right to distribute to the public. Agencies may also obtain a license of

different scope if the contracting officer determines, after consulting with legal counsel, such a license will substantially enhance the dissemination of any data first produced under the contract or if such a license is required to comply with international agreements. If an agency obtains a different license, the contractor shall clearly state the scope of that license in a conspicuous place on the medium on which the data is recorded. For example, if the data is delivered as a report, the terms of the license shall be stated on the cover, or first page, of the report.

(5) The clause requires the contractor to affix the applicable copyright notices of 17 U.S.C. 401 or 402, and acknowledgment of Government sponsorship, (including the contract number) to data when it asserts copyright in data. Failure to do so could result in such data being treated as unlimited rights data (see 27.404–5(b)).

(b) *Data not first produced in the performance of a contract.* (1)

Contractors shall not deliver any data that is not first produced under the contract without either—

(i) Acquiring for or granting to the Government a copyright license for the data; or

(ii) Obtaining permission from the contracting officer to do otherwise.

(2) The copyright license the Government acquires for such data will normally be of the same scope as discussed in paragraph (a)(4) of this subsection, and is set forth in paragraph (c)(2) of the clause at 52.227–14. However, agencies may obtain a license of different scope if the agency determines, after consultation with its legal counsel, that such different license will not be inconsistent with the purpose of acquiring the data. If a license of a different scope is acquired, it must be so stated in the contract and clearly set forth in a conspicuous place on the data when delivered to the Government. If the contractor delivers computer software not first produced under the contract, the contractor shall grant the Government the license set forth in paragraph (g)(4) of Alternate III if included in the clause at 52.227–14, or a license agreed to in a collateral agreement made part of the contract.

27.404–4 Contractor's release, publication, and use of data.

(a) In contracts for basic or applied research with universities or colleges, agencies shall not place any restrictions on the conduct of or reporting on the results of unclassified basic or applied research, except as provided in applicable U.S. statutes. However,

agencies may restrict the release or disclosure of computer software that is or is intended to be developed to the point of practical application (including for agency distribution under established programs). This is not considered a restriction on the reporting of the results of basic or applied research. Agencies may also preclude a contractor from asserting copyright in any computer software for purposes of established agency distribution programs, or where required to accomplish the purpose for which the software is acquired.

(b) Except for the results of basic or applied research under contracts with universities or colleges, agencies may, to the extent provided in their FAR supplements, place limitations or restrictions on the contractor's exercise of its rights in data first produced in the performance of the contract, including a requirement to assign copyright to the Government or another party. Any of these restrictions shall be expressly included in the contract.

27.404–5 Unauthorized, omitted, or incorrect markings.

(a) *Unauthorized marking of data.* (1) The Government has, in accordance with paragraph (e) of the clause at 52.227–14, the right to either return data containing unauthorized markings or to cancel or ignore the markings.

(2) Agencies shall not cancel or ignore markings without making written inquiry of the contractor and affording the contractor at least 60 days to provide a written justification substantiating the propriety of the markings.

(i) If the contractor fails to respond or fails to provide a written justification substantiating the propriety of the markings within the time afforded, the Government may cancel or ignore the markings.

(ii) If the contractor provides a written justification substantiating the propriety of the markings, the contracting officer shall consider the justification.

(A) If the contracting officer determines that the markings are authorized, the contractor will be so notified in writing.

(B) If the contracting officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the contractor will be furnished a written determination which becomes the final agency decision regarding the appropriateness of the markings and the markings will be cancelled or ignored and the data will no longer be made subject to disclosure prohibitions, unless the contractor files suit within 90 days in a court of competent

jurisdiction. The markings will not be cancelled or ignored until final resolution of the matter, either by the contracting officer's determination becoming the final agency decision or by final disposition of the matter by court decision if suit is filed.

(3) The foregoing procedures may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request. In addition, the contractor may bring a claim, in accordance with the Disputes clause of the contract, that may arise as the result of the Government's action to remove or ignore any markings on data, unless the action occurs as the result of a final disposition of the matter by a court of competent jurisdiction.

(b) *Omitted or incorrect notices.* (1)

Data delivered under a contract containing the clause without a limited rights notice or restricted rights notice, and without a copyright notice, will be presumed to have been delivered with unlimited rights, and the Government assumes no liability for the disclosure, use, or reproduction of the data.

However, to the extent the data has not been disclosed without restriction outside the Government, the contractor may, within 6 months (or a longer period approved by the contracting officer for good cause shown), request permission of the contracting officer to have the omitted limited rights or restricted rights notices, as applicable, placed on qualifying data at the contractor's expense. The contracting officer may permit adding appropriate notices if the contractor—

(i) Identifies the data for which a notice is to be added;

(ii) Demonstrates that the omission of the proposed notice was inadvertent;

(iii) Establishes that use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to any disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(2) The contracting officer may also—

(i) Permit correction, at the contractor's expense, of incorrect notices if the contractor identifies the data on which correction of the notice is to be made, and demonstrates that the correct notice is authorized; or

(ii) Correct any incorrect notices.

27.404–6 Inspection of data at the contractor's facility.

Contracting officers may obtain the right to inspect data at the contractor's facility by use of the clause at 52.227–14 with its Alternate V, which adds

paragraph (j) to provide that right. Agencies may also adopt Alternate V for general use. The data subject to inspection may be data withheld or withholdable under paragraph (g)(1) of the clause. Inspection may be made by the contracting officer or designee (including nongovernmental personnel under the same conditions as the contracting officer) for the purpose of verifying a contractor's assertion regarding the limited rights or restricted rights status of the data, or for evaluating work performance under the contract. This right may be exercised up to 3 years after acceptance of all items to be delivered under the contract. The contract may specify data items that are not subject to inspection under paragraph (j) of the Alternate. If the contractor demonstrates to the contracting officer that there would be a possible conflict of interest if inspection were made by a particular representative, the contracting officer shall designate an alternate representative.

27.405 Other data rights provisions.

27.405-1 Special works.

(a) The clause at 52.227-17, Rights in Data—Special Works, is for use in contracts (or may be made applicable to portions thereof) that are primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's own use, or when there is a specific need to limit distribution and use of the data or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples are contracts for—

- (1) The production of audiovisual works, including motion pictures or television recordings with or without accompanying sound, or for the preparation of motion picture scripts, musical compositions, sound tracks, translation, adaptation, and the like;
- (2) Histories of the respective agencies, departments, services, or units thereof;
- (3) Surveys of Government establishments;
- (4) Works pertaining to the instruction or guidance of Government officers and employees in the discharge of their official duties;
- (5) The compilation of reports, books, studies, surveys, or similar documents that do not involve research, development, or experimental work;
- (6) The collection of data containing personally identifiable information such that the disclosure thereof would violate the right of privacy or publicity of the

individual to whom the information relates;

(7) Investigatory reports;

(8) The development, accumulation, or compilation of data (other than that resulting from research, development, or experimental work performed by the contractor), the early release of which could prejudice follow-on acquisition activities or agency regulatory or enforcement activities; or

(9) The development of computer software programs, where the program—

- (i) May give a commercial advantage; or
- (ii) Is agency mission sensitive, and release could prejudice agency mission, programs, or follow-on acquisitions.

(b) The contract may specify the purposes and conditions (including time limitations) under which the data may be used, released, or reproduced other than for contract performance. Contracts for the production of audiovisual works, sound recordings, etc., may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the works are acquired.

(c) Paragraph (c)(1)(ii) of the clause, which enables the Government to obtain assignment of copyright in any data first produced in the performance of the contract, may be deleted if the contracting officer determines that such assignment is not needed to further the objectives of the contract.

(d) Paragraph (e) of the clause, which requires the contractor to indemnify the Government against any liability incurred as the result of any violation of trade secrets, copyrights, right of privacy or publicity, or any libelous or other unlawful matter arising out of or contained in any production or compilation of data that are subject to the clause, may be deleted or limited in scope where the contracting officer determines that, because of the nature of the particular data involved, such liability will not arise.

(e) When the audiovisual or other special works are produced to accomplish a public purpose other than acquisition for the Government's own use (such as for production and distribution to the public of the works by other than a Federal agency) agencies are authorized to modify the clause for use in contracts, with rights in data provisions that meet agency mission needs yet protect free speech and freedom of expression, as well as the artistic license of the creator of the work.

27.405-2 Existing works.

The clause at 52.227-18, Rights in Data—Existing Works, is for use in contracts exclusively for the acquisition (without modification) of existing works such as, motion pictures, television recordings, and other audiovisual works; sound recordings; musical, dramatic, and literary works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; and works of a similar nature. The contract may set forth limitations consistent with the purposes for which the works covered by the contract are being acquired. Examples of these limitations are means of exhibition or transmission, time, type of audience, and geographical location. However, if the contract requires that works of the type indicated in this paragraph are to be modified through editing, translation, or addition of subject matter, etc. (rather than purchased in existing form), then see 27.405-1.

27.405-3 Commercial computer software.

(a) When contracting other than from GSA's Multiple Award Schedule contracts for the acquisition of commercial computer software, no specific contract clause prescribed in this subpart need be used, but the contract shall specifically address the Government's rights to use, disclose, modify, distribute, and reproduce the software. Section 12.212 sets forth the guidance for the acquisition of commercial computer software and states that commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent the license is consistent with Federal law and otherwise satisfies the Government's needs. The clause at 52.227-19, Commercial Computer Software License, may be used when there is any confusion as to whether the Government's needs are satisfied or whether a customary commercial license is consistent with Federal law. Additional or lesser rights may be negotiated using the guidance concerning restricted rights as set forth in 27.404-2(d), or the clause at 52.227-19. If greater rights than the minimum rights identified in the clause at 52.227-19 are needed, or lesser rights are to be acquired, they shall be negotiated and set forth in the contract. This includes any additions to, or limitations on, the rights set forth in paragraph (b) of the clause at 52.227-19 when used. Examples of greater rights may be those necessary for networking purposes or use of the software from remote terminals communicating with a host

computer where the software is located. If the computer software is to be acquired with unlimited rights, the contract shall also so state. In addition, the contract shall adequately describe the computer programs and/or databases, the media on which it is recorded, and all the necessary documentation.

(b) If the contract incorporates, makes reference to, or uses a vendor's standard commercial lease, license, or purchase agreement, the contracting officer shall ensure that the agreement is consistent with paragraph (a)(1) of this subsection. The contracting officer should exercise caution in accepting a vendor's terms and conditions, since they may be directed to commercial sales and may not be appropriate for Government contracts. Any inconsistencies in a vendor's standard commercial agreement shall be addressed in the contract and the contract terms shall take precedence over the vendor's standard commercial agreement. If the clause at 52.227-19 is used, inconsistencies in the vendor's standard commercial agreement regarding the Government's right to use, reproduce or disclose the computer software are reconciled by that clause.

(c) If a prime contractor under a contract containing the clause at 52.227-14, Rights in Data—General, with paragraph (g)(4) (Alternate III) in the clause, acquires restricted computer software from a subcontractor (at any tier) as a separate acquisition for delivery to or for use on behalf of the Government, the contracting officer may approve any additions to, or limitations on the restricted rights in the Restricted Rights Notice of paragraph (g)(4) in a collateral agreement incorporated in and made part of the contract.

27.405-4 Other existing data.

(a) Except for existing works pursuant to 27.405-2 or commercial computer software pursuant to 27.405-3, no clause contained in this subpart is required to be included in—

(1) Contracts solely for the acquisition of books, periodicals, and other printed items in the exact form in which these items are to be obtained unless reproduction rights are to be acquired; or

(2) Other contracts that require only existing data (other than limited rights data) to be delivered and the data are available without disclosure prohibitions, unless reproduction rights to the data are to be obtained.

(b) If the reproduction rights to the data are to be obtained in any contract of the type described in paragraph (b)(1) (i) or (ii) of this section, the rights shall

be specifically set forth in the contract. No clause contained in this subpart is required to be included in contracts substantially for on-line data base services in the same form as they are normally available to the general public.

27.406 Acquisition of data.

27.406-1 General.

(a) It is the Government's practice to determine, to the extent feasible, its data requirements in time for inclusion in solicitations. The data requirements may be subject to revision during contract negotiations. Since the preparation, reformatting, maintenance and updating, cataloging, and storage of data represents an expense to both the Government and the contractor, efforts should be made to keep the contract data requirements to a minimum, consistent with the purposes of the contract.

(b) The contracting officer shall specify in the contract all known data requirements, including the time and place for delivery and any limitations and restrictions to be imposed on the contractor in the handling of the data. Further, and to the extent feasible, in major system acquisitions, the contracting officer shall set out data requirements as separate contract line items. In establishing the contract data requirements and in specifying data items to be delivered by a contractor, agencies may, consistent with paragraph (a) of this subsection, develop their own contract schedule provisions. Agency procedures may, among other things, provide for listing, specifying, identifying source, assuring delivery, and handling any data required to be delivered, first produced, or specifically used in the performance of the contract.

(c) Data delivery requirements should normally not require that a contractor provide the Government, as a condition of the procurement, unlimited rights in data that qualify as limited rights data or restricted computer software. Rather, form, fit, and function data may be furnished with unlimited rights instead of the qualifying data, or the qualifying data may be furnished with limited rights or restricted rights if needed (see 27.404-2(c) and (d)). If greater rights are needed, they should be clearly set forth in the solicitation and the contractor fairly compensated for the greater rights.

27.406-2 Additional data requirements.

(a) In some contracting situations, such as experimental, developmental, research, or demonstration contracts, it may not be feasible to ascertain all the data requirements at contract award. The clause at 52.227-16, Additional

Data Requirements, may be used to enable the subsequent ordering by the contracting officer of additional data first produced or specifically used in the performance of these contracts as the actual requirements become known. The clause shall normally be used in solicitations and contracts involving experimental, developmental, research or demonstration work (other than basic or applied research to be performed under a contract solely by a university or college when the contract amount will be \$500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract. If the contract is for basic or applied research to be performed by a university or college, and the contracting officer believes the contract effort will in the future exceed \$500,000, even though the initial award does not, the contracting officer may include the clause in the initial award.

(b) Data may be ordered under the clause at 52.227-16 at any time during contract performance or within a period of 3 years after acceptance of all items to be delivered under the contract. The contractor is to be compensated for converting the data into the prescribed form, for reproduction, and for delivery. In order to minimize storage costs for the retention of data, the contracting officer may relieve the contractor of the retention requirements for specified data items at any time during the retention period required by the clause. The contracting officer may permit the contractor to identify and specify in the contract data not to be ordered for delivery under the clause if the data is not necessary to meet the Government's requirements for data. Also, the contracting officer may alter the clause by deleting the term "or specifically used" in paragraph (a) of the clause if delivery of the data is not necessary to meet the Government's requirements for data. Any data ordered under this clause will be subject to the clause at 52.227-14, Rights in Data—General, (or other equivalent clause setting forth the respective rights of the Government and the contractor) in the contract. Data authorized to be withheld under such clause will not be required to be delivered under the clause at 52.227-16, except as provided in Alternate II or Alternate III, if included (see 27.404-2(c) and (d)).

(c) Absent an established program for dissemination of computer software, agencies should not order additional computer software under the clause at 52.227-16, for the sole purpose of disseminating or marketing the software to the public. In ordering software for internal purposes, the contracting

officer shall consider, consistent with the Government's needs, not ordering particular source codes, algorithms, processes, formulas, or flow charts of the software if the contractor shows that this aids its efforts to disseminate or market the software.

27.406-3 Major system acquisition.

(a) The clause at 52.227-21, Technical Data Declaration, Revision, and Withholding of Payment—Major Systems, implements 41 U.S.C. 418a(d). When using the clause at 52.227-21, the section of the contract specifying data delivery requirements (see 27.406-1(b)) shall expressly identify those line items of technical data to which the clause applies. Upon delivery of the technical data, the contracting officer shall review the technical data and the contractor's declaration relating to it to assure that the data are complete, accurate, and comply with contract requirements. If the data are not complete, accurate, or compliant, the contracting officer should request the contractor to correct the deficiencies, and may withhold payment. Final payment shall not be made under the contract until it has been determined that the delivery requirements of those line items of data to which the clause applies have been satisfactorily met.

(b) In a contract for, or in support of, a major system awarded by a civilian agency other than NASA or the U.S. Coast Guard, the following applies:

(1) The contracting officer shall require the delivery of any technical data relating to the major system or supplies for the major system, that are to be developed exclusively with Federal funds if the delivery of the technical data is needed to ensure the competitive acquisition of supplies or services that will be required in substantial quantities in the future. The clause at 52.227-22, Major System—Minimum Rights, is used in addition to the clause at 52.227-14, Rights in Data—General, and other required clauses, to ensure that the Government acquires at least those rights required by Pub. L. 98-577 in technical data developed exclusively with Federal funds.

(2) Technical data, relating to a major system or supplies for a major system, procured or to be procured by the Government and also relating to the design, development, or manufacture of products or processes offered or to be offered for sale to the public (except for such data as may be necessary for the Government to operate or maintain the product, or use the process if obtained by the Government as an element of performance under the contract), shall

not be required to be provided to the Government from persons who have developed such products or processes as a condition for the procurement of such products or processes by the Government.

27.407 Rights to technical data in successful proposals.

The clause at 52.227-23, Rights to Proposal Data (Technical), allows the Government to acquire unlimited rights to technical data in successful proposals. Pursuant to the clause, the prospective contractor is afforded the opportunity to specifically identify pages containing technical data to be excluded from the grant of unlimited rights. This exclusion is not dispositive of the protective status of the data, but any excluded technical data, as well as any commercial and financial information contained in the proposal, will remain subject to the policies in Subpart 15.2 or 15.6 (or agency supplements) relating to proposal information (e.g., will be used for evaluation purposes only). If there is a need to have access to any of the excluded technical data during contract performance, consideration should be given to acquiring the data with limited rights, if they so qualify, in accordance with 27.404-2(c).

27.408 Cosponsored research and development activities.

(a) In contracts involving cosponsored research and development that require the contractor to make substantial contributions of funds or resources (e.g., by cost-sharing or by repayment of nonrecurring costs), and the contractor's and the Government's respective contributions to any item, component, process, or computer software, developed or produced under the contract are not readily segregable, the contracting officer may limit the acquisition of, or acquire less than unlimited rights to, any data developed and delivered under the contract. Agencies may regulate the use of this authority in their supplements. Lesser rights shall, at a minimum, assure use of the data for agreed-to Governmental purposes (including reprourement rights as appropriate), and address any disclosure limitations or restrictions to be imposed on the data. Also, consideration may be given to requiring the contractor to directly license others if needed to carry out the objectives of the contract. Since the purpose of the cosponsored research and development, the legitimate proprietary interests of the contractor, the needs of the Government, and the respective contributions of both parties may vary,

no specific clauses are prescribed, but a clause providing less than unlimited rights in the Government for data developed and delivered under the contract (such as license rights) may be tailored to the circumstances consistent with the foregoing and the policy set forth in 27.402. As a guide, a clause may be appropriate when the contractor contributes money or resources, or agrees to make repayment of nonrecurring costs, of a value of approximately 50 percent of the total cost of the contract (i.e., Government, contractor, and/or third party paid costs), and the respective contributions are not readily segregable for any work element to be performed under the contract. A clause may be used for all or for only specifically identified tasks or work elements under the contract. In the latter instance, its use will be in addition to whatever other data rights clause is prescribed under this subpart, with the contract specifically identifying which clause is to apply to which tasks or work elements. Further, this type of clause may not be appropriate where the purpose of the contract is to produce data for dissemination to the public, or to develop or demonstrate technologies that will be available, in any event, to the public for its direct use.

(b) Where the contractor's contributions are readily segregable (by performance requirements and the funding for the contract) and so identified in the contract, any resulting data may be treated under this clause as limited rights data or restricted computer software in accordance with 27.404-2(c) or (d), as applicable; or if this treatment is inconsistent with the purpose of the contract, rights to the data may, if so negotiated and stated in the contract, be treated in a manner consistent with paragraph (a) of this section.

27.409 Solicitation provisions and contract clauses

(a) Generally, a contract should contain only one data rights clause. However, where more than one is needed, the contract should distinguish the portion of contract performance to which each pertains.

(b)(1) Insert the clause at 52.227-14, Rights in Data—General, in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract, unless the contract is—

(i) For the production of special works of the type set forth in 27.405-1, although in these cases insert the clause at 52.227-14, Rights in Data—General, and make it applicable to data other

than special works, as appropriate (see paragraph (e) of this section);

(ii) For the acquisition of existing data, commercial computer software, or other existing data, as described in 27.405-2 through 27.405-4 (see paragraphs (f) and (g) of this section);

(iii) A small business innovation research contract (see paragraph (h) of this section);

(iv) To be performed outside the United States (see paragraph (i)(1) of this section);

(v) For architect-engineer services or construction work (see paragraph (i)(2) of this section);

(vi) For the management, operation, design, or construction of a Government-owned facility to perform research, development, or production work (see paragraph (i)(3) of this section); or

(vii) A contract involving cosponsored research and development in which a clause providing for less than unlimited right has been authorized (see 27.408).

(2) If an agency determines, in accordance with 27.404-2(b), to adopt the alternate definition of "Limited Rights Data" in paragraph (a) of the clause, use the clause with its Alternate I.

(3) If a contracting officer determines, in accordance with 27.404-2(c) that it is necessary to obtain limited rights data, use the clause with its Alternate II. The contracting officer shall complete paragraph (g)(3) to include the purposes, if any, for which limited rights data are to be disclosed outside the Government.

(4) In accordance with 27.404-2(d), if a contracting officer determines it is necessary to obtain restricted computer software, use the clause with its Alternate III. Any greater or lesser rights regarding the use, reproduction, or disclosure of restricted computer software than those set forth in the Restricted Rights Notice of paragraph (g)(4) of the clause shall be specified in the contract and the notice modified accordingly.

(5) Use the clause with its Alternate IV in contracts for basic or applied research (other than those for the management or operation of Government facilities, and contracts and subcontracts in support of programs being conducted at those facilities or where international agreements require otherwise) to be performed solely by universities and colleges. The clause may be used with its Alternate IV in other contracts if in accordance with 27.404-3(a), an agency determines to grant permission for the contractor to assert claim to copyright subsisting in all data first produced without further request being made by the contractor.

When Alternate IV is used, the contract may exclude items or categories of data from the permission granted, either by express provisions in the contract or by the addition of a paragraph (d)(4) to the clause (see 27.404-4).

(6) In accordance with 27.404-6, if the Government needs the right to inspect certain data at a contractor's facility, use the clause with its Alternate V.

(c) In accordance with 27.404-2(c)(2) and 27.404-2(d)(5), if the contracting officer desires to have an offeror state in response to a solicitation whether limited rights data or restricted computer software are likely to be used in meeting the data delivery requirements set forth in the solicitation, insert the provision at 52.227-15, Representation of Limited Rights Data and Restricted Computer Software, in any solicitation containing the clause at 52.227-14, Rights in Data—General. The contractor's response may provide an aid in determining whether the clause should be used with Alternate II and/or Alternate III.

(d) Insert the clause at 52.227-16, Additional Data Requirements, in solicitations and contracts involving experimental, developmental, research, or demonstration work (other than basic or applied research to be performed solely by a university or college where the contract amount will be \$500,000 or less) unless all the requirements for data are believed to be known at the time of contracting and specified in the contract (see 27.406-2). This clause may also be used in other contracts when considered appropriate. For example, if the contract is for basic or applied research to be performed by a university or college, and the contracting officer believes the contract effort will in the future exceed \$500,000, even though the initial award does not, the contracting officer may include the clause in the initial award.

(e) In accordance with 27.405-1, insert the clause at 52.227-17, Rights in Data—Special Works, in solicitations and contracts primarily for the production or compilation of data (other than limited rights data or restricted computer software) for the Government's internal use, or when there is a specific need to limit distribution and use of the data or to obtain indemnity for liabilities that may arise out of the content, performance, or disclosure of the data. Examples of such contracts are set forth in 27.405-1.

(1) Insert the clause if existing works are to be modified, as by editing, translation, addition of subject matter, etc.

(2) The contract may specify the purposes and conditions (including

time limitations) under which the data may be used, released, or reproduced by the contractor for other than contract performance.

(3) Contracts for the production of audiovisual works, sound recordings, etc. may include limitations in connection with talent releases, music licenses, and the like that are consistent with the purposes for which the data is acquired.

(4) The clause may be modified in accordance with paragraphs (c) through (e) of 27.405-1.

(f) Insert the clause at 52.227-18, Rights in Data—Existing Works, in solicitations and contracts exclusively for the acquisition, without modification, of existing audiovisual and similar works of the type set forth in 27.405-2. The contract may set forth limitations consistent with the purposes for which the work is being acquired. While no specific clause of this subpart is required to be included in contracts solely for the acquisition, without disclosure prohibitions, of books, publications, and similar items in the exact form in which the items exist prior to the request for purchase (*i.e.*, the off-the-shelf purchase of such items), or in other contracts where only existing data available without disclosure prohibitions is to be furnished, if reproduction rights are to be acquired, the contract shall include terms addressing such rights. (See 27.405-4.)

(g) In accordance with 27.405-3, when contracting (other than from GSA's Multiple Award Schedule contracts) for the acquisition of commercial computer software, the contracting officer may insert the clause at 52.227-19, Commercial Computer Software License, in the solicitation and contract. In any event, the contracting officer shall assure that the contract contains terms to obtain sufficient rights for the Government to fulfill the need for which the software is being acquired and is otherwise consistent with 27.405-3).

(h) If the contract is a Small Business Innovation Research (SBIR) contract, insert the clause at 52.227-20, Rights in Data—SBIR Program in all Phase I, Phase II, and Phase III contracts awarded under the Small Business Innovation Research Program established pursuant to 15 U.S.C. 638. The SBIR protection period may be extended in accordance with the Small Business Administration's "Small Business Innovation Research Program Policy Directive" (September 24, 2002).

(i) Agencies may prescribe in their procedures, as appropriate, a clause

consistent with the policy of 27.402 in contracts—

(1) To be performed outside the United States;

(2) For architect-engineer services and construction work, e.g., the clause at 52.227-17, Rights in Data—Special Works); or

(3) For management, operation, design, or construction of Government-owned research, development, or production facilities, and in contracts and subcontracts in support of programs being conducted at such facilities.

(j) In accordance with 27.406-3(a), insert the clause at 52.227-21, Technical Data Declaration, Revision, and Withholding of Payment—Major Systems, in contracts for major systems acquisitions or for support of major systems acquisitions. This requirement includes contracts for detailed design, development, or production of a major system and contracts for any individual part, component, subassembly, assembly, or subsystem integral to the major system, and other property that may be replaced during the service life of the system, including spare parts. When used, this clause requires that the technical data to which it applies be specified in the contract (see 27.406-3(a)).

(k) In accordance with 27.406-3(b), in the case of civilian agencies other than NASA and the U.S. Coast Guard, insert the clause at 52.227-22, Major System—Minimum Rights, in contracts for major systems or contracts in support of major systems.

(l) In accordance with 27.407, if a contracting officer desires to acquire unlimited rights in technical data contained in a successful proposal upon which a contract award is based, insert the clause at 52.227-23, Rights to Proposal Data (Technical). Rights to technical data in a proposal are not acquired by mere incorporation by reference of the proposal in the contract, and if a proposal is incorporated by reference, the contracting officer shall follow 27.404 to assure that the rights are appropriately addressed.

Subpart 27.5—Foreign License and Technical Assistance Agreements

27.501 General.

Agencies shall provide necessary policy and procedures regarding foreign technical assistance agreements and license agreements involving intellectual property, including avoiding unnecessary royalty charges.

PART 33—PROTESTS, DISPUTES, AND APPEALS

33.104 [Amended]

■ 9. Amend section 33.104 in paragraph (h)(5) introductory text by removing “19.001” and adding “2.101” in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 10. Amend section 52.227-1 by revising the introductory paragraph, date of the clause, and paragraphs (a) and (b) of the clause; and revising the introductory paragraphs of Alternate I and II to read as follows:

52.227-1 Authorization and Consent.

As prescribed in 27.201-2(a)(1), insert the following clause:

AUTHORIZATION AND CONSENT (DEC 2007)

(a) The Government authorizes and consents to all use and manufacture, in performing this contract or any subcontract at any tier, of any invention described in and covered by a United States patent—

(1) Embodied in the structure or composition of any article the delivery of which is accepted by the Government under this contract; or

(2) Used in machinery, tools, or methods whose use necessarily results from compliance by the Contractor or a subcontractor with (i) specifications or written provisions forming a part of this contract or (ii) specific written instructions given by the Contracting Officer directing the manner of performance. The entire liability to the Government for infringement of a United States patent shall be determined solely by the provisions of the indemnity clause, if any, included in this contract or any subcontract hereunder (including any lower-tier subcontract), and the Government assumes liability for all other infringement to the extent of the authorization and consent hereinabove granted.

(b) The Contractor shall include the substance of this clause, including this paragraph (b), in all subcontracts that are expected to exceed the simplified acquisition threshold. However, omission of this clause from any subcontract, including those at or below the simplified acquisition threshold, does not affect this authorization and consent.

(End of Clause)

Alternate I (Apr 1984). As prescribed in 27.201-2(a)(2), substitute the following paragraph (a) for paragraph (a) of the basic clause:

* * * * *

Alternate II (Apr 1984). As prescribed in 27.201-2(a)(3), substitute the following paragraph (a) for paragraph (a) of the basic clause:

* * * * *

■ 11. Amend section 52.227-2 by revising the introductory paragraph, date of the clause, and paragraphs (b) and (c) to read as follows:

52.227-2 Notice and Assistance Regarding Patent and Copyright Infringement.

As prescribed in 27.201-2(b), insert the following clause:

NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT (DEC 2007)

* * * * *

(b) In the event of any claim or suit against the Government on account of any alleged patent or copyright infringement arising out of the performance of this contract or out of the use of any supplies furnished or work or services performed under this contract, the Contractor shall furnish to the Government, when requested by the Contracting Officer, all evidence and information in the Contractor's possession pertaining to such claim or suit. Such evidence and information shall be furnished at the expense of the Government except where the Contractor has agreed to indemnify the Government.

(c) The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts that are expected to exceed the simplified acquisition threshold.

(End of clause)

■ 12. Amend section 52.227-3 by revising the introductory paragraph and the introductory paragraphs of Alternate I, II, and III to read as follows:

52.227-3 Patent Indemnity.

As prescribed in 27.201-2(c)(1), insert the following clause:

* * * * *

Alternate I (Apr 1984). As prescribed in 27.201-2(c)(2), add the following paragraph (c) to the basic clause:

* * * * *

Alternate II (Apr 1984). As prescribed in 27.201-2(c)(2), add the following paragraph (c) to the basic clause:

* * * * *

Alternate III (Jul 1995). As prescribed in 27.201-2(c)(3), add the following paragraph to the basic clause:

* * * * *

■ 13. Revise section 52.227-4 to read as follows:

52.227-4 Patent Indemnity—Construction Contracts.

As prescribed in 27.201-2(d)(1), insert the following clause:

PATENT INDEMNITY—CONSTRUCTION CONTRACTS (DEC 2007)

Except as otherwise provided, the Contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs and expenses, for infringement of any United States patent (except a patent issued upon an application that is now or may hereafter be withheld from issue pursuant to a Secrecy Order under 35 U.S.C. 181) arising out of performing this contract or out of the use or disposal by or for the account of the Government of supplies furnished or work performed under this contract.

(End of clause)

Alternate I (DEC 2007). As prescribed in 27.201-2(d)(2), designate the first paragraph of the basic clause as paragraph (a) and add the following paragraph (b) to the basic clause:

(b) This patent indemnification shall not apply to the following items:

[Contracting Officer list the items to be excluded.]

52.227-5 [Amended]

■ 14. Amend the introductory paragraph of section 52.227-5 by removing “at 27.203-6” and adding “in 27.201-2(e)” in its place.

■ 15. Amend section 52.227-6 by revising the introductory paragraph and the introductory paragraph of Alternate I to read as follows:

52.227-6 Royalty Information.

As prescribed in 27.202-5(a)(1), insert the following provision:

* * * * *

Alternate I (Apr 1984). As prescribed in 27.202-5(a)(2), substitute the following for the introductory portion of paragraph (a) of the basic provision:

* * * * *

52.227-7 [Amended]

■ 16. Amend the introductory paragraph of section 52.227-7 by removing “27.204-3(c)” and adding “27.202-5(b)” in its place.

■ 17. Amend section 52.227-9 by revising the introductory paragraph to read as follows:

52.227-9 Refund of Royalties.

As prescribed in 27.202-5(c), insert the following clause:

* * * * *

■ 18. Amend section 52.227-10 by revising the introductory paragraph, the date of the clause, and paragraph (e) to read as follows:

52.227-10 Filing of Patent Applications—Classified Subject Matter.

As prescribed at 27.203-2, insert the following clause:

FILING OF PATENT APPLICATIONS—
CLASSIFIED SUBJECT MATTER (DEC 2007)

* * * * *

(e) The Contractor shall include the substance of this clause, including this paragraph (e), in all subcontracts that cover or are likely to cover classified subject matter.

(End of clause)

■ 19. Revise section 52.227-11 to read as follows:

52.227-11 Patent Rights—Ownership by the Contractor.

As prescribed in 27.303(b)(1), insert the following clause:

PATENT RIGHTS—OWNERSHIP BY THE CONTRACTOR (DEC 2007)

(a) As used in this clause—

Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code, or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*)

Made means—

(1) When used in relation to any invention other than a plant variety, the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, that the Contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Nonprofit organization means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)), or any nonprofit scientific or educational organization qualified under a State nonprofit organization statute.

Practical application means to manufacture, in the case of a composition of product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention means any invention of the Contractor made in the performance of work under this contract.

(b) *Contractor's rights.* (1) *Ownership.* The Contractor may retain ownership of each subject invention throughout the world in accordance with the provisions of this clause.

(2) *License.* (i) The Contractor shall retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, unless the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. The Contractor's license extends to any domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part, and includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(ii) The Contractor's license may be revoked or modified by the agency to the extent necessary to achieve expeditious practical application of the subject invention in a particular country in accordance with the procedures in FAR 27.302(i)(2) and 27.304-1(f).

(c) *Contractor's obligations.* (1) The Contractor shall disclose in writing each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters. The disclosure shall identify the inventor(s) and this contract under which the subject invention was made. It shall be sufficiently complete in

technical detail to convey a clear understanding of the subject invention. The disclosure shall also identify any publication, on sale (*i.e.*, sale or offer for sale), or public use of the subject invention, or whether a manuscript describing the subject invention has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor shall promptly notify the Contracting Officer of the acceptance of any manuscript describing the subject invention for publication and any on sale or public use.

(2) The Contractor shall elect in writing whether or not to retain ownership of any subject invention by notifying the Contracting Officer within 2 years of disclosure to the agency. However, in any case where publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor shall file either a provisional or a nonprovisional patent application or a Plant Variety Protection Application on an elected subject invention within 1 year after election. However, in any case where a publication, on sale, or public use has initiated the 1-year statutory period during which valid patent protection can be obtained in the United States, the Contractor shall file the application prior to the end of that statutory period. If the Contractor files a provisional application, it shall file a nonprovisional application within 10 months of the filing of the provisional application. The Contractor shall file patent applications in additional countries or international patent offices within either 10 months of the first filed patent application (whether provisional or nonprovisional) or 6 months from the date permission is granted by the Commissioner of Patents to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) The Contractor may request extensions of time for disclosure, election, or filing under paragraphs (c)(1), (c)(2), and (c)(3) of this clause.

(d) *Government's rights—(1) Ownership.* The Contractor shall assign to the agency, on written request, title to any subject invention—

(i) If the Contractor fails to disclose or elect ownership to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain ownership; provided, that the agency may request title only within 60 days after learning of the Contractor's failure to disclose or elect within the specified times.

(ii) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the written request of the agency, the Contractor shall continue to retain ownership in that country.

(iii) In any country in which the Contractor decides not to continue the prosecution of

any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(2) *License.* If the Contractor retains ownership of any subject invention, the Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.

(e) *Contractor action to protect the Government's interest.* (1) The Contractor shall execute or have executed and promptly deliver to the agency all instruments necessary to—

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions in which the Contractor elects to retain ownership; and

(ii) Assign title to the agency when requested under paragraph (d) of this clause and to enable the Government to obtain patent protection and plant variety protection for that subject invention in any country.

(2) The Contractor shall require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in the Contractor's format, each subject invention in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. The disclosure format should require, as a minimum, the information required by paragraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Contractor shall notify the Contracting Officer of any decisions not to file a nonprovisional patent application, continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response or filing period required by the relevant patent office.

(4) The Contractor shall include, within the specification of any United States nonprovisional patent or plant variety protection application and any patent or plant variety protection certificate issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the contract) awarded by (identify the agency). The Government has certain rights in the invention."

(f) *Reporting on utilization of subject inventions.* The Contractor shall submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining utilization of the subject invention that are being made by the Contractor or its licensees or assignees. The reports shall include

information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and other data and information as the agency may reasonably specify. The Contractor also shall provide additional reports as may be requested by the agency in connection with any march-in proceeding undertaken by the agency in accordance with paragraph (h) of this clause. The Contractor also shall mark any utilization report as confidential/proprietary to help prevent inadvertent release outside the Government. As required by 35 U.S.C. 202(c)(5), the agency will not disclose that information to persons outside the Government without the Contractor's permission.

(g) *Preference for United States industry.* Notwithstanding any other provision of this clause, neither the Contractor nor any assignee shall grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for an agreement may be waived by the agency upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States, or that under the circumstances domestic manufacture is not commercially feasible.

(h) *March-in rights.* The Contractor acknowledges that, with respect to any subject invention in which it has retained ownership, the agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c), and in accordance with the procedures in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of contract award.

(i) *Special provisions for contracts with nonprofit organizations.* If the Contractor is a nonprofit organization, it shall—

(1) Not assign rights to a subject invention in the United States without the written approval of the agency, except where an assignment is made to an organization that has as one of its primary functions the management of inventions, *provided*, that the assignee shall be subject to the same provisions as the Contractor;

(2) Share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (but through their agency if the agency deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;

(3) Use the balance of any royalties or income earned by the Contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions for the support of scientific research or education; and

(4) Make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business concerns, and give a preference to a small business concern when licensing a subject

invention if the Contractor determines that the small business concern has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business concerns; *provided*, that the Contractor is also satisfied that the small business concern has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the Contractor.

(5) Allow the Secretary of Commerce to review the Contractor's licensing program and decisions regarding small business applicants, and negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when the Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of paragraph (i)(4) of this clause.

(j) *Communications.* [Complete according to agency instructions.]

(k) *Subcontracts.* (1) The Contractor shall include the substance of this clause, including this paragraph (k), in all subcontracts for experimental, developmental, or research work to be performed by a small business concern or nonprofit organization.

(2) The Contractor shall include in all other subcontracts for experimental, developmental, or research work the substance of the patent rights clause required by FAR Subpart 27.3.

(3) At all tiers, the patent rights clause must be modified to identify the parties as follows: references to the Government are not changed, and the subcontractor has all rights and obligations of the Contractor in the clause. The Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(4) In subcontracts, at any tier, the agency, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the agency with respect to the matters covered by the clause; *provided*, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (h) of this clause.

(End of clause)

Alternate I (Jun 1989). As prescribed in 27.303(b)(3), add the following sentence at the end of paragraph (d)(2) of the basic clause:

The license shall include the right of the Government to sublicense foreign governments, their nationals and international organizations pursuant to the following treaties or international agreements: _____*

[* *Contracting Officer complete with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.*]

Alternate II (DEC 2007). As prescribed in 27.303(b)(4), add the following sentence at

the end of paragraph (d)(2) of the basic clause:

The agency reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into by the Government before or after the effective date of the contract and effectuate those license or other rights that are necessary for the Government to meet its obligations to foreign governments, their nationals, and international organizations under the treaties or international agreements with respect to subject inventions made after the date of the amendment.

Alternate III (Jun 1989). As prescribed in 27.303(b)(5), substitute the following paragraph (i)(3) in place of paragraph (i)(3) of the basic clause:

(3) After payment of patenting costs, licensing costs, payments to inventors, and other expenses incidental to the administration of subject inventions, the balance of any royalties or income earned and retained by the Contractor during any fiscal year on subject inventions under this or any successor contract containing the same requirement, up to any amount equal to 5 percent of the budget of the facility for that fiscal year, shall be used by the Contractor for the scientific research, development, and education consistent with the research and development mission and objectives of the facility, including activities that increase the licensing potential of other inventions of the facility. If the balance exceeds 5 percent, 75 percent of the excess above 5 percent shall be paid by the Contractor to the Treasury of the United States and the remaining 25 percent shall be used by the Contractor only for the same purposes as described above. To the extent it provides the most effective technology transfer, the licensing of subject inventions shall be administered by Contractor employees on location at the facility.

Alternate IV (Jun 1989). As prescribed in 27.303(b)(6), include the following paragraph (e)(5) in paragraph (e) of the basic clause:

(5) The Contractor shall establish and maintain active and effective procedures to ensure that subject inventions are promptly identified and timely disclosed, and shall submit a description of the procedures to the Contracting Officer so that the Contracting Officer may evaluate and determine their effectiveness.

Alternate V (DEC 2007). As prescribed in 27.303(b)(7), include the following paragraph (d)(3) in paragraph (d) of the basic clause:

(d)(3) *CRADA licensing.* If the Contractor performs services at a Government owned and operated laboratory or at a Government owned and Contractor operated laboratory directed by the Government to fulfill the Government's obligations under a Cooperative Research and Development Agreement (CRADA) authorized by 15 U.S.C. 3710a, the Government may require the Contractor to negotiate an agreement with the CRADA collaborating party or parties regarding the allocation of rights to any subject invention the Contractor makes, solely or jointly, under the CRADA. The agreement shall be negotiated prior to the Contractor undertaking the CRADA work or, with the permission of the Government, upon

the identification of a subject invention. In the absence of such an agreement, the Contractor agrees to grant the collaborating party or parties an option for a license in its inventions of the same scope and terms set forth in the CRADA for inventions made by the Government.

52.227-12 [Removed]

■ 20. Remove and reserve section 52.227-12.

■ 21. Revise sections 52.227-13 through 52.227-15 to read as follows:

52.227-13 Patent Rights—Ownership by the Government.

As prescribed at 27.303(e), insert the following clause:

PATENT RIGHTS—OWNERSHIP BY THE GOVERNMENT (DEC 2007)

(a) *Definitions.* As used in this clause—
Invention means any invention or discovery that is or may be patentable or otherwise protectable under title 35 of the U.S. Code or any variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, *et seq.*)

Made means—

(1) When used in relation to any invention other than a plant variety, means the conception or first actual reduction to practice of the invention; or

(2) When used in relation to a plant variety, means that the Contractor has at least tentatively determined that the variety has been reproduced with recognized characteristics.

Practical application, means to manufacture, in the case of a composition or product; to practice, in the case of a process or method; or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

Subject invention, means any invention of the Contractor made in the performance of work under this contract.

(b) *Ownership.* (1) *Assignment to the Government.* The Contractor shall assign to the Government title throughout the world to each subject invention, except to the extent that rights are retained under paragraphs (b)(2) and (d) of this clause.

(2) Greater rights determinations. (i) The Contractor, or an employee-inventor after consultation with the Contractor, may request greater rights than the nonexclusive license provided in paragraph (d) of this clause. The request for a greater rights must be submitted to the Contracting Officer at the time of the first disclosure of the subject invention pursuant to paragraph (e)(2) of this clause, or not later than 8 months thereafter, unless a longer period is authorized in writing by the Contracting Officer for good cause shown in writing by the Contractor. Each determination of greater rights under this contract normally shall be subject to paragraph (c) of this clause, and to the reservations and conditions deemed to be appropriate by the agency.

(ii) Upon request, the Contractor shall provide the filing date, serial number and

title, a copy of the patent application (including an English-language version if filed in a language other than English), and patent number and issue date for any subject invention in any country for which the Contractor has retained title.

(iii) Upon request, the Contractor shall furnish the agency an irrevocable power to inspect and make copies of the patent application file.

(c) *Minimum rights acquired by the Government.* (1) Regarding each subject invention to which the Contractor retains ownership, the Contractor agrees as follows:

(i) The Government will have a nonexclusive, nontransferable, irrevocable, paid-up license to practice, or have practiced for or on its behalf, the subject invention throughout the world.

(ii) The agency has the right to require licensing pursuant to 35 U.S.C. 203 and 210(c) and in accordance with the procedures set forth in 37 CFR 401.6 and any supplemental regulations of the agency in effect on the date of the contract award.

(iii) Upon request, the Contractor shall submit periodic reports no more frequently than annually on the utilization, or efforts to obtain utilization, of a subject invention by the Contractor or its licensees or assignees. The reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and any other data and information as the agency may reasonably specify. The Contractor also shall provide additional reports as may be requested by the agency in connection with any march-in proceedings undertaken by the agency in accordance with paragraph (c)(1)(ii) of this clause. To the extent data or information supplied under this section is considered by the Contractor, or its licensees, or assignees to be privileged and confidential and is so marked, the agency, to the extent permitted by law, will not disclose such information to persons outside the Government.

(iv) When licensing a subject invention, the Contractor shall—

(A) Ensure that no royalties are charged on acquisitions involving Government funds, including funds derived through a Military Assistance Program of the Government or otherwise derived through the Government;

(B) Refund any amounts received as royalty charges on a subject invention in acquisitions for, or on behalf of, the Government;

(C) Provide for this refund in any instrument transferring rights in the subject invention to any party.

(v) When transferring rights in a subject invention, the Contractor shall provide for the Government's rights set forth in paragraphs (c)(1)(i) through (c)(1)(iv) of this clause.

(2) Nothing contained in paragraph (c) of this clause shall be deemed to grant to the Government rights in any invention other than a subject invention.

(d) *Minimum rights to the Contractor.* (1) The Contractor is hereby granted a revocable, nonexclusive, paid-up license in each patent application filed in any country on a subject invention and any resulting patent in which the Government obtains title, unless the

Contractor fails to disclose the subject invention within the times specified in paragraph (e)(2) of this clause. The Contractor's license extends to any of its domestic subsidiaries and affiliates within the corporate structure of which the Contractor is a part, and includes the right to grant sublicenses to the extent the Contractor was legally obligated to do so at contract award. The license is transferable only with the written approval of the agency except when transferred to the successor of that part of the Contractor's business to which the subject invention pertains.

(2) The Contractor's license may be revoked or modified by the agency to the extent necessary to achieve expeditious practical application of the subject invention in a particular country in accordance with the procedures in FAR 27.302(i)(2) and 27.304-1(f).

(3) When the Government elects not to apply for a patent in any foreign country, the Contractor retains rights in that foreign country to apply for a patent, subject to the Government's rights in paragraph (c)(1) of this clause.

(e) *Invention identification, disclosures, and reports.* (1) The Contractor shall establish and maintain active and effective procedures to educate its employees in order to assure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters. The procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show the procedures for identifying and disclosing subject inventions are followed. Upon request, the Contractor shall furnish the Contracting Officer a description of these procedures for evaluation and for a determination as to their effectiveness.

(2) The Contractor shall disclose in writing each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters or, if earlier, within 6 months after the Contractor becomes aware that a subject invention has been made, but in any event before any on sale (*i.e.*, sale or offer for sale), public use, or publication of the subject invention known to the Contractor. The disclosure shall identify the contract under which the subject invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding of the subject invention. The disclosure shall also identify any publication, on sale, or public use of the subject invention and whether a manuscript describing the subject invention has been submitted for publication and, if so, whether it has been accepted for publication. In addition, after disclosure to the agency, the Contractor shall promptly notify the Contracting Officer of the acceptance of any manuscript describing the subject invention for publication and any on sale or public use.

(3) The Contractor shall furnish the Contracting Officer the following:

(i) Interim reports every 12 months (or a longer period as may be specified by the

Contracting Officer) from the date of the contract, listing subject inventions during that period, and stating that all subject inventions have been disclosed (or that there are none) and that the procedures required by paragraph (e)(1) of this clause have been followed.

(ii) A final report, within 3 months after completion of the contracted work, listing all subject inventions or stating that there were none, and listing all subcontracts at any tier containing a patent rights clause or stating that there were none.

(4) The Contractor shall require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in the Contractor's format each subject invention in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by paragraph (e)(2) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, as to the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(5) Subject to FAR 27.302(i), the Contractor agrees that the Government may duplicate and disclose subject invention disclosures and all other reports and papers furnished or required to be furnished pursuant to this clause.

(f) *Examination of records relating to inventions.* (1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this contract, have the right to examine any books (including laboratory notebooks), records, and documents of the Contractor relating to the conception or first actual reduction to practice of inventions in the same field of technology as the work under this contract to determine whether—

(i) Any inventions are subject inventions;

(ii) The Contractor has established and maintains the procedures required by paragraphs (e)(1) and (e)(4) of this clause; and

(iii) The Contractor and its inventors have complied with the procedures.

(2) The Contractor shall disclose to the Contracting Officer, for the determination of ownership rights, any unreported invention that the Contracting Officer believes may be a subject invention.

(3) Any examination of records under paragraph (f) of this clause will be subject to appropriate conditions to protect the confidentiality of the information involved.

(g) *Withholding of payment.* (*This paragraph does not apply to subcontracts.*)

(1) Any time before final payment under this contract, the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding \$50,000 or 5 percent of the amount of this contract, whichever is less, shall have been set aside if, in the Contracting Officer's opinion, the Contractor fails to—

(i) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to paragraph (e)(1) of this clause;

(ii) Disclose any subject invention pursuant to paragraph (e)(2) of this clause;

(iii) Deliver acceptable interim reports pursuant to paragraph (e)(3)(i) of this clause; or

(iv) Provide the information regarding subcontracts pursuant to paragraph (i)(4) of this clause.

(2) The Contracting Officer will withhold the reserve or balance until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) The Contracting Officer will not make final payment under this contract before the Contractor delivers to the Contracting Officer, as required by this clause, all disclosures of subject inventions, an acceptable final report, and all due confirmatory instruments.

(4) The Contracting Officer may decrease or increase the sums withheld up to the maximum authorized. The Contracting Officer will not withhold any amount under this paragraph while the amount specified by this paragraph is being withheld under other provisions of the contract. The withholding of any amount or the subsequent payment shall not be construed as a waiver of any Government rights.

(h) *Preference for United States industry.* Unless provided otherwise, neither the Contractor nor any assignee shall grant to any person the exclusive right to use or sell any subject invention in the United States unless the person agrees that any products embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement may be waived by the agency upon a showing by the Contractor or assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that, under the circumstances, domestic manufacture is not commercially feasible.

(i) *Subcontracts.* (1) The Contractor shall include the substance of the patent rights clause required by FAR Subpart 27.3 in all subcontracts for experimental, developmental, or research work. The prescribed patent rights clause must be modified to identify the parties as follows: references to the Government are not changed, and the subcontractor has all rights and obligations of the Contractor in the clause. The Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) In the event of a refusal by a prospective subcontractor to accept the clause, the Contractor—

(i) Shall promptly submit a written notice to the Contracting Officer setting forth the subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such subcontract without the written authorization of the Contracting Officer.

(3) In subcontracts at any tier, the agency, the subcontractor, and the Contractor agree that the mutual obligations of the parties created by the patent rights clause constitute a contract between the subcontractor and the agency with respect to those matters covered by this clause.

(4) The Contractor shall promptly notify the Contracting Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by identifying the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor shall furnish a copy of such subcontract, and, no more frequently than annually, a listing of the subcontracts that have been awarded.

(End of clause)

Alternate I (Jun 1989). As prescribed in 27.303(e) (4), add the following sentence at the end of paragraph (c)(1)(i) of the basic clause:

The license will include the right of the Government to sublicense foreign governments, their nationals, and international organizations pursuant to the following treaties or international agreements:

* *Contracting Officer complete with the names of applicable existing treaties or international agreements. The above language is not intended to apply to treaties or agreements that are in effect on the date of the award but are not listed.*

Alternate II (DEC 2007). As prescribed in 27.303(e) (5), add the following sentence at the end of paragraph (c)(1)(i) of the basic clause:

The agency reserves the right to unilaterally amend this contract to identify specific treaties or international agreements entered into by the Government before or after the effective date of this contract, and effectuate those license or other rights that are necessary for the Government to meet its obligations to foreign governments, their nationals, and international organizations under treaties or international agreements with respect to subject inventions made after the date of the amendment.

52.227-14 Rights in Data—General.

As prescribed in 27.409(b)(1), insert the following clause with any appropriate alternates:

RIGHTS IN DATA—GENERAL (DEC 2007)

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

Computer database or database means a collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software—(1) Means (i) Computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(ii) Recorded information comprising source code listings, design details,

algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled.

(2) Does not include computer databases or computer software documentation.

Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

Form, fit, and function data means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.

Limited rights means the rights of the Government in limited rights data as set forth in the Limited Rights Notice of paragraph (g)(3) if included in this clause.

Limited rights data means data, other than computer software, that embody trade secrets or are commercial or financial and confidential or privileged, to the extent that such data pertain to items, components, or processes developed at private expense, including minor modifications.

Restricted computer software means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is copyrighted computer software, including minor modifications of the computer software.

Restricted rights, as used in this clause, means the rights of the Government in restricted computer software, as set forth in a Restricted Rights Notice of paragraph (g) if included in this clause, or as otherwise may be provided in a collateral agreement incorporated in and made part of this contract, including minor modifications of such computer software.

Technical data, means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. The term includes recorded information of a scientific or technical nature that is included in computer databases (See 41 U.S.C. 403(8)).

Unlimited rights means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to

the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) *Allocation of rights.* (1) Except as provided in paragraph (c) of this clause, the Government shall have unlimited rights in—

(i) Data first produced in the performance of this contract;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract; and

(iv) All other data delivered under this contract unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph (g) of this clause.

(2) The Contractor shall have the right to—

(i) Assert copyright in data first produced in the performance of this contract to the extent provided in paragraph (c)(1) of this clause;

(ii) Use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, unless provided otherwise in paragraph (d) of this clause;

(iii) Substantiate the use of, add, or correct limited rights, restricted rights, or copyright notices and to take other appropriate action, in accordance with paragraphs (e) and (f) of this clause; and

(iv) Protect from unauthorized disclosure and use those data that are limited rights data or restricted computer software to the extent provided in paragraph (g) of this clause.

(c) *Copyright*—(1) *Data first produced in the performance of this contract.* (i) Unless provided otherwise in paragraph (d) of this clause, the Contractor may, without prior approval of the Contracting Officer, assert copyright in scientific and technical articles based on or containing data first produced in the performance of this contract and published in academic, technical or professional journals, symposia proceedings, or similar works. The prior, express written permission of the Contracting Officer is required to assert copyright in all other data first produced in the performance of this contract.

(ii) When authorized to assert copyright to the data, the Contractor shall affix the applicable copyright notices of 17 U.S.C. 401 or 402, and an acknowledgment of Government sponsorship (including contract number).

(iii) For data other than computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license in such copyrighted data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly by or on behalf of the Government. For computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license in such copyrighted computer software to reproduce, prepare derivative works, and perform publicly and

display publicly (but not to distribute copies to the public) by or on behalf of the Government.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without the prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract unless the Contractor—

(i) Identifies the data; and

(ii) Grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause or, if such data are restricted computer software, the Government shall acquire a copyright license as set forth in paragraph (g)(4) of this clause (if included in this contract) or as otherwise provided in a collateral agreement incorporated in or made part of this contract.

(3) *Removal of copyright notices.* The Government will not remove any authorized copyright notices placed on data pursuant to this paragraph (c), and will include such notices on all reproductions of the data.

(d) *Release, publication, and use of data.* The Contractor shall have the right to use, release to others, reproduce, distribute, or publish any data first produced or specifically used by the Contractor in the performance of this contract, except—

(1) As prohibited by Federal law or regulation (e.g., export control or national security laws or regulations);

(2) As expressly set forth in this contract; or

(3) If the Contractor receives or is given access to data necessary for the performance of this contract that contain restrictive markings, the Contractor shall treat the data in accordance with such markings unless specifically authorized otherwise in writing by the Contracting Officer.

(e) *Unauthorized marking of data.* (1) Notwithstanding any other provisions of this contract concerning inspection or acceptance, if any data delivered under this contract are marked with the notices specified in paragraph (g)(3) or (g)(4) if included in this clause, and use of the notices is not authorized by this clause, or if the data bears any other restrictive or limiting markings not authorized by this contract, the Contracting Officer may at any time either return the data to the Contractor, or cancel or ignore the markings. However, pursuant to 41 U.S.C. 253d, the following procedures shall apply prior to canceling or ignoring the markings.

(i) The Contracting Officer will make written inquiry to the Contractor affording the Contractor 60 days from receipt of the inquiry to provide written justification to substantiate the propriety of the markings;

(ii) If the Contractor fails to respond or fails to provide written justification to substantiate the propriety of the markings within the 60-day period (or a longer time approved in writing by the Contracting Officer for good cause shown), the Government shall have the right to cancel or ignore the markings at any time after said period and the data will no longer be made subject to any disclosure prohibitions.

(iii) If the Contractor provides written justification to substantiate the propriety of

the markings within the period set in paragraph (e)(1)(i) of this clause, the Contracting Officer will consider such written justification and determine whether or not the markings are to be cancelled or ignored. If the Contracting Officer determines that the markings are authorized, the Contractor will be so notified in writing. If the Contracting Officer determines, with concurrence of the head of the contracting activity, that the markings are not authorized, the Contracting Officer will furnish the Contractor a written determination, which determination will become the final agency decision regarding the appropriateness of the markings unless the Contractor files suit in a court of competent jurisdiction within 90 days of receipt of the Contracting Officer's decision. The Government will continue to abide by the markings under this paragraph (e)(1)(iii) until final resolution of the matter either by the Contracting Officer's determination becoming final (in which instance the Government will thereafter have the right to cancel or ignore the markings at any time and the data will no longer be made subject to any disclosure prohibitions), or by final disposition of the matter by court decision if suit is filed.

(2) The time limits in the procedures set forth in paragraph (e)(1) of this clause may be modified in accordance with agency regulations implementing the Freedom of Information Act (5 U.S.C. 552) if necessary to respond to a request thereunder.

(3) Except to the extent the Government's action occurs as the result of final disposition of the matter by a court of competent jurisdiction, the Contractor is not precluded by paragraph (e) of the clause from bringing a claim, in accordance with the Disputes clause of this contract, that may arise as the result of the Government removing or ignoring authorized markings on data delivered under this contract.

(f) *Omitted or incorrect markings.* (1) Data delivered to the Government without any restrictive markings shall be deemed to have been furnished with unlimited rights. The Government is not liable for the disclosure, use, or reproduction of such data.

(2) If the unmarked data has not been disclosed without restriction outside the Government, the Contractor may request, within 6 months (or a longer time approved by the Contracting Officer in writing for good cause shown) after delivery of the data, permission to have authorized notices placed on the data at the Contractor's expense. The Contracting Officer may agree to do so if the Contractor—

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability for the disclosure, use, or reproduction of any data made prior to the addition of the notice or resulting from the omission of the notice.

(3) If data has been marked with an incorrect notice, the Contracting Officer may—

(i) Permit correction of the notice at the Contractor's expense if the Contractor

identifies the data and demonstrates that the correct notice is authorized; or

(ii) Correct any incorrect notices.

(g) *Protection of limited rights data and restricted computer software.* (1) The Contractor may withhold from delivery qualifying limited rights data or restricted computer software that are not data identified in paragraphs (b)(1)(i), (ii), and (iii) of this clause. As a condition to this withholding, the Contractor shall—

(i) Identify the data being withheld; and

(ii) Furnish form, fit, and function data instead.

(2) Limited rights data that are formatted as a computer database for delivery to the Government shall be treated as limited rights data and not restricted computer software.

(3) [Reserved]

(h) *Subcontracting.* The Contractor shall obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government those rights, the Contractor shall promptly notify the Contracting Officer of the refusal and shall not proceed with the subcontract award without authorization in writing from the Contracting Officer.

(i) *Relationship to patents or other rights.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

(End of clause)

Alternate I (DEC 2007). As prescribed in 27.409(b)(2), substitute the following definition for *limited rights data* in paragraph (a) of the basic clause:

Limited rights data means data, other than computer software, developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

Alternate II (DEC 2007). As prescribed in 27.409(b)(3), insert the following paragraph (g)(3) in the basic clause:

(g)(3) Notwithstanding paragraph (g)(1) of this clause, the contract may identify and specify the delivery of limited rights data, or the Contracting Officer may require by written request the delivery of limited rights data that has been withheld or would otherwise be entitled to be withheld. If delivery of that data is required, the Contractor shall affix the following "Limited Rights Notice" to the data and the Government will treat the data, subject to the provisions of paragraphs (e) and (f) of this clause, in accordance with the notice:

LIMITED RIGHTS NOTICE (DEC 2007)

(a) These data are submitted with limited rights under Government Contract No.

_____, (and subcontract _____, if appropriate). These data may be reproduced and used by the Government with the express limitation that they will not, without written permission of the Contractor, be used for purposes of manufacture nor disclosed outside the Government; except that the Government may disclose these data outside the Government for the following purposes, if any; provided that the Government makes

such disclosure subject to prohibition against further use and disclosure: [Agencies may list additional purposes as set forth in 27.404–2(c)(1) or if none, so state.]

(b) This notice shall be marked on any reproduction of these data, in whole or in part.

(End of notice)

Alternate III (DEC 2007). As prescribed in 27.409(b)(4), insert the following paragraph (g)(4) in the basic clause:

(g)(4)(i) Notwithstanding paragraph (g)(1) of this clause, the contract may identify and specify the delivery of restricted computer software, or the Contracting Officer may require by written request the delivery of restricted computer software that has been withheld or would otherwise be entitled to be withheld. If delivery of that computer software is required, the Contractor shall affix the following “Restricted Rights Notice” to the computer software and the Government will treat the computer software, subject to paragraphs (e) and (f) of this clause, in accordance with the notice:

RESTRICTED RIGHTS NOTICE (DEC 2007)

(a) This computer software is submitted with restricted rights under Government Contract No. _____ (and subcontract _____, if appropriate). It may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b) of this notice or as otherwise expressly stated in the contract.

(b) This computer software may be—

(1) Used or copied for use with the computer(s) for which it was acquired, including use at any Government installation to which the computer(s) may be transferred;

(2) Used or copied for use with a backup computer if any computer for which it was acquired is inoperative;

(3) Reproduced for safekeeping (archives) or backup purposes;

(4) Modified, adapted, or combined with other computer software, *provided* that the modified, adapted, or combined portions of the derivative software incorporating any of the delivered, restricted computer software shall be subject to the same restricted rights;

(5) Disclosed to and reproduced for use by support service Contractors or their subcontractors in accordance with paragraphs (b)(1) through (4) of this notice; and

(6) Used or copied for use with a replacement computer.

(c) Notwithstanding the foregoing, if this computer software is copyrighted computer software, it is licensed to the Government with the minimum rights set forth in paragraph (b) of this notice.

(d) Any other rights or limitations regarding the use, duplication, or disclosure of this computer software are to be expressly stated in, or incorporated in, the contract.

(e) This notice shall be marked on any reproduction of this computer software, in whole or in part.

(End of notice)

(ii) Where it is impractical to include the Restricted Rights Notice on restricted computer software, the following short-form notice may be used instead:

RESTRICTED RIGHTS NOTICE SHORT FORM (Jun 1987)

Use, reproduction, or disclosure is subject to restrictions set forth in Contract No. _____

(and subcontract, if appropriate) with _____ (name of Contractor and subcontractor).

(End of notice)

(iii) If restricted computer software is delivered with the copyright notice of 17 U.S.C. 401, it will be presumed to be licensed to the Government without disclosure prohibitions, with the minimum rights set forth in paragraph (b) of this clause.

Alternate IV (DEC 2007). As prescribed in 27.409(b)(5), substitute the following paragraph (c)(1) for paragraph (c)(1) of the basic clause:

(c) *Copyright—(1) Data first produced in the performance of the contract.* Except as otherwise specifically provided in this contract, the Contractor may assert copyright in any data first produced in the performance of this contract. When asserting copyright, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402, and an acknowledgment of Government sponsorship (including contract number), to the data when such data are delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. For data other than computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all such data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Contractor grants to the Government and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all such computer software to reproduce, prepare derivative works, and perform publicly and display publicly (but not to distribute copies to the public), by or on behalf of the Government.

Alternate V (DEC 2007). As prescribed in 27.409(b)(6), add the following paragraph (j) to the basic clause:

(j) The Contractor agrees, except as may be otherwise specified in this contract for specific data deliverables listed as not subject to this paragraph, that the Contracting Officer may, up to three years after acceptance of all deliverables under this contract, inspect at the Contractor's facility any data withheld pursuant to paragraph (g)(1) of this clause, for purposes of verifying the Contractor's assertion of limited rights or restricted rights status of the data or for evaluating work performance. When the Contractor whose data are to be inspected demonstrates to the Contracting Officer that there would be a possible conflict of interest if a particular representative made the inspection, the Contracting Officer shall designate an alternate inspector.

52.227–15 Representation of Limited Rights Data and Restricted Computer Software.

As prescribed in 27.409(c), insert the following provision:

REPRESENTATION OF LIMITED RIGHTS DATA AND RESTRICTED COMPUTER SOFTWARE (DEC 2007)

(a) This solicitation sets forth the Government's known delivery requirements for data (as defined in the clause at 52.227–14, Rights in Data—General). Any resulting contract may also provide the Government the option to order additional data under the Additional Data Requirements clause at 52.227–16, if included in the contract. Any data delivered under the resulting contract will be subject to the Rights in Data—General clause at 52.227–14 included in this contract. Under the latter clause, a Contractor may withhold from delivery data that qualify as limited rights data or restricted computer software, and deliver form, fit, and function data instead. The latter clause also may be used with its Alternates II and/or III to obtain delivery of limited rights data or restricted computer software, marked with limited rights or restricted rights notices, as appropriate. In addition, use of Alternate V with this latter clause provides the Government the right to inspect such data at the Contractor's facility.

(b) By completing the remainder of this paragraph, the offeror represents that it has reviewed the requirements for the delivery of technical data or computer software and states [offeror check appropriate block]—

() None of the data proposed for fulfilling the data delivery requirements qualifies as limited rights data or restricted computer software; or

() Data proposed for fulfilling the data delivery requirements qualify as limited rights data or restricted computer software and are identified as follows:

(c) Any identification of limited rights data or restricted computer software in the offeror's response is not determinative of the status of the data should a contract be awarded to the offeror.

(End of provision)

52.227–16 [Amended]

■ 22. Amend section 52.227–16 by removing from the introductory paragraph “27.409(h)” and adding “27.409(d)” in its place.

■ 23. Revise section 52.227–17 to read as follows:

52.227–17 Rights in Data—Special Works.

As prescribed in 27.409(e), insert the following clause:

RIGHTS IN DATA—SPECIAL WORKS (DEC 2007)

(a) *Definitions.* As used in this clause—
Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing, or management information.

Unlimited rights means the rights of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

(b) *Allocation of Rights.* (1) The Government shall have—

(i) Unlimited rights in all data delivered under this contract, and in all data first produced in the performance of this contract, except as provided in paragraph (c) of this clause.

(ii) The right to limit assertion of copyright in data first produced in the performance of this contract, and to obtain assignment of copyright in that data, in accordance with paragraph (c)(1) of this clause.

(iii) The right to limit the release and use of certain data in accordance with paragraph (d) of this clause.

(2) The Contractor shall have, to the extent permission is granted in accordance with paragraph (c)(1) of this clause, the right to assert claim to copyright subsisting in data first produced in the performance of this contract.

(c) *Copyright*—(1) *Data first produced in the performance of this contract.* (i) The Contractor shall not assert or authorize others to assert any claim to copyright subsisting in any data first produced in the performance of this contract without prior written permission of the Contracting Officer. When copyright is asserted, the Contractor shall affix the appropriate copyright notice of 17 U.S.C. 401 or 402 and acknowledgment of Government sponsorship (including contract number) to the data when delivered to the Government, as well as when the data are published or deposited for registration as a published work in the U.S. Copyright Office. The Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license for all delivered data to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government.

(ii) If the Government desires to obtain copyright in data first produced in the performance of this contract and permission has not been granted as set forth in paragraph (c)(1)(i) of this clause, the Contracting Officer shall direct the Contractor to assign (with or without registration), or obtain the assignment of, the copyright to the Government or its designated assignee.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data not first produced in the performance of this contract and that contain the copyright notice of 17 U.S.C. 401 or 402, unless the Contractor identifies such data and grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause.

(d) *Release and use restrictions.* Except as otherwise specifically provided for in this contract, the Contractor shall not use, release, reproduce, distribute, or publish any data first produced in the performance of this contract, nor authorize others to do so, without written permission of the Contracting Officer.

(e) *Indemnity.* The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including

costs and expenses, incurred as the result of the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication, or use of any data furnished under this contract; or any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense of the claim or suit, and obtains the Contractor's consent to the settlement of any claim or suit other than as required by final decree of a court of competent jurisdiction; and these provisions do not apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

(End of clause)

52.227-18 [Amended]

■ 24. Amend section 52.227-18 by—

■ a. Removing from the introductory paragraph “27.409(j)” and adding “27.409(f)” in its place;

■ b. Revising the date of the clause to read “(DEC 2007)”; and

■ c. Removing from paragraph (b) “thereof” and adding “of the claim or suit” in its place, and removing “suit or claim” and adding “claim or suit” in its place.

■ 25. Revise sections 52.227-19 thru 52.227-21 to read as follows:

52.227-19 Commercial Computer Software License.

As prescribed in 27.409(g), insert the following clause:

COMMERCIAL COMPUTER SOFTWARE LICENSE (DEC 2007)

(a) Notwithstanding any contrary provisions contained in the Contractor's standard commercial license or lease agreement, the Contractor agrees that the Government will have the rights that are set forth in paragraph (b) of this clause to use, duplicate or disclose any commercial computer software delivered under this contract. The terms and provisions of this contract shall comply with Federal laws and the Federal Acquisition Regulation.

(b)(1) The commercial computer software delivered under this contract may not be used, reproduced, or disclosed by the Government except as provided in paragraph (b)(2) of this clause or as expressly stated otherwise in this contract.

(2) The commercial computer software may be—

(i) Used or copied for use with the computer(s) for which it was acquired, including use at any Government installation to which the computer(s) may be transferred;

(ii) Used or copied for use with a backup computer if any computer for which it was acquired is inoperative;

(iii) Reproduced for safekeeping (archives) or backup purposes;

(iv) Modified, adapted, or combined with other computer software, provided that the modified, adapted, or combined portions of

the derivative software incorporating any of the delivered, commercial computer software shall be subject to same restrictions set forth in this contract;

(v) Disclosed to and reproduced for use by support service Contractors or their subcontractors, subject to the same restrictions set forth in this contract; and

(vi) Used or copied for use with a replacement computer.

(3) If the commercial computer software is otherwise available without disclosure restrictions, the Contractor licenses it to the Government without disclosure restrictions.

(c) The Contractor shall affix a notice substantially as follows to any commercial computer software delivered under this contract:
Notice—Notwithstanding any other lease or license agreement that may pertain to, or accompany the delivery of, this computer software, the rights of the Government regarding its use, reproduction and disclosure are as set forth in Government Contract No. _____.

(End of clause)

52.227-20 Rights in Data—SBIR Program.

As prescribed in 27.409(h), insert the following clause:

RIGHTS IN DATA—SBIR PROGRAM (DEC 2007)

(a) *Definitions.* As used in this clause—
Computer database or database means a collection of recorded information in a form capable of, and for the purpose of, being stored in, processed, and operated on by a computer. The term does not include computer software.

Computer software—(1) Means (i) Computer programs that comprise a series of instructions, rules, routines, or statements, regardless of the media in which recorded, that allow or cause a computer to perform a specific operation or series of operations; and

(ii) Recorded information comprising source code listings, design details, algorithms, processes, flow charts, formulas, and related material that would enable the computer program to be produced, created, or compiled.

(2) Does not include computer databases or computer software documentation.

Computer software documentation means owner's manuals, user's manuals, installation instructions, operating instructions, and other similar items, regardless of storage medium, that explain the capabilities of the computer software or provide instructions for using the software.

Data means recorded information, regardless of form or the media on which it may be recorded. The term includes technical data and computer software. The term does not include information incidental to contract administration, such as financial, administrative, cost or pricing or management information.

Form, fit, and function data means data relating to items, components, or processes that are sufficient to enable physical and functional interchangeability, and data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements. For computer software it

means data identifying source, functional characteristics, and performance requirements but specifically excludes the source code, algorithms, processes, formulas, and flow charts of the software.

Limited rights data means data (other than computer software) developed at private expense that embody trade secrets or are commercial or financial and confidential or privileged.

Restricted computer software means computer software developed at private expense and that is a trade secret, is commercial or financial and confidential or privileged, or is copyrighted computer software, including minor modifications of the computer software.

SBIR data means data first produced by a Contractor that is a small business concern in performance of a small business innovation research contract issued under the authority of 15 U.S.C. 638, which data are not generally known, and which data without obligation as to its confidentiality have not been made available to others by the Contractor or are not already available to the Government.

SBIR rights means the rights in SBIR data set forth in the SBIR Rights Notice of paragraph (d) of this clause.

Technical data means recorded information (regardless of the form or method of the recording) of a scientific or technical nature (including computer databases and computer software documentation). This term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. The term includes recorded information of a scientific or technical nature that is included in computer databases. (See 41 U.S.C. 403(8).)

Unlimited rights means the right of the Government to use, disclose, reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, in any manner and for any purpose whatsoever, and to have or permit others to do so.

(b) *Allocation of rights.* (1) Except as provided in paragraph (c) of this clause regarding copyright, the Government shall have unlimited rights in—

(i) Data specifically identified in this contract as data to be delivered without restriction;

(ii) Form, fit, and function data delivered under this contract;

(iii) Data delivered under this contract (except for restricted computer software) that constitute manuals or instructional and training material for installation, operation, or routine maintenance and repair of items, components, or processes delivered or furnished for use under this contract; and

(iv) All other data delivered under this contract unless provided otherwise for SBIR data in accordance with paragraph (d) of this clause or for limited rights data or restricted computer software in accordance with paragraph (f) of this clause.

(2) The Contractor shall have the right to—

(i) Assert copyright in data first produced in the performance of this contract to the extent provided in paragraph (c)(1) of this clause;

(ii) Protect SBIR rights in SBIR data delivered under this contract in the manner and to the extent provided in paragraph (d) of this clause;

(iii) Substantiate use of, add, or correct SBIR rights or copyright notices and to take other appropriate action, in accordance with paragraph (e) of this clause; and

(iv) Withhold from delivery those data which are limited rights data or restricted computer software to the extent provided in paragraph (f) of this clause.

(c) *Copyright—(1) Data first produced in the performance of this contract.* (i) Except as otherwise specifically provided in this contract, the Contractor may assert copyright subsisting in any data first produced in the performance of this contract.

(ii) When asserting copyright, the Contractor shall affix the applicable copyright notice of 17 U.S.C. 401 or 402 and an acknowledgment of Government sponsorship (including contract number).

(iii) For data other than computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, distribute copies to the public, and perform publicly and display publicly, by or on behalf of the Government. For computer software, the Contractor grants to the Government, and others acting on its behalf, a paid-up, nonexclusive, irrevocable, worldwide license in such copyrighted computer software to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government.

(2) *Data not first produced in the performance of this contract.* The Contractor shall not, without prior written permission of the Contracting Officer, incorporate in data delivered under this contract any data that are not first produced in the performance of this contract unless the Contractor (i) identifies such data and (ii) grants to the Government, or acquires on its behalf, a license of the same scope as set forth in paragraph (c)(1) of this clause.

(3) *Removal of copyright notices.* The Government will not remove any copyright notices placed on data pursuant to this paragraph (c), and will include such notices on all reproductions of the data.

(d) *Rights to SBIR data.* (1) The Contractor is authorized to affix the following “SBIR Rights Notice” to SBIR data delivered under this contract and the Government will treat the data, subject to the provisions of paragraphs (e) and (f) of this clause, in accordance with the notice:

SBIR RIGHTS NOTICE (DEC 2007)

These SBIR data are furnished with SBIR rights under Contract No. _____ (and subcontract _____, if appropriate). For a period of 4 years, unless extended in accordance with FAR 27.409(h), after acceptance of all items to be delivered under this contract, the Government will use these data for Government purposes only, and they shall not be disclosed outside the Government (including disclosure for procurement purposes) during such period without permission of the Contractor, except that, subject to the foregoing use and

disclosure prohibitions, these data may be disclosed for use by support Contractors. After the protection period, the Government has a paid-up license to use, and to authorize others to use on its behalf, these data for Government purposes, but is relieved of all disclosure prohibitions and assumes no liability for unauthorized use of these data by third parties. This notice shall be affixed to any reproductions of these data, in whole or in part.

(End of notice)

(2) The Government's sole obligation with respect to any SBIR data shall be as set forth in this paragraph (d).

(e) *Omitted or incorrect markings.* (1) Data delivered to the Government without any notice authorized by paragraph (d) of this clause shall be deemed to have been furnished with unlimited rights. The Government assumes no liability for the disclosure, use, or reproduction of such data.

(2) If the unmarked data has not been disclosed without restriction outside the Government, the Contractor may request, within 6 months (or a longer time approved by the Contracting Officer in writing for good cause shown) after delivery of the data, permission to have authorized notices placed on the data at the Contractor's expense, and the Contracting Officer may agree to do so if the Contractor—

(i) Identifies the data to which the omitted notice is to be applied;

(ii) Demonstrates that the omission of the notice was inadvertent;

(iii) Establishes that the use of the proposed notice is authorized; and

(iv) Acknowledges that the Government has no liability with respect to the disclosure or use of any such data made prior to the addition of the notice or resulting from the omission of the notice.

(3) If the data has been marked with an incorrect notice, the Contracting Officer may—

(i) Permit correction of the notice at the Contractor's expense, if the Contractor identifies the data and demonstrates that the correct notice is authorized, or

(ii) Correct any incorrect notices.

(f) *Protection of limited rights data and restricted computer software.* The Contractor may withhold from delivery qualifying limited rights data and restricted computer software that are not identified in paragraphs (b)(1)(i), (ii), and (iii) of this clause. As a condition to this withholding, the Contractor shall identify the data being withheld, and furnish form, fit, and function data instead.

(g) *Subcontracting.* The Contractor shall obtain from its subcontractors all data and rights therein necessary to fulfill the Contractor's obligations to the Government under this contract. If a subcontractor refuses to accept terms affording the Government those rights, the Contractor shall promptly notify the Contracting Officer of the refusal and not proceed with the subcontract award without further authorization in writing from the Contracting Officer.

(h) *Relationship to patents.* Nothing contained in this clause shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other right otherwise granted to the Government.

(End of clause)

52.227–21 Technical Data Declaration, Revision, and Withholding of Payment—Major Systems.

As prescribed in 27.409(j), insert the following clause:

TECHNICAL DATA DECLARATION, REVISION, AND WITHHOLDING OF PAYMENT—MAJOR SYSTEMS (DEC 2007)

(a) *Scope of declaration.* The Contractor shall provide, in accordance with 41 U.S.C. 418a (d)(7), the following declaration with respect to all technical data that relate to a major system and that are delivered or required to be delivered under this contract or that are delivered within 3 years after acceptance of all items (other than technical data) delivered under this contract unless a different period is set forth in the contract. The Contracting Officer may release the Contractor from all or part of the requirements of this clause for specifically identified technical data items at any time during the period covered by this clause.

(b) *Technical data declaration.* (1) All technical data that are subject to this clause shall be accompanied by the following declaration upon delivery:

Technical Data Declaration (Jan 1997)

The Contractor, _____, hereby declares that, to the best of its knowledge and belief, the technical data delivered herewith under Government contract No.

_____ (and subcontract _____, if appropriate) are complete, accurate, and comply with the requirements of the contract concerning such technical data.

(End of declaration)

(2) The Government may, at any time during the period covered by this clause, direct correction of any deficiencies that are not in compliance with contract requirements. The corrections shall be made at the expense of the Contractor. Unauthorized markings on data shall not be considered a deficiency for the purpose of this clause, but will be treated in accordance with paragraph (e) of the Rights in Data—General clause included in this contract.

(c) *Technical data revision.* The Contractor also shall, at the request of the Contracting Officer, revise technical data that are subject to this clause to reflect engineering design changes made during the performance of this contract and affecting the form, fit, and function of any item (other than technical data) delivered under this contract. The Contractor may submit a request for an equitable adjustment to the terms and conditions of this contract for any revisions to technical data made pursuant to this paragraph.

(d) *Withholding of payment.* (1) At any time before final payment under this contract the Contracting Officer may withhold payment as a reserve up to an amount not exceeding \$100,000 or 5 percent of the amount of this contract, whichever is less, if the Contractor fails to—

(i) Make timely delivery of the technical data;

(ii) Provide the declaration required by paragraph (b)(1) of this clause;

(iii) Make the corrections required by paragraph (b)(2) of this clause; or

(iv) Make revisions requested under paragraph (c) of this clause.

(2) The Contracting Officer may withhold the reserve until the Contractor has complied with the direction or requests of the Contracting Officer or determines that the deficiencies relating to delivered data, arose out of causes beyond the control of the Contractor and without the fault or negligence of the Contractor.

(3) The withholding of any reserve under this clause, or the subsequent payment of the reserve, shall not be construed as a waiver of any Government rights.

(End of clause)

52.227–22 [Amended]

■ 26. Amend section 52.227–22 by removing from the introductory paragraph “27.409(r)” and adding “27.409(k)” in its place.

52.227–23 [Amended]

■ 27. Amend section 52.227–23 by removing from the introductory paragraph “27.409(s)” and adding “27.409(l)” in its place.

[FR Doc. 07–5475 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 5, and 13

[FAC 2005–21; FAR Case 2006–015; Item IV; Docket 2007–0001; Sequence 10]

RIN 9000–AK68

Federal Acquisition Regulation; FAR Case 2006–015, Federal Computer Network (FACNET) Architecture

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to delete references to FACNET.

DATES: *Effective Date:* December 7, 2007

FOR FURTHER INFORMATION CONTACT Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755.

Please cite FAC 2005–21, FAR case 2006–015.

SUPPLEMENTARY INFORMATION:

A. Background

The Councils published a proposed rule with request for comments in the **Federal Register** at 72 FR 4675 on February 1, 2007, to amend the FAR to remove FACNET references and provide the opportunity to recognize the evolution of alternative technologies and processes, etc., that Federal agencies are using and will use to satisfy their acquisition needs without removing the use of FACNET for Federal agencies that may use the system. The comment period closed April 2, 2007. No public comments were received on the rule. The Councils have agreed to adopt the proposed rule as final without change.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

DoD, GSA, and NASA certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule addresses the deletion of a term used to describe a system for the electronic data interchange of acquisition information between the private sector and the Federal Government without removing the use of the system. The rule does not present new requirements that impose a burden on contractors. No comments were received with regard to an impact on small business.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 2, 4, 5, and 13.

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 5, and 13 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 5, and 13 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

■ 2. Amend section 2.101(b)(2) by removing the definition “Federal Acquisition Computer (Network FACNET) Architecture.”

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.502 by revising paragraph (b)(2) to read as follows:

4.502 Policy.

* * * * *

(b) * * *

(2) Are implemented only after considering the full or partial use of existing infrastructures;

* * * * *

PART 5—PUBLICIZING CONTRACT ACTIONS

5.101 [Amended]

■ 4. Amend section 5.101 by removing from paragraph (a)(2)(ii) the words “or Federal Acquisition Computer Network (FACNET)”.

■ 5. Amend section 5.102 by revising paragraph (a)(3) to read as follows:

5.102 Availability of solicitations.

(a) * * *

(3) The contracting officer must ensure that solicitations transmitted using electronic commerce are forwarded to the GPE to satisfy the requirements of paragraph (a)(1) of this section.

* * * * *

■ 6. Amend section 5.201 by revising paragraph (b)(2) to read as follows:

5.201 General.

* * * * *

(b) * * *

(2) When transmitting notices using electronic commerce, contracting officers must ensure the notice is forwarded to the GPE.

* * * * *

5.203 [Amended]

■ 7. Amend section 5.203 in paragraph (b) by removing the words “via FACNET or for which” and adding the word “where” in its place.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

13.104 [Amended]

■ 8. Amend section 13.104 by removing from paragraph (b) the words “using either FACNET or”.

■ 9. Amend section 13.105 by revising paragraph (a) to read as follows:

13.105 Synopsis and posting requirements.

(a) The contracting officer must comply with the public display and synopsis requirements of 5.101 and 5.203 unless an exception in 5.202 applies.

* * * * *

■ 10. Amend section 13.106–1 by revising paragraph (f) to read as follows:

13.106–1 Soliciting competition.

* * * * *

(f) *Inquiries.* An agency should respond to inquiries received through any medium (including electronic commerce) if doing so would not interfere with the efficient conduct of the acquisition.

13.106–2 [Amended]

■ 11. Amend section 13.106–2 by removing from paragraph (b)(4) introductory text the words “FACNET or”.

13.106–3 [Amended]

■ 12. Amend section 13.106–3 by removing from paragraph (c) the words “FACNET or”.

13.307 [Amended]

■ 13. Amend section 13.307 by removing from paragraph (b)(1) “via FACNET,” and the comma after “electronically”.

[FR Doc. 07–5479 Filed 11–6–07; 8:45 am]

BILLING CODE 6820-EP-S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 15, 17, 22, and 52

[FAC 2005–21; FAR Case 2001–004; Item V; Docket 2007–0001, Sequence 6]

RIN 9000–AK82

Federal Acquisition Regulation; FAR Case 2001–004, Exemption of Certain Service Contracts from the Service Contract Act (SCA)

AGENCIES: Department of Defense (DoD), General Services Administration (GSA),

and National Aeronautics and Space Administration (NASA).

ACTION: Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to revise the current SCA exemption and to add a SCA exemption for contracts for certain additional services that meet specific criteria.

DATES: *Effective Date:* November 7, 2007.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before January 7, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–21, FAR case 2001–004, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. To search for any document, first select under “Step 1,” “Documents with an Open Comment Period” and select under “Optional Step 2,” “Federal Acquisition Regulation” as the agency of choice. Under “Optional Step 3,” select “Rules”. Under “Optional Step 4,” from the drop down list, select “Document Title” and type the FAR case number “2001–004”. Click the “Submit” button. Please include your name and company name (if any) inside the document.

You may also search for any document by clicking on the “Search for Documents” tab at the top of the screen. Select from the agency field “Federal Acquisition Regulation”, and type “2001–004” in the “Document Title” field. Select the “Submit” button.

• Fax: 202–501–4067.

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

Instructions: Please submit comments only and cite FAC 2005–21, FAR case 2001–004, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>. Please include your name and company name (if any) inside the document.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501–3775 for clarification of content. Please cite FAC 2005–21, FAR case 2001–004. For information pertaining to status or publication

schedules, contact the FAR Secretariat at (202) 501-4755.

SUPPLEMENTARY INFORMATION:

A. Background

On January 18, 2001, the Wage and Hour Division of the U.S. Department of Labor's Employment Standards Administration, issued a final rule amending the regulations at 29 CFR part 4 to exempt certain contracts for services meeting specific criteria from coverage under the SCA (66 FR 5327). The Councils opened FAR case 2001-004 to implement the Department of Labor (DoL) rule.

The FAR currently exempts contracts (or subcontracts) principally for the maintenance, calibration, or repair of certain equipment if—

- The items of equipment are items which are used regularly for other than Government purposes and are sold or traded by the contractor in substantial quantities to the general public in the course of normal business operations.
- The contract services are furnished at prices which are, or are based on, established catalog or market prices (see 29 CFR 4.123(e)(1)(ii)(B)).
- The contractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for equivalent employees servicing the same equipment of commercial customers.
- The contractor certifies in the contract that it meets these criteria.

This interim FAR rule incorporates slight revisions to this current exemption for consistency with the current DoL regulations and clarification of appropriate course of action for the contracting officer.

The interim FAR rule does not refer to these services as commercial services, because the specified criteria are not exactly the same as the FAR definition of "commercial item." Rather than redefining "commercial item," this rule imposes the DoL criteria and does not utilize the term "commercial services."

In addition to this first category of service contracts, in order to implement the new DoL regulations, the FAR interim rule establishes a new category of exemption for contracts for certain services that includes the following:

- Automobile or other vehicle (*e.g.*, aircraft) maintenance services (other than contracts or subcontracts to operate a Government motor pool or similar facility).
- Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).

- Hotel/motel services for conferences, including lodging and/or meals, that are part of the contract or subcontract for the conference (which must not include ongoing contracts for lodging on an as needed or continuing basis).

- Maintenance, calibration, repair, and/or installation (where the installation is not subject to the Davis-Bacon Act, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis.

- Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services).

- Real estate services, including real property appraisal services, related to housing Federal agencies or disposing of real property owned by the Government.

- Relocation services, including services of real estate brokers and appraisers to assist Federal employees or military personnel in buying and selling homes (which shall not include actual moving or storage of household goods and related services).

In order for these contracts for services to be exempt, the contract must meet all the criteria for the other services in the first category (substituting "services" for "item of equipment" in the first criterion, and removing other specific references to "equipment" and "manufacturer"), but the contract must also meet the following criteria:

- The services under the contract (or subcontract) will be awarded on a sole-source basis or the contractor will be selected for award based on other factors in addition to price or cost, with the combination of other factors at least as important as price or cost in selecting the contractor.

- Each service employee who will perform the services under the contract (or subcontract) will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract (or subcontract).

- The contracting officer (or contractor with respect to a subcontract) determines in advance, based on the nature of the contract (or subcontract) requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the conditions. If the services are currently being performed under contract (or

subcontract), the contracting officer (or contractor with respect to a subcontract) shall consider the practices of the existing contractor (or subcontractor) in making a determination regarding the conditions.

- The apparent successful offeror certifies, the contracting officer has no reason to doubt the certification, and the contracting officer determines that the same certification is obtained from substantially all other offerors that are—

- In the competitive range, if discussions are to be conducted (see FAR 15.306)(c); or
- Considered responsive, if award is to be made without discussions (see FAR 15.306(a)).

Council representatives discussed with DoL the implementation of the DoL rule for these contracts for services at the point of receipt of offers. The FAR rule attempts to minimize the occurrence of the situation in which it will be necessary to revise the solicitation after receipt of offers to remove the exemption provision and require use of the SCA clauses, even though the apparent successful offeror certified to criteria for the exemption. The FAR rule uses the term "substantially all" to indicate that there could be a slightly different interpretation of the phrase "all or nearly all" than at the beginning of the process. DoL concurs that the contracting officer will have the discretion to interpret this term, as long as the intention reflected in the preamble to the SCA regulations (66 FR 5327) controls the contracting officer's exercise of discretion. DoL also concurs that it is not necessary to consider offerors that did not certify if these offerors were not in the competitive range or not responsive. Therefore, the FAR rule adds this condition when considering whether substantially all offerors have certified.

The exemption for the second category of contracts for services does not apply to solicitations and contracts (subcontracts)—

- Awarded under the Javits-Wagner-O'Day Act, 41 U.S.C. 47.
- For the operation of a Government facility, or part of a Government facility (but may be applicable to subcontracts for services that meet all of the criteria); or
- Subject to Section 4(c) of the Service Contract Act (see 22.1002-3).

Whether the contracts for services fall in the first or second category, the Department of Labor retains the right to review those contracts that claim exemption from the SCA. If the Department of Labor determines after award of the contract (or subcontract)

that any condition for exemption has not been met, the exemption shall be deemed inapplicable, and the contract (or subcontract) becomes subject to the Service Contract Act. In such case, the procedures at 29 CFR 4.123(e)(2)(iii) and 29 CFR 4.5(c) will be followed.

In accordance with Section 29 of the Office of Federal Procurement Policy Act, the Federal Acquisition Regulatory Council (FAR Council) has obtained the approval of the Administrator of the Office of Federal Procurement Policy for the inclusion of two nonstatutory certifications in this interim FAR rule, as required by the Department of Labor Regulations at 29 CFR 4.123(e)(1)(ii)(D) and (e)(2)(ii)(G).

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because this rule exempts certain service contracts from the Service Contract Act for both contractors and subcontractors. An Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The analysis is summarized as follows:

This interim rule implements 29 CFR 4.123(e) of the Department of Labor (DoL) regulation regarding Administrative limitations, variance, tolerances, and exemptions. Paragraph (e) provides exemption for contracts for certain services that meet specific criteria.

The objective of the DoL final rule was to further the commitment of the Administration to be more commercial-like, encourage broader participation in Government procurement by companies doing business in the commercial sector, and reinforce our commitment to reduce Government-unique terms and conditions, without compromising the purpose of the SCA to protect prevailing labor standards.

The interim FAR rule should have a positive economic impact on the small contractors and subcontractors that meet the exemption criteria to be exempt from the SCA for certain services, because it may provide additional opportunities for work on Federal projects; enable these contractors to compete in a more commercial-like environment, and alleviate the burden of complying with Government-unique terms and conditions for these types of contracts.

Pursuant to Section (4)(b) of the SCA, the Secretary of Labor may grant reasonable exemptions to the provisions of the SCA, but only in special circumstances where the exemption is necessary and proper in the public interest, and is in accord with the

remedial purposes of the Act to protect prevailing labor standards.

This interim FAR rule will apply to all large and small entities that seek award of Federal service contracts in the service categories identified. The Councils relied on the DoL regulatory flexibility analysis (66 FR 5339), which determined that a majority of contracts affected by the proposed exemption would likely be performed by small businesses. Federal Procurement Data System (FPDS) does not provide an accurate estimate of the contracts potentially covered by the exemption, but DoL estimates that the total value of the exempt contracts could be relatively small, and that the SCA would no longer apply to only a relatively small number of contracts that currently contain SCA wage determination provisions.

The interim rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no practical alternatives that will accomplish the objectives of this interim rule. However, the exemption is expected to have a positive impact on small entities, because it does not contain any new reporting or recordkeeping or other compliance requirements applicable to small business. Rather, the exemption would relieve small businesses and other contractors from the requirements of the SCA on certain contracts.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy from the FAR Secretariat. The Councils will consider comments from small entities concerning the affected FAR Parts 4, 15, 17, 22, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.*, (FAC 2005–21, FAR case 2001–004), in the correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary to incorporate the Department of Labor's final rule, which was effective March 19, 2001, into the Federal Acquisition Regulation. Although there has been delay while

seeking appropriate implementation of the DoL final rule, industries that provide services in these categories are seeking to take advantage of the offered exemptions without further delay. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 4, 15, 17, 22, and 52

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 4, 15, 17, 22, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 4, 15, 17, 22, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 4—ADMINISTRATIVE MATTERS

4.1201 [Amended]

■ 2. Amend section 4.1201 by removing from paragraph (c) “52.212–3(k)” and adding “52.212–3(l)” in its place.

■ 3. Amend section 4.1202 by revising paragraph (q) to read as follows:

4.1202 Solicitation provision and contract clause.

* * * * *

(q) 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.

* * * * *

PART 15—CONTRACTING BY NEGOTIATION

15.102 [Amended]

■ 4. Amend section 15.102 by removing from paragraph (b) “52.212–3(k)” and adding “52.212–3(l)” in its place.

PART 17—SPECIAL CONTRACTING METHODS

17.109 [Amended]

■ 5. Amend section 17.109 by removing from paragraph (b)(1) “, as amended”.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 6. Amend section 22.1003–4 by removing paragraph (b)(4); and by adding paragraphs (c) and (d) to read as follows:

22.1003-4 Administrative limitations, variations, tolerances, and exemptions.

* * * * *

(c) *Contracts for maintenance, calibration or repair of certain equipment.*— (1) *Exemption.* The Secretary of Labor has exempted from the Act contracts and subcontracts in which the primary purpose is to furnish maintenance, calibration, or repair of the following types of equipment, if the conditions at paragraph (c)(2) of this subsection are met:

(i) Automated data processing equipment and office information/word processing systems.

(ii) Scientific equipment and medical apparatus or equipment if the application of micro-electronic circuitry or other technology of at least similar sophistication is an essential element (for example, Federal Supply Classification (FSC) Group 65, Class 6515, “Medical Diagnostic Equipment;” Class 6525, “X-Ray Equipment;” FSC Group 66, Class 6630, “Chemical Analysis Instruments;” and Class 6665, “Geographical and Astronomical Instruments,” are largely composed of the types of equipment exempted in this paragraph).

(iii) Office/business machines not otherwise exempt pursuant to paragraph (c)(1)(i) of this subsection, if such services are performed by the manufacturer or supplier of the equipment.

(2) *Conditions.* The exemption at paragraph (c)(1) of this subsection applies if all the following conditions are met for a contract (or a subcontract):

(i) The items of equipment to be serviced under the contract are used regularly for other than Government purposes and are sold or traded by the contractor in substantial quantities to the general public in the course of normal business operations.

(ii) The services will be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of such equipment. As defined at 29 CFR 4.123(e)(1)(ii)(B)—

(A) An established catalog price is a price included in a catalog price list, schedule, or other form that is regularly maintained by the manufacturer or the contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(B) An established market price is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be

substantiated from sources independent of the manufacturer or contractor.

(iii) The contractor will use the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for these employees and equivalent employees servicing the same equipment of commercial customers.

(iv) The apparent successful offeror certifies to the conditions in paragraph (c)(2)(i) through (iii) of this subsection. (See 22.1006(e).)

(3) *Affirmative determination and contract award.* (i) For source selections where the contracting officer has established a competitive range, if the contracting officer determines that one or more of the conditions in paragraphs 22.1003-4 (c)(2)(i) through (iii) of an offeror’s certification will not be met, the contracting officer shall identify the deficiency to the offeror before receipt of the final proposal revisions. Unless the offeror provides a revised offer acknowledging applicability of the Service Contract Act or demonstrating to the satisfaction of the contracting officer an ability to meet all required conditions for exemption, the offer will not be further considered for award.

(ii) The contracting officer shall determine in writing the applicability of this exemption to the contract before contract award. If the apparent successful offeror will meet all conditions in paragraph (c)(2) of this subsection, the contracting officer shall make an affirmative determination and award the contract without the otherwise applicable Service Contract Act clause(s).

(iii) If the apparent successful offeror does not certify to the conditions in paragraph (c)(2)(i) through (iii) of this subsection, the contracting officer shall incorporate in the contract the Service Contract Act clause (see 22.1006(a)(2)) and, if the contract will exceed \$2,500, the appropriate Department of Labor wage determination (see 22.1007).

(4) *Department of Labor determination.* (i) If the Department of Labor determines after award of the contract that any condition for exemption in paragraph (c)(2) of this subsection has not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Act, effective as of the date of the Department of Labor determination. In such case, the procedures at 29 CFR 4.123(e)(1)(iv) and 29 CFR 4.5(c) shall be followed.

(ii) If the Department of Labor determines after award of the subcontract that any conditions for

exemption in paragraph (c)(2) of this subsection have not been met, the exemption shall be deemed inapplicable. The contractor may be responsible for ensuring that the subcontractor complies with the Act, effective as of the date of the subcontract award.

(d) *Contracts for certain services.*— (1) *Exemption.* Except as provided in paragraph (d)(5) of this subsection, the Secretary of Labor has exempted from the Act contracts and subcontracts in which the primary purpose is to provide the following services, if the conditions in paragraph (d)(2) of this subsection are met:

(i) Automobile or other vehicle (e.g., aircraft) maintenance services (other than contracts or subcontracts to operate a Government motor pool or similar facility).

(ii) Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).

(iii) Hotel/motel services for conferences, including lodging and/or meals, that are part of the contract or subcontract for the conference (which must not include ongoing contracts for lodging on an as needed or continuing basis).

(iv) Maintenance, calibration, repair, and/or installation (where the installation is not subject to the Davis-Bacon Act, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment under a contract awarded on a sole source basis.

(v) Transportation by common carrier of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services).

(vi) Real estate services, including real property appraisal services, related to housing Federal agencies or disposing of real property owned by the Government.

(vii) Relocation services, including services of real estate brokers and appraisers to assist Federal employees or military personnel in buying and selling homes (which shall not include actual moving or storage of household goods and related services).

(2) *Conditions.* The exemption for the services in paragraph (d)(1) of this subsection applies if all the following conditions are met for a contract (or a subcontract):

(i)(A) The contract will be awarded on a sole-source basis; or

(B) Except for services identified in paragraph (d)(1)(iv) of this subsection, the contractor will be selected for award

based on other factors in addition to price or cost, with the combination of other factors at least as important as price or cost in selecting the contractor.

(ii) The services under the contract are offered and sold regularly to non-Governmental customers, and are provided by the contractor (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations.

(iii) The contract services are furnished at prices that are, or are based on, established catalog or market prices. As defined at 29 CFR 4.123(e)(2)(ii)(C)—

(A) An established catalog price is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the contractor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(B) An established market price is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or contractor.

(iv) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract.

(v) The contractor will use the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the contractor uses for these employees and equivalent employees servicing commercial customers.

(vi) The contracting officer (or contractor with respect to a subcontract) determines in advance, based on the nature of the contract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the conditions in paragraph (d)(2)(ii) through (v) of this subsection. If the services are currently being performed under contract, the contracting officer (or contractor with respect to a subcontract) shall consider the practices of the existing contractor in making a determination regarding the conditions in paragraphs (d)(2)(ii) through (v) of this subsection.

(vii)(A) The apparent successful offeror certifies that the conditions in paragraphs (d)(2)(ii) through (v) will be met; and

(B) For other than sole source awards, the contracting officer determines that the same certification is obtained from substantially all other offerors that are—

(1) In the competitive range, if discussions are to be conducted (see FAR 15.306(c)); or

(2) Considered responsive, if award is to be made without discussions (see FAR 15.306(a)).

(3) *Contract award or resolicitation.* (i) If the apparent successful offeror does not certify to the conditions, the contracting officer shall insert in the contract the applicable Service Contract Act clause(s) (see 22.1006(a)(2)) and, if the contract will exceed \$2,500, the appropriate Department of Labor wage determination (see 22.1007).

(ii) The contracting officer shall award the contract without the otherwise applicable Service Contract Act clause(s) if—

(A) The apparent successful offeror certifies to the conditions in paragraphs (d)(2)(ii) through (v) of this subsection;

(B) The contracting officer determines that the same certification is obtained from substantially all other offerors that are—

(1) In the competitive range, if discussions are to be conducted (see FAR 15.306); or

(2) Considered responsive, if award is to be made without discussions (see FAR 15.306(a)); and

(C) The contracting officer has no reason to doubt the certification.

(iii) If the conditions in paragraph (d)(3)(ii) of this subsection are not met, then the contracting officer shall resolicit, amending the solicitation by removing the exemption provision from the solicitation (see 22.1006(e)(4)), and inserting in the contract the applicable Service Contract Act clause(s) (see 22.1006(a)(2)) and, if the contract will exceed \$2,500, the appropriate Department of Labor wage determination (see 22.1007).

(4) *Department of Labor determination.* (i) If the Department of Labor determines after award of the contract that any conditions for exemption at paragraph (d)(2) of this subsection have not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Act. In such case, the procedures at 29 CFR 4.123(e)(2)(iii) and 29 CFR 4.5(c) shall be followed.

(ii) If the Department of Labor determines that any conditions in paragraph (d)(2) of this subsection have not been met with respect to a subcontract, the exemption shall be deemed inapplicable and the contractor may be responsible for ensuring that the

subcontractor complies with the Act, effective as of the date of the subcontract award.

(5) *Exceptions.* The exemption at paragraph (d)(1) of this subsection does not apply to solicitations and contracts (subcontracts)—

(i) Awarded under the Javits-Wagner-O'Day Act, 41 U.S.C. 47 (see Subpart 8.7).

(ii) For the operation of a Government facility, or part of a Government facility (but may be applicable to subcontracts for services); or

(iii) Subject to Section 4(c) of the Service Contract Act (see 22.1002–3).

22.1003–5 [Amended]

■ 7. Amend section 22.1003–5 by removing from paragraph (k) “22.1003–4(b)(4)” and adding “22.1003(c)(1) and (d)(1)(iv)” in its place.

22.1003–6 [Amended]

■ 8. Amend section 22.1003–6 by removing from paragraph (b)(2) “22.1003–4(b)(4)” and adding “22.1003(c)(1) and (d)(1)(iv)” in its place.

■ 9. Amend section 22.1004 by revising paragraph (h) to read as follows:

22.1004 Department of Labor responsibilities and regulations.

* * * * *

(h) Practice before the Administrative Review Board (29 CFR part 8).

■ 10. Amend section 22.1006 by—

■ a. Revising the section heading;

■ b. Revising paragraph (a);

■ c. Removing from paragraphs (c)(1) and (c)(2) “as amended,”; and

■ d. Revising paragraph (e) to read as follows:

22.1006 Solicitation provisions and contract clauses.

(a)(1) The contracting officer shall insert the clause at 52.222–41, Service Contract Act of 1965, in solicitations and contracts if the contract is subject to the Act and is—

(i) Over \$2,500; or

(ii) For an indefinite dollar amount and the contracting officer does not know in advance that the contract amount will be \$2,500 or less.

(2) If the solicitation includes the provision at 52.222–48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification, or 52.222–52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification, the contracting officer shall not insert the clause at 52.222–41 (or any of the associated Service Contract Act clauses

prescribed in this section for possible use when 52.222-41 applies) in the resultant contract unless the contracting officer determines, in accordance with paragraphs (c)(3) or (d)(3) of subsection 22.1003-4, that the Service Contract Act applies to the contract. (In such case, do not insert the clause at 52.222-51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, or 52.222-53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, in the contract, in accordance with the prescription at paragraph (e)(2) or (e)(4) of this subsection).

* * * * *

(e)(1) The contracting officer shall insert the provision at 52.222-48, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Certification, in solicitations that include the clause at 52.222-41, Service Contract Act of 1965, but the contract may be exempt from the Service Contract Act in accordance with 22.1003-4(c).

(2) The contracting officer shall insert the clause at 52.222-51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, in solicitations that include the provision at 52.222-48, and resulting contracts in which the contracting officer has determined, in accordance with 22.1003-4(c)(3), that the Service Contract Act does not apply.

(3) Insert the provision at 52.222-52, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification, in solicitations that include the clause at 52.222-41, Service Contract Act of 1965, but the contract may be exempt from the Service Contract Act in accordance with 22.1003-4(d).

(4) The contracting officer shall insert the clause at 52.222-53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, in solicitations that include the provision at 52.222-52, and resulting contracts in which the contracting officer has determined, in accordance with 22.1003-4(d)(3), that the Service Contract Act does not apply.

* * * * *

22.1008-2 [Amended]

■ 11. Amend section 22.1008-2 by removing from the last sentence of paragraph (d)(1) “, as amended”.

22.1018 [Amended]

■ 12. Amend section 22.1018 by removing from paragraph (b) “, as amended”.

22.1019 [Amended]

■ 13. Amend section 22.1019 by removing from paragraphs (a), in the first sentence, and (c) “, as amended”.

22.1020 [Amended]

■ 14. Amend section 22.1020 by removing “, as amended”.

22.1022 [Amended]

■ 15. Amend section 22.1022 by removing “Assistant” and “Board of Service Contract Appeals” and adding “Deputy” and “Administrative Review Board” in their places, respectively.

22.1023 [Amended]

■ 16. Amend section 22.1023 by removing “, as amended”.

22.1026 [Amended]

■ 17. Amend section 22.1026 by removing “as amended,”.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-1 [Amended]

■ 18. Amend section 52.212-1 by revising the date of the clause to read “(Nov 2007)”; and by removing from paragraph (b)(8) “52.212-3(k)” and adding “52.212-3(l)” in its place.

■ 19. Amend section 52.212-3 by—
 ■ a. Revising the date of the clause;
 ■ b. Removing from the introductory text of the clause “paragraph (k)” and “through (j)” and adding “paragraph (l)” and “through (k)” in its place, respectively;

■ c. Redesignating paragraph (k) as paragraph (l); removing from the newly designated paragraph (l)(1) “paragraph (k)(2)” and adding “paragraph (l)(2)” in its place, and in the newly designated paragraph (l)(2), in the bracketed paragraph, removing “through (j)” and adding “through (k)” in its place; and
 ■ d. Adding a new paragraph (k) to read as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS
 “(Nov 2007)”

* * * * *

(k) *Certificates regarding exemptions from the application of the Service Contract Act.* (Certification by the offeror as to its compliance with respect to the contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the

exempt services.) *[The contracting officer is to check a box to indicate if paragraph (k)(1) or (k)(2) applies.]*

(1) Maintenance, calibration, or repair of certain equipment as described in FAR 22.1003-4(c)(1). The offeror does does not certify that—

(i) The items of equipment to be serviced under this contract are used regularly for other than Governmental purposes and are sold or traded by the offeror in substantial quantities to the general public in the course of normal business operations;

(ii) The services will be furnished at prices which are, or are based on, established catalog or market prices (see FAR 22.1003-4(c)(2)(ii)) for the maintenance, calibration, or repair of such equipment; and

(iii) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract will be the same as that used for these employees and equivalent employees servicing the same equipment of commercial customers.

(2) Certain services as described in FAR 22.1003-4(d)(1). The offeror does does not certify that—

(i) The services under the contract are offered and sold regularly to non-Governmental customers, and are provided by the offeror (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations;

(ii) The contract services will be furnished at prices that are, or are based on, established catalog or market prices (see FAR 22.1003-4(d)(2)(iii));

(iii) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract; and

(iv) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract is the same as that used for these employees and equivalent employees servicing commercial customers.

(3) If paragraph (k)(1) or (k)(2) of this clause applies—

(i) If the offeror does not certify to the conditions in paragraph (k)(1) or (k)(2) and the Contracting Officer did not attach a Service Contract Act wage determination to the solicitation, the offeror shall notify the Contracting Officer as soon as possible; and

(ii) The Contracting Officer may not make an award to the offeror if the offeror fails to execute the certification in paragraph (k)(1) or (k)(2) of this clause or to contact the Contracting Officer as required in paragraph (k)(3)(i) of this clause.

* * * * *

■ 20. Amend section 52.212-5 by—

■ a. Revising the date of the clause;
 ■ b. Revising paragraph (c)(1), redesignating paragraph (c)(5) as (c)(7), and adding new paragraphs (c)(5) and (c)(6); and

■ c. Revising paragraph (e)(1)(vi), and redesignating paragraph (e)(1)(viii) as

(e)(1)(x), and adding new paragraphs (e)(1)(viii) and (e)(1)(ix).
 ■ The revised and added text reads as follows:

52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *
 CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS—COMMERCIAL ITEMS “(Nov 2007)”

* * * * *
 (c) * * *
 (1) 52.222-41, Service Contract Act of 1965 “(Nov 2007)” (41 U.S.C. 351, *et seq.*).
 * * * * *

(5) 52.222-51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements “([Insert Abbreviated Month and Year of Date of Publication in the **Federal Register**])” (41 U.S.C. 351, *et seq.*).

(6) 52.222-53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements “(Nov 2007)” (41 U.S.C. 351, *et seq.*).

* * * * *
 (e)(1) * * *
 (vi) 52.222-41, Service Contract Act of 1965 “([Insert Abbreviated Month and Year of Date of Publication in the **Federal Register**])” (41 U.S.C. 351, *et seq.*).
 * * * * *

(viii) 52.222-51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements “(Nov 2007)” (41 U.S.C. 351, *et seq.*).

(ix) 52.222-53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements “(Nov 2007)” (41 U.S.C. 351, *et seq.*).
 * * * * *

■ 21. Amend section 52.213-4 by revising the date of the clause; and revising the first sentence of paragraph (b)(1)(vi) to read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

* * * * *
 TERMS AND CONDITIONS—SIMPLIFIED ACQUISITIONS (OTHER THAN COMMERCIAL ITEMS) “(Nov 2007)”

* * * * *
 (b) * * *
 (1) * * *
 (vi) 52.222-41, Service Contract Act of 1965 “(Nov 2007)” (41 U.S.C. 351, *et seq.*).
 * * * * *

■ 22. Amend section 52.222-41 by—
 ■ a. Revising the section heading;
 ■ b. Revising the clause heading and the date; and
 ■ c. Amending paragraph (a) by—
 ■ 1. Revising the introductory text;

■ 2. Revising the definitions “Act” and “Contractor”;
 ■ 3. Removing from the definition “Service employee” the words “, as used in this clause.”; and
 ■ 4. Removing from paragraph (f) “Board of Service Contract Appeals” and adding “Administrative Review Board” in its place.
 ■ The revised text reads as follows:

52.222-41 Service Contract Act of 1965.

* * * * *
 SERVICE CONTRACT ACT OF 1965 “(Nov 2007)”

(a) *Definitions.* As used in this clause—
 Act means the Service Contract Act of 1965 (41 U.S.C. 351, *et seq.*)

Contractor when this clause is used in any subcontract, shall be deemed to refer to the subcontractor, except in the term “Government Prime Contractor.”

* * * * *
 ■ 23. Revise section 52.222-48 to read as follows:

52.222-48 Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment Certification.

As prescribed in 22.1006(e)(1), insert the following provision:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR MAINTENANCE, CALIBRATION, OR REPAIR OF CERTAIN EQUIPMENT CERTIFICATION “(Nov 2007)”

(a) The offeror shall check the following certification:

CERTIFICATION
 The offeror does does not certify that—

(1) The items of equipment to be serviced under this contract are used regularly for other than Government purposes, and are sold or traded by the offeror in substantial quantities to the general public in the course of normal business operations;

(2) The services will be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of equipment.

(i) An “established catalog price” is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the offeror, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(ii) An “established market price” is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or offeror; and

(3) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract are the same as that used for these employees and equivalent employees servicing the same equipment of commercial customers.

(b) Certification by the offeror as to its compliance with respect to the contract also

constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. If the offeror certifies to the conditions in paragraph (a) of this provision, and the Contracting Officer determines in accordance with FAR 22.1003-4(c)(3) that the Service Contract Act—

(1) Will not apply to this offeror, then the Service Contract Act of 1965 clause in this solicitation will not be included in any resultant contract to this offeror; or

(2) Will apply to this offeror, then the clause at 52.222-51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, in this solicitation will not be included in any resultant contract awarded to this offeror, and the offeror may be provided an opportunity to submit a new offer on that basis.

(c) If the offeror does not certify to the conditions in paragraph (a) of this provision—

(1) The clause in this solicitation at 52.222-51, Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements, will not be included in any resultant contract awarded to this offeror; and

(2) The offeror shall notify the Contracting Officer as soon as possible, if the Contracting Officer did not attach a Service Contract Act wage determination to the solicitation.

(d) The Contracting Officer may not make an award to the offeror, if the offeror fails to execute the certification in paragraph (a) of this provision or to contact the Contracting Officer as required in paragraph (c) of this provision.

(End of provision)

■ 24. Add sections 52.222-51, 52.222-52, and 52.222-53 to read as follows:

52.222-51 Exemption from Application of the Service Contract Act to Contracts for Maintenance, Calibration, or Repair of Certain Equipment—Requirements.

As prescribed in 22.1006(e)(2), insert the following clause:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR MAINTENANCE, CALIBRATION, OR REPAIR OF CERTAIN EQUIPMENT—REQUIREMENTS “(Nov 2007)”

(a) The items of equipment to be serviced under this contract are used regularly for other than Government purposes, and are sold or traded by the Contractor in substantial quantities to the general public in the course of normal business operations.

(b) The services shall be furnished at prices which are, or are based on, established catalog or market prices for the maintenance, calibration, or repair of equipment.

(1) An “established catalog price” is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the Contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public.

(2) An “established market price” is a current price, established in the usual course of trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or Contractor.

(c) The compensation (wage and fringe benefits) plan for all service employees performing work under the contract shall be the same as that used for these employees and for equivalent employees servicing the same equipment of commercial customers.

(d) The Contractor is responsible for compliance with all the conditions of this exemption by its subcontractors. The Contractor shall determine the applicability of this exemption to any subcontract on or before subcontract award. In making a judgment that the exemption applies, the Contractor shall consider all factors and make an affirmative determination that all of the conditions in paragraphs (a) through (c) of this clause will be met.

(e) If the Department of Labor determines that any conditions for exemption in paragraphs (a) through (c) of this clause have not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Act. In such case, the procedures at 29 CFR 4.123(e)(1)(iv) and 29 CFR 4.5(c) will be followed.

(f) The Contractor shall include the substance of this clause, including this paragraph (f), in subcontracts for exempt services under this contract.

(End of clause)

52.222–52 Exemption from Application of the Service Contract Act to Contracts for Certain Services—Certification.

As prescribed in 22.1006(e)(3), insert the following provision:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR CERTAIN SERVICES—CERTIFICATION “(Nov 2007)”

(a) The offeror shall check the following certification:

CERTIFICATION

The offeror does does not certify that—

(1) The services under the contract are offered and sold regularly to non-Governmental customers, and are provided by the offeror (or subcontractor in the case of an exempt subcontract) to the general public in substantial quantities in the course of normal business operations;

(2) The contract services are furnished at prices that are, or are based on, established catalog or market prices. An “established catalog price” is a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or the offeror, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public. An “established market price” is a current price, established in the usual course of ordinary and usual trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or offeror;

(3) Each service employee who will perform the services under the contract will

spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract; and

(4) The offeror uses the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the offeror uses for these employees and for equivalent employees servicing commercial customers.

(b) Certification by the offeror as to its compliance with respect to the contract also constitutes its certification as to compliance by its subcontractor if it subcontracts out the exempt services. If the offeror certifies to the conditions in paragraph (a) of this provision, and the Contracting Officer determines in accordance with FAR 22.1003–4(d)(3) that the Service Contract Act—

(1) Will not apply to this offeror, then the Service Contract Act of 1965 clause in this solicitation will not be included in any resultant contract to this offeror; or

(2) Will apply to this offeror, then the clause at FAR 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, in this solicitation will not be included in any resultant contract awarded to this offer, and the offeror may be provided an opportunity to submit a new offer on that basis.

(c) If the offeror does not certify to the conditions in paragraph (a) of this provision—

(1) The clause of this solicitation at 52.222–53, Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements, will not be included in any resultant contract to this offeror; and

(2) The offeror shall notify the Contracting Officer as soon as possible if the Contracting Officer did not attach a Service Contract Act wage determination to the solicitation.

(d) The Contracting Officer may not make an award to the offeror, if the offeror fails to execute the certification in paragraph (a) of this provision or to contact the Contracting Officer as required in paragraph (c) of this provision.

(End of provision)

52.222–53 Exemption from Application of the Service Contract Act to Contracts for Certain Services—Requirements.

As prescribed in 22.1006(e)(4), insert the following clause:

EXEMPTION FROM APPLICATION OF THE SERVICE CONTRACT ACT TO CONTRACTS FOR CERTAIN SERVICES—REQUIREMENTS “(Nov 2007)”

(a) The services under this contract are offered and sold regularly to non-Governmental customers, and are provided by the Contractor to the general public in substantial quantities in the course of normal business operations.

(b) The contract services are furnished at prices that are, or are based on, established catalog or market prices. An “established catalog price” is a price included in a catalog, price list, schedule, or other form that is

regularly maintained by the manufacturer or the Contractor, is either published or otherwise available for inspection by customers, and states prices at which sales currently, or were last, made to a significant number of buyers constituting the general public. An “established market price” is a current price, established in the usual course of ordinary and usual trade between buyers and sellers free to bargain, which can be substantiated from sources independent of the manufacturer or Contractor.

(c) Each service employee who will perform the services under the contract will spend only a small portion of his or her time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government contract.

(d) The Contractor uses the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the Contractor uses for these employees and for equivalent employees servicing commercial customers.

(e)(1) Any subcontract for these exempt services shall be awarded on a sole-source basis; or

(2) Except for services identified in FAR 22.1003–4(d)(1)(iv), the subcontractor shall be selected for award based on other factors in addition to price or cost with the combination of other factors at least as important as price or cost in selecting the Contractor.

(f) The Contractor is responsible for compliance with all the conditions of this exemption by its subcontractors. The Contractor shall determine in advance, based on the nature of the subcontract requirements and knowledge of the practices of likely subcontractors, that all or nearly all likely subcontractors will meet the conditions in paragraphs (a) through (d) of this clause. If the services are currently being performed under a subcontract, the Contractor shall consider the practices of the existing subcontractor in making a determination regarding the conditions in paragraphs (a) through (d) of this clause. If the Contractor has reason to doubt the validity of the certification, the requirements of the Service Contract Act shall be included in the subcontract.

(g) If the Department of Labor determines that any conditions for exemption at paragraphs (a) through (e) of this clause have not been met, the exemption shall be deemed inapplicable, and the contract shall become subject to the Service Contract Act. In such case, the procedures in at 29 CFR 4.123(e)(2)(iii) and 29 CFR 4.5(c) will be followed.

(h) The Contractor shall include the substance of this clause, including this paragraph (h), in subcontracts for exempt services under this contract.

(End of clause)

[FR Doc. 07–5481 Filed 11–6–07; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 5, 6, 12, 18, 26, and 52**

[FAC 2005–21; FAR Case 2006–014; Item VI; Docket 2007–0001, Sequence 7]

RIN 9000–AK54

**Federal Acquisition Regulation; FAR
Case 2006–014, Local Community
Recovery Act of 2006****AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).**ACTION:** Interim rule with request for comments.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a second interim rule amending the Federal Acquisition Regulation (FAR) to implement amendments to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act). The Local Community Recovery Act of 2006 amended the Stafford Act to authorize set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. Section 694 of the Department of Homeland Security (DHS) Appropriations Act of 2007, Pub. L. 109–295, enacted requirements for transitioning work under existing contracts.

DATES: *Effective Date:* November 7, 2007.

Comment Date: Interested parties should submit written comments to the FAR Secretariat on or before January 7, 2008 to be considered in the formulation of a final rule.

ADDRESSES: Submit comments identified by FAC 2005–21, FAR case 2006–014, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. To search for any document, first select under “Step 1,” “Documents with an Open Comment Period” and select under “Optional Step 2,” “Federal Acquisition Regulation” as the agency of choice. Under “Optional Step 3,” select “Rules”. Under “Optional Step 4,” from the drop down list, select “Document Title” and type the FAR case number “2006–014”. Click the “Submit” button. Please include

your name and company name (if any) inside the document. You may also search for any document by clicking on the “Search for Documents” tab at the top of the screen. Select from the agency field “Federal Acquisition Regulation”, and type “2006–014” in the “Document Title” field. Select the “Submit” button.

- Fax: 202–501–4067.

- Mail: General Services

Administration, Regulatory Secretariat (VIR), 1800 F Street, NW, Room 4035, ATTN: Laurieann Duarte, Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005–21, FAR case 2006–014, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>. Please include your name and company name (if any) inside the document.

FOR FURTHER INFORMATION CONTACT Mr. William Clark, Procurement Analyst, at (202) 219–1813, for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–21, FAR case 2006–014.

SUPPLEMENTARY INFORMATION:**A. Background**

An interim rule was published August 4, 2006 (71 FR 44546), implementing an amendment to the Stafford Act at 42 U.S.C. 5150. This second interim rule is necessary because of a later statutory amendment to this section. This second rule also addresses the public comments received on the first rule. The Councils request comments on the new language added for this second interim rule, and on whether branch offices should qualify for the set-aside.

Local area set-aside. The first interim rule implemented the 42 U.S.C. 5150 authorization of set-asides for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. The set-aside may be used together with other authorized set-asides, for example, those in FAR Part 19 for small businesses. The contracting officer determines the geographic area for a specific local area set-aside. The local area set-aside may be the whole of, or some subpart of, the affected area (e.g., one or more counties, including across state lines). However, it may not be outside of the declared major disaster or emergency area.

Residing or doing business primarily in the area. Congress directed that preference be given to “organizations,

firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency,” without defining the terms. The Councils consider that an offeror who in the last twelve months had its main operating office in the area, which generated at least half of the offeror’s gross revenues and employed at least half of the offeror’s permanent employees is, therefore, residing or primarily doing business in the set-aside area.

Branch offices. A public comment questioned the exclusion of branch offices. The Councils believe the intent of Congress was to favor firms in the local area who hire local people. A local branch office is local and hires local people, but the contract would not be restricted to the branch office, because the branch office is not the contracting entity. The Councils invite further comment on this issue.

Transition of work; justification. The recent amendment to 42 U.S.C. 5150 provided: (1) that any expenditure of funds on contracts not awarded to local area organizations, firms or individuals must be justified in writing in the contract file; and (2) that work performed under contracts already in effect be transitioned to local area organizations, firms or individuals, unless the head of the agency determines it is not feasible or practicable.

This second interim rule implements these requirements. The rule emphasizes the wisdom of awarding contracts in advance of an emergency, but not awarding orders so lengthy that they make transition to a local firm awkward.

The rule also gives factors for the agencies to consider prior to determining that a transition is not feasible or practicable. The determination not to transition may be done within a reasonable time. Class determinations and class justifications are allowed.

Competition justification. The first interim rule established a new FAR Subpart 6.6 to clarify the competition justification requirements for Stafford Act acquisitions, but that was to be revisited in the final (now second interim) rule. This second interim rule moves to section 6.207 the section declaring that no competition justification is needed for the local area set-aside. The rest of the subpart has been deleted as unnecessary. No justification for other than full and open competition is needed for the use of an evaluation factor if preference is afforded local firms through such a mechanism. The revised statute

establishes a new justification, but this is not a full and open competition justification, so it is being placed in Part 26, not Part 6.

Definitions. The Councils established a new definition for "Major disaster or emergency area" to clarify the role of the Presidential declaration and DHS. DHS has a website where the public and contracting officers can easily find information on recently declared major disasters and recently declared emergencies. This website is added to the definition.

New definitions are also added for "emergency response contract" and "local firm" to clarify how these concepts are used in the rule.

The term "designated area" was not defined in the first interim rule. To avoid confusion, the second interim rule changes it everywhere to more precisely read "set-aside area."

A reference to the Small Business Administration (SBA) regulatory definitions of terms used in the "Restrictions on Subcontracting Outside Disaster or Emergency Area" clause is added to that clause.

Public comments. No public comments were received in response to the Councils' request in the first rule for views on whether the "Restrictions on Subcontracting Outside Disaster or Emergency Area" and the "Disaster or Emergency Area Representation" should apply to preferences other than local area set asides; or whether the percentages for general or specialty construction should be raised.

The Councils received nine public comments from four respondents regarding the first interim rule. A summary of the comments and the Councils' responses follows.

1. **Comment:** One respondent recommended that it would be more appropriate to create a new section within FAR Subpart 6.2 (*i.e.*, section 6.207) for consistency with the content of sections 6.205 and 6.206 which describes set-asides as a type of full and open competition after the exclusion of sources rather than to maintain the interim rule FAR Subpart 6.6, Stafford Act Preference for Local Area Contractor. The recommendation also suggested removal of FAR section 6.603 entirely since it implies that implementing the local area preference by using an evaluation factor would qualify as other than full and open competition.

Response: The recommendation was accepted and this second interim rule moves to FAR 6.207 the section declaring that no competition justification is needed for the local area

set-aside. The rest of the previous FAR Subpart 6.6 has been removed.

2. **Comment:** One respondent expressed an opinion that the instructions in FAR 12.301(e)(4) for FAR 52.226-4 and 52.226-5 were unnecessary because they are already included in the list of clauses contained in FAR 52.212-5, which is a mandatory clause in commercial item contracts. The respondent also suggested replacing the phrase, "when setting aside under the Stafford Act" due to its inconsistency with the language used in the FAR 26.203 prescription. A new FAR subparagraph 12.301(e)(4) was suggested as follows: "The contracting officer shall insert the provision at 52.226-3, Disaster or Emergency Area Representation, in solicitations for acquisitions that are set-aside for a Disaster or Emergency Area under 26.203(a). This representation is not in the Online Representations and Certifications Application (ORCA) Database."

Response: The recommendation was partially accepted in that only the provision, not the clauses, is mentioned at FAR subparagraph 12.301(e)(4). Regarding the suggested rewording of FAR subparagraph 12.301(e)(4), the Councils believe the reference to the Stafford Act should be kept, rather than adding a second reference to the "Disaster or Emergency Area" in the same sentence.

3. **Comment:** The rule should revise the text at FAR 26.202(a)(2) to state, "A major disaster or emergency may result in numerous Presidential declarations spanning counties in several contiguous States" for consistency with 6.602(a) and (b), which refer to both "disasters" and "emergencies."

Response: The respondent's comment was accepted. The second interim rule contains the correction as recommended.

4. **Comment:** A comment was submitted indicating that 26.203(a) content is inconsistent with FAR 26.203(b). The respondent suggested replacing paragraph (a) with the following, "The contracting officer shall insert the provision at 52.226-3, Disaster or Emergency Area Representation, in solicitations for acquisitions that are set-aside for a Disaster or Emergency Area under 26.203(a). For commercial items see 12.301(e)(4)."

Response: Partially accepted. The prescription content was revised for consistency with the FAR conventions on prescription format.

5. **Comment:** FAR 52.212-5(b)(27) and (28) did not contain clause dates and

"Aug 2006" should be inserted into parentheses after the title of each clause.

Response: Accepted, however the dates for both clauses have been revised due to amendment of the clauses.

6. **Comment:** The rule does not discuss whether the phrase, "offerors residing or doing business primarily in the area affected * * *," excludes branch offices of corporations headquartered elsewhere. The comment described a scenario where a branch office could meet all of the tests imposed at FAR 52.226-3(c) and still not have the corporate business meet the adjective test of "primarily" doing business within the affected region. The respondent suggested adding the term "* * * to include branches, divisions, or other sub units of corporation headquartered outside of the affected area * * *" after "* * * offerors residing or doing business primarily in the area affected" in FAR 26.202, 52.226-3, 52.226-4, and 52.226-5.

Response: The recommendation was not adopted for the second interim rule. However, the Councils are seeking further public views on this comment as indicated in the Preamble to this rule.

7. **Comment:** Several respondents commented on the designation of FAR 52.226-4, Notice of Disaster or Emergency, as a "provision" vice a "clause". Another comment on the prescription for FAR 52.226-4 suggested clarifying the prescription by replacing the phrase, "* * * that are set-aside for a Disaster or Emergency Area under 26.203(a)" with "* * * that contain the provision at 52.226-3."

Response: The second interim rule changes FAR 52.226-4 to a "clause." The prescription for FAR 52.226-4 and 52.226-5 are revised for consistency with the FAR conventions on prescription format.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The interim rule is not expected to have a significant Economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* This second interim rule continues the set-aside for local businesses in an area affected by a major disaster or emergency to promote economic recovery. The set-aside does not replace the small business set-aside. Both set-asides can apply to an acquisition. The local set-aside will encourage use of

local small businesses. The rule also implements a new requirement that work performed under contracts already in effect be transitioned to local area organizations, firms, or individuals, unless the agency head determines it is not feasible or practicable. The Councils expect that more work will be transitioned to small businesses than away from them. The Government Accountability Office (GAO) report on Hurricane Katrina Small Business Contracts (GAO-07-205) found that businesses in the three states primarily affected by the hurricane received \$1.9 billion, which was 18% of the \$11.6 billion spent by DHS, GSA, DoD and the Army Corps of Engineers between August 1, 2005, and June 30, 2006. Small businesses received 66% of the \$1.9 billion awarded to those local businesses. The Councils believe this shows that small businesses would not be hurt by a local area set-aside.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 5, 6, 12, 18, 26, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 601, *et seq.* (FAC 2005-21, FAR case 2006-014), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

D. Determination to Issue an Interim Rule

A determination has been made under the authority of DoD, GSA, and NASA that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because this interim rule implements the Local Community Recovery Act of 2006 (Pub. L. 109-218), and section 694 of the DHS Appropriations Act of 2007 (DHS Appropriations Act) (Pub. L. 109-295). These statutes amended the Stafford Act at 42 U.S.C. 5150, to authorize set-asides for major disaster or emergency assistance acquisitions to businesses that reside or primarily do business in the geographic area affected by the disaster or emergency. Section 694 of the DHS Appropriations Act enacted requirements for transitioning work under existing contracts to local area organizations, firms, or individuals.

This action is necessary to improve the Government's ability to target local businesses and promote local economic recovery in an affected area. The statutes went into effect April 20, 2006, and October 4, 2006, respectively. However, pursuant to Pub. L. 98-577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

List of Subjects in 48 CFR Parts 5, 6, 12, 18, 26, and 52

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 5, 6, 12, 18, 26, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 5, 6, 12, 18, 26, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 5—PUBLICIZING CONTRACT ACTIONS

■ 2. Amend section 5.207 by revising paragraph (d) to read as follows:

5.207 Preparation and transmittal of synopses.

* * * * *

(d) *Set-asides.* When the proposed acquisition provides for a total or partial small business set-aside, HUBZone small business set-aside, or a service-disabled veteran-owned small business set-aside, the appropriate Numbered Note will be cited. When the proposed acquisition provides for a local area set-aside (see Subpart 26.2) the contracting officer shall identify his set-aside in the synopsis.

* * * * *

PART 6—COMPETITION REQUIREMENTS

■ 3. Add section 6.207 to read as follows:

6.207 Set-asides for local firms during a major disaster or emergency.

(a) To fulfill the statutory requirements relating to 42 U.S.C. 5150, contracting officers may set aside solicitations to allow only offerors residing or doing business primarily in the area affected by such major disaster or emergency to compete (see Subpart 26.2).

(b) No separate justification or determination and findings is required under this part to set aside a contract action. The set-aside area specified by

the contracting officer shall be a geographic area within the area identified in a Presidential declaration(s) of major disaster or emergency and any additional geographic areas identified by the Department of Homeland Security.

Subpart 6.6 [Removed]

■ 4. Remove subpart 6.6.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 5. Amend section 12.301 by revising paragraphs (b)(4) and (e)(4) to read as follows:

12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.

* * * * *

(b) * * *

(4) *The clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.* This clause incorporates by reference only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.212-5(b) or (c) are applicable to the specific acquisition. Some of the clauses require fill-in; the fill-in language should be inserted as directed by 52.104(d). When cost information is obtained pursuant to Part 15 to establish the reasonableness of prices for commercial items, the contracting officer shall insert the clauses prescribed for this purpose in an addendum to the solicitation and contract. This clause may not be tailored. Use the clause with its Alternate I when the head of the agency has waived the examination of records by the Comptroller General in accordance with 25.1001.

* * * * *

(e) * * *

(4) When setting aside under the Stafford Act (Subpart 26.2), include the provision at 52.226-3, Disaster or Emergency Area Representation, in the solicitation. The representation in this provision is not in the Online Representations and Certifications Application (ORCA) Database.

* * * * *

PART 18—EMERGENCY ACQUISITIONS

■ 6. Amend section 18.203 by:

- a. Removing paragraph (a);
- b. Redesignating paragraphs (b) and (c) as (a) and (b) respectively; and
- c. Revising redesignated paragraph (a) to read as follows:

18.203 Incidents of national significance, emergency declaration, or major disaster declaration.

(a) *Disaster or emergency assistance activities.* Preference will be given to local organizations, firms, and individuals when contracting for major disaster or emergency assistance activities when the President has made a declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. Preference may take the form of local area set-asides or an evaluation preference. (See 6.207 and Subpart 26.2.)

* * * * *

PART 26—OTHER SOCIOECONOMIC PROGRAMS

- 7. Revise subpart 26.2 to read as follows:

Subpart 26.2—Disaster or Emergency Assistance Activities

Sec.

- 26.200 Scope of subpart.
- 26.201 Definitions.
- 26.202 Local area preference.
- 26.202-1 Local area set-aside.
- 26.202-2 Evaluation preference.
- 26.203 Transition of work.
- 26.204 Justification for expenditures to other than local firms.
- 26.205 Solicitation provision and contract clauses.

26.200 Scope of subpart.

This subpart implements the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5150), which provides a preference for local organizations, firms, and individuals when contracting for major disaster or emergency assistance activities.

26.201 Definitions.

Emergency response contract means a contract with private entities that supports assistance activities in a major disaster or emergency area, such as debris clearance, distribution of supplies, or reconstruction.

Local firm means a private organization, firm, or individual residing or doing business primarily in a major disaster or emergency area.

Major disaster or emergency area means the area included in the official Presidential declaration(s) and any additional areas identified by the Department of Homeland Security. Major disaster declarations and

emergency declarations are published in the **Federal Register** and are available at <http://www.fema.gov/news/disasters.fema>.

26.202 Local area preference.

When awarding emergency response contracts during the term of a major disaster or emergency declaration by the President of the United States under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C.5121, et seq.), preference shall be given, to the extent feasible and practicable, to local firms. Preference may be given through a local area set-aside or an evaluation preference.

26.202-1 Local area set-aside.

The contracting officer may set aside solicitations to allow only local firms within a specific geographic area to compete (see 6.207).

(a) The contracting officer, in consultation with the requirements office, shall define the specific geographic area for the local set-aside.

(b) A major disaster or emergency area may span counties in several contiguous States. The set-aside area need not include all the counties in the declared disaster/emergency area(s), but cannot go outside it.

(c) The contracting officer shall also determine whether a local area set-aside should be further restricted to small business concerns in the set-aside area (see Part 19).

26.202-2 Evaluation preference.

The contracting officer may use an evaluation preference, when authorized in agency regulations.

26.203 Transition of work.

(a) In anticipation of potential emergency response requirements, agencies involved in response planning should consider awarding emergency response contracts before a major disaster or emergency occurs to ensure immediate response and relief. These contracts should be structured to respond to immediate emergency response needs, and should not be structured in any way that may inhibit the transition of emergency response work to local firms (e.g., unnecessarily broad scopes of work or long periods of performance).

(b) 42 U.S.C. 5150(b)(2) requires that agencies performing response, relief, and reconstruction activities transition to local firms any work performed under contracts in effect on the date on which the President declares a major disaster or emergency, unless the head of such agency determines in writing that it is

not feasible or practicable. This determination may be made on an individual contract or class basis. The written determination shall be prepared within a reasonable time given the circumstances of the emergency.

(c) In effecting the transition, agencies are not required to terminate or renegotiate existing contracts. Agencies should transition the work at the earliest practical opportunity after consideration of the following:

(1) The potential duration of the disaster or emergency.

(2) The severity of the disaster or emergency.

(3) The scope and structure of the existing contract, including its period of performance and the milestone(s) at which a transition is reasonable (e.g., before exercising an option).

(4) The potential impact of a transition, including safety, national defense, and mobilization.

(5) The expected availability of qualified local offerors who can provide the products or services at a reasonable price.

(d) The agency shall transition the work to local firms using the local area set-aside identified in 26.202-1.

26.204 Justification for expenditures to other than local firms.

(a) 42 U.S.C. 5150(b)(1) requires that, subsequent to any Presidential declaration of a major disaster or emergency, any expenditure of Federal funds, under an emergency response contract not awarded to a local firm, must be justified in writing in the contract file. The justification should include consideration for the scope of the major disaster or emergency and the immediate requirements or needs of supplies and services to ensure life is protected, victims are cared for, and property is protected.

(b) The justification may be made on an individual or class basis. The contracting officer approves the justification.

26.205 Solicitation provision and contract clauses.

(a) The contracting officer shall insert the provision at 52.226-3, Disaster or Emergency Area Representation, in solicitations involving the local area set-aside. For commercial items, see 12.301(e)(4).

(b) The contracting officer shall insert the clause at 52.226-4, Notice of Disaster or Emergency Area Set-aside in solicitations and contracts involving local area set-asides.

(c) The contracting officer shall insert the clause at 52.226-5, Restrictions on Subcontracting Outside Disaster or

Emergency Area, in all solicitations and contracts that involve local area set-asides.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Revise section 52.212–5 in clause heading and paragraphs (b)(30) and (b)(31) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *
 CONTRACT TERMS AND CONDITIONS
 REQUIRED TO IMPLEMENT STATUTES OR
 EXECUTIVE ORDERS—COMMERCIAL
 ITEMS (Nov 2007)

* * * * *

(b) * * *

____ (30) 52.226–4, Notice of Disaster or Emergency Area Set-Aside (Nov 2007) (42 U.S.C. 5150).

____ (31) 52.226–5, Restrictions on Subcontracting Outside Disaster or Emergency Area (Nov 2007) (42 U.S.C. 5150).

* * * * *

■ 9. Revise section 52.226–3 to read as follows:

52.226–3 Disaster or Emergency Area Representation.

As prescribed in 26.205(a), insert the following provision:

DISASTER OR EMERGENCY AREA REPRESENTATION (Nov 2007)

(a) *Set-aside area.* The area covered in this contract is:

[Contracting Officer to fill in with definite geographic boundaries.]

(b) *Representations.* The offeror represents that it _____ does _____ does not reside or primarily do business in the set-aside area.

(c) An offeror is considered to be residing or primarily doing business in the set-aside area if, during the last twelve months—

(1) The offeror had its main operating office in the area; and

(2) That office generated at least half of the offeror’s gross revenues and employed at least half of the offeror’s permanent employees.

(d) If the offeror does not meet the criteria in paragraph (c) of this provision, factors to be considered in determining whether an offeror resides or primarily does business in the set-aside area include—

(1) Physical location(s) of the offeror’s permanent office(s) and date any office in the set-aside area(s) was established;

(2) Current state licenses;

(3) Record of past work in the set-aside area(s) (e.g., how much and for how long);

(4) Contractual history the offeror has had with subcontractors and/or suppliers in the set-aside area;

(5) Percentage of the offeror’s gross revenues attributable to work performed in the set-aside area;

(6) Number of permanent employees the offeror employs in the set-aside area;

(7) Membership in local and state organizations in the set-aside area; and

(8) Other evidence that establishes the offeror resides or primarily does business in the set-aside area. For example, sole proprietorships may submit utility bills and bank statements.

(e) If the offeror represents it resides or primarily does business in the set-aside area, the offeror shall furnish documentation to support its representation if requested by the Contracting Officer. The solicitation may require the offeror to submit with its offer documentation to support the representation.

(End of provision)

■ 10. Revise section 52.226–4 to read as follows:

52.226–4 Notice of Disaster or Emergency Area Set-Aside.

As prescribed in 26.205(b), insert the following clause:

NOTICE OF DISASTER OR EMERGENCY AREA SET-ASIDE (Nov 2007)

(a) *Set-aside area.* Offers are solicited only from businesses residing or primarily doing business in

 [Contracting Officer to fill in with definite geographic boundaries.] Offers received from other businesses shall not be considered.

(b) This set-aside is in addition to any small business set-aside contained in this contract.

(End of clause)

■ 11. Revise section 52.226–5 to read as follows:

52.226–5 Restrictions on Subcontracting Outside Disaster or Emergency Area.

As prescribed in 26.205(c), insert the following clause:

RESTRICTIONS ON SUBCONTRACTING OUTSIDE DISASTER OR EMERGENCY AREA (Nov 2007)

(a) *Definitions.* The definitions of the following terms used in this clause are found in the Small Business Administration regulations at 13 CFR 125.6(e): cost of the contract, cost of contract performance incurred for personnel, cost of manufacturing, cost of materials, personnel, and subcontracting.

(b) The Contractor agrees that in performance of the contract in the case of a contract for—

(1) *Services (except construction).* At least 50 percent of the cost of contract performance incurred for personnel

shall be expended for employees of the Contractor or employees of other businesses residing or primarily doing business in the clause at FAR 52.226–4, Notice of Disaster or Emergency Area Set-Aside;

(2) *Supplies (other than procurement from a nonmanufacturer of such supplies).* The Contractor or employees of other businesses residing or primarily doing business in the set-aside area shall perform work for at least 50 percent of the cost of manufacturing the supplies, not including the cost of materials;

(3) *General construction.* The Contractor will perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees or employees of other businesses residing or primarily doing business in the set-aside area; or

(4) *Construction by special trade Contractors.* The Contractor will perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees or employees of other businesses residing or primarily doing business in the set-aside area.

(End of clause)

[FR Doc. 07–5482 Filed 11–6–07; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Part 22

[FAC 2005–21; FAR Case 2007–001; Item VII; Docket 2007–0001; Sequence 9]

RIN 9000–AK81

Federal Acquisition Regulation; FAR Case 2007–001, Labor Standards for Contracts Containing Construction Requirements—Contract Pricing Method References

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise references to published pricing sources available to the contracting officer. The revision will

provide greater flexibilities for contracting officers when selecting sources of pricing data.

DATES: *Effective Date:* December 7, 2007.

FOR FURTHER INFORMATION CONTACT: Mr. Ernest Woodson, Procurement Analyst, at (202) 501-3775 for clarification of content. The TTY Federal Relay Number for further information is 1-800-877-8973. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-21, FAR case 2007-001.

SUPPLEMENTARY INFORMATION:

A. Background

FAR 22.404-12(c)(2) allows the contracting officer to include in the contract a separately specified pricing method that permits an adjustment to the contract price or contract labor unit price at the exercise of each option to extend the term of the contract. References to published pricing sources are included to assist the contracting officer in identifying pricing data to support the pricing method used to calculate the contract pricing adjustment. This final rule revises the language at FAR 22.404-12(c)(2) that references published pricing sources available to the contracting officer. The FAR currently references a single commercial product and the intent of this change is to not show favor to any commercial product. The revised language deletes the specified product and allows the contracting officer to choose any commercial product.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98-577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Part 22 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005-21, FAR case 2007-001), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information

collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 22

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 22 as set forth below:

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

■ 1. The authority citation for 48 CFR part 22 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Amend section 22.404-12 by revising the third sentence of paragraph (c)(2) to read as follows:

22.404-12 Labor standards for contracts containing construction requirements and option provisions that extend the term of the contract.

* * * * *

(c) * * *

(2) * * * An example of a contract pricing method that the contracting officer might separately specify is incorporation in the solicitation and resulting contract of the pricing data from an annually published unit pricing book (e.g., the U.S. Army Computer-Aided Cost Estimating System or similar commercial product), which is multiplied in the contract by a factor proposed by the contractor (e.g., .95 or 1.1). * * *

* * * * *

[FR Doc. 07-5483 Filed 11-6-07; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 25, 52, and 53

[FAC 2005-21; Item VIII; Docket FAR-2007-0003; Sequence 3]

Federal Acquisition Regulation; Technical Amendments

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

ACTION: Final rule.

SUMMARY: This document makes amendments to the Federal Acquisition Regulation (FAR) in order to make editorial changes.

DATES: *Effective Date:* November 7, 2007.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. Please cite FAC 2005-21, Technical Amendments.

List of Subjects in 48 CFR Parts 1, 25, 52, and 53

Government procurement.

Dated: October 31, 2007.

Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 25, 52, and 53 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 25, 52, and 53 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

1.106 [Amended]

■ 2. Amend section 1.106 by removing FAR Segments 52.210-8 with OMB Control Number "9000-0018", 52.210-9 with OMB Control Number "9000-0016", 52.210-10 with OMB Control Number "9000-0017", and 52.212-1 and 52.212-2 with OMB Control Number "9000-0043"; and adding, in numerical order, FAR Segments 52.211-8 and 52.211-9 with OMB Control Number "9000-0043".

PART 25—FOREIGN ACQUISITION

25.003 [Amended]

■ 3. Amend section 25.003 in the definition "Caribbean Basin country end product" by removing from paragraph (1)(ii)(B) "<http://www.customs.ustreas.gov/impexpo/impexpo.htm>" and adding "<http://www.usitc.gov/tata/hts/>" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-5 [Amended]

■ 4. Amend section 52.212-5 by—
 ■ a. Revising date of the clause to read "(Nov 2007)";
 ■ b. Removing from paragraph (b)(8)(i) "(Sep 2007)" and adding "(Nov 2007)" in its place; and
 ■ c. Removing from paragraph (b)(28) "(Aug 2007)" and adding "(Nov 2007)" in its place.