

Part 42 - Contract Administration and Audit Services

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42.000 Scope of part.

This part prescribes policies and procedures for assigning and performing contract administration and contract audit services.

42.001 Interagency agreements.

(a) Agencies must use interagency agreements to prevent duplicate audits, reviews, inspections, and examinations of contractors or subcontractors by more than one agency.

(b) Subject to the fiscal regulations of the agencies and applicable interagency agreements, the requesting agency must pay the servicing agency for services rendered, in accordance with the Economy Act (31 U.S.C. 1535).

42.002 Cognizant Federal agency.

(a) The cognizant Federal agency is the agency with the largest dollar amount in negotiated contracts, including options, for each contractor business unit, except for educational institutions and nonprofits. The cognizant Federal agency for educational institutions (defined as institutions of higher education at 2 CFR part 200, subpart A, and 20 U.S.C. 1001) and nonprofit organizations (as defined in 2 CFR part 200), the

cognizant Federal agency for indirect costs is determined by using the OMB Uniform Guidance at 2 CFR part 200, appendices III and IV, respectively.

(b) Once a Federal agency assumes cognizance for a contractor, it should remain the cognizant Federal agency for at least 5 years to ensure continuity and ease of administration.

Subpart 42.1 - Contract Audit Services

42.101 Contract audit responsibilities.

(a) The auditor is responsible for-

(1) Analyzing contractor financial records or other related data and advising the requesting activity on the acceptability of the contractor's incurred and estimated costs;

(2) Reviewing the financial and accounting aspects of the contractor's cost control systems; and

(3) Performing other analyses and reviews that require access to the contractor's financial and accounting records supporting proposed and incurred costs.

(b) Normally, the Defense Contract Audit Agency (DCAA) is the responsible Government audit agency. However, there may be instances where an agency other than DCAA desires cognizance of a particular contractor. In those instances, the two agencies must agree on the most efficient and economical approach to meet contract audit requirements. For educational institutions (defined as institutions of higher education in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001) and nonprofit organizations (as defined in the OMB Uniform Guidance at 2 CFR part 200), audit cognizance will be determined according to the provisions of the OMB Uniform Guidance at 2 CFR part 200.

42.102 Assignment of contract audit services.

(a) Contracting officers may request audit services directly from the responsible audit agency listed in the Directory of Federal Contract Audit Offices. Requests must include a suspense date and identify any information needed by the contracting officer.

(b) The responsible audit agency may decline requests for services on a case-by-case basis if they lack adequate resources. Declinations must be in writing.

42.103 Contract audit services directory.

(a) DCAA maintains the Directory of Federal Contract Audit Offices. The directory identifies cognizant audit offices and the assigned contractors they have cognizance over. Contract Audit Offices must provide audit cognizance changes to DCAA for directory updates.

(b) To obtain the directory or information about audit offices, contact: Defense Contract Audit Agency, ATTN: CMO, Publications Officer, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060-6219.

Subpart 42.2 - Contract Administration Services

42.201 Contract administration responsibilities.

For each contract assigned for administration, the contract administration office (CAO) will-

- (a) Perform the functions listed in 42.302(a) to the extent that they apply to the contract, except for the functions specifically withheld;
- (b) Perform the functions listed in 42.302(b) only when and to the extent specifically authorized by the contracting officer; and
- (c) Request supporting contract administration under 42.202(e) and (f) as required.

42.202 Assignment of contract administration.

(a) *Delegating functions.* Contracting officers may delegate contract administration or specialized support services through interagency agreements or by direct request to the cognizant CAO listed in the Contract Administration Services Directory (CASD). The delegation should include-

- (1) The name and address of the CAO designated to perform the administration (this information must also be entered in the contract);

- (2) Any special instructions, including any functions withheld or any specific authorization to perform functions listed in 42.302 (b);
- (3) A copy of the contract to be administered; and
- (4) Copies of all contracting agency regulations or directives that are
 - (i) Incorporated into the contract by reference; or
 - (ii) Otherwise, necessary to administer the contract, unless copies have been provided previously.

(b) *Special instructions.* As necessary, the contracting officer must advise the contractor (and other activities as appropriate) of any functions withheld from or additional functions delegated to the CAO.

(c) *Delegating additional functions.* For individual contracts or groups of contracts, the contracting officer may delegate additional functions beyond those listed in 42.302 to the CAO, provided that-

- (1) Prior coordination with the CAO ensures the availability of required resources;
- (2) In the case of authority to issue orders under provisioning procedures in existing contracts and under basic ordering agreements for items and services identified in the schedule, the head of the contracting activity or designee approves the delegation; and
- (3) The delegation does not require the CAO to undertake new or follow-on acquisitions.

(d) *Rescinding functions.* The contracting officer at the requesting agency may rescind or recall a delegation to administer a contract or perform a contract administration function, except for the cognizant Federal agency functions identified in 42.302(a). The requesting agency must coordinate with the CAO to establish a reasonable transition period prior to rescinding or recalling the delegation.

(e) *Secondary delegations of contract administration.*

(1) A CAO that has been delegated administration of a contract function may request supporting contract administration from the cognizant CAO at the location. The request must-

- (i) Be in writing;
- (ii) Clearly state the specific administration functions to be performed; and

(iii) Be accompanied by a copy of pertinent contractual and other necessary documents.

(2) The prime contractor is responsible for managing its subcontracts. The CAO's review of subcontracts is normally limited to evaluating the prime contractor's management of the subcontracts (see part 44). Therefore, supporting contract administration may only be used for subcontracts when-

(i) The Government otherwise would incur undue cost;

(ii) Successful completion of the prime contract is threatened; or

(iii) It is authorized under paragraph (f) of this section or elsewhere in this regulation.

(f) *Special surveillance.* For major system acquisitions (see part 34), the contracting officer may designate certain high risk or critical subsystems or components for special surveillance in addition to requesting supporting contract administration. This surveillance must be conducted in a manner consistent with the policy of requesting that the cognizant CAO perform contract administration functions at a contractor's facility (see 42.002).

(g) *Refusing delegation of contract administration.* An agency may decline a request for contract administration services on a case-by-case basis if they lack adequate resources to accomplish the tasks. Declinations must be in writing.

42.203 Contract administration services directory.

The Defense Contract Management Agency (DCMA) maintains the CASD. The directory lists the contact information of those DCMA and other agency offices that offer contract administration services within designated geographic areas and at specified contractor locations. Federal agencies may access CASD on the Internet at <https://piee.eb.mil/pcm/xhtml/unauth/index.xhtml>.

Subpart 42.3 - Contract Administration Office Functions

42.301 General.

When a contract is assigned for administration under subpart 42.2, the contract administration office (CAO) will perform contract administration functions in accordance with 48 CFR Chapter 1, the contract terms, and, unless otherwise agreed to in an interagency agreement (see 42.001), the applicable regulations of the servicing agency.

42.302 Contract administration functions.

(a) The contracting officer normally delegates the following contract administration functions to a CAO. The contracting officer may retain any of these functions, except those in paragraphs (a)(5), (a)(9), (a)(11), and (a)(12) of this section, which must be performed by the cognizant Federal agency.

(1) Review the contractor's compensation structure.

(2) Review the contractor's insurance plans.

(3) Conduct post-award orientation conferences.

(4) Review and evaluate contractors' proposals under subpart 15.4 and, when the contracting officer will conduct negotiations, furnish comments and recommendations to that officer.

(5) Negotiate forward pricing rate agreements (see part 15 and subpart 42.13).

(6) Negotiate advance agreements pursuant to the contract cost principles in part 31.

(7) Determine the allowability of costs suspended or disapproved as required (see subpart 42.6), direct the suspension or disapproval of costs when there is reason to believe they should be suspended or disapproved, and approve final vouchers.

(8) Issue Notices of Intent to Disallow or not Recognize Costs (see subpart 42.6).

(9) Establish final indirect cost rates and billing rates for contractors meeting the criteria for contracting officer determination in subpart 42.5.

(10) Attempt to resolve issues in controversy, using alternative dispute resolution (ADR) procedures when appropriate (see part 33); prepare findings of fact; and issue decisions under the Disputes clause on matters in which the administrative contracting officer (ACO) has the authority to take definitive action.

(11) In connection with Cost Accounting Standards (CAS) (see part 30 and 48 CFR chapter 99)-

- (i) Determine the adequacy of the contractor's disclosure statements;
 - (ii) Determine whether disclosure statements are in compliance with CAS and part 31;
 - (iii) Determine the contractor's compliance with CAS and disclosure statements, if applicable; and
 - (iv) Negotiate price adjustments and execute supplemental agreements under the CAS clauses at 52.230-2, 52.230-3, 52.230-4, 52.230-5, and 52.230-6.
- (12) Determine the adequacy of the contractor's accounting system. The contractor's accounting system should be adequate during the entire period of contract performance. The adequacy of the contractor's accounting system and its associated internal control system, as well as contractor compliance with the CAS, affects the quality and validity of the contractor data the Government relies on for contractor oversight.
- (13) Review and approve or disapprove contractor requests for financing payments (see part 32).
- (14) Make payments on assigned contracts when prescribed in agency acquisition regulations.
- (15) Manage special bank accounts.
- (16) Ensure the contractor notifies the contracting officer in a timely manner of any anticipated overrun or underrun of the estimated cost under cost-reimbursement contracts.
- (17) Monitor the contractor's financial condition and advise the contracting officer when it jeopardizes contract performance.
- (18) Analyze quarterly limitation on payments statements and act in accordance with part 32 to recover overpayments from the contractor.
- (19) Issue tax exemption forms.
- (20) Ensure processing and execution of duty-free entry certificates.
- (21) For classified contracts, administer delegated portions of the industrial security program delegated to the CAO (see part 40).
- (22) Review and negotiate supplemental agreements in response to contractor work requests under maintenance, overhaul, modification, and repair contracts.

- (23) Negotiate prices and execute supplemental agreements for spare parts and other items selected through provisioning procedures when prescribed by agency acquisition regulations.
- (24) Negotiate and execute settlement of partial and complete contract terminations for convenience, unless stated otherwise by part 49.
- (25) Negotiate and execute settlements of cancellation charges under multiyear contracts.
- (26) Process and execute novation and change of name agreements under subpart 42.9.
- (27) Perform property administration (see part 45).
- (28) Perform necessary screening, redistribution, and disposal of contractor inventory.
- (29) Issue contract modifications requiring the contractor to provide packing, crating, and handling services on excess Government property.
- (30) When contractors request Government property-
- (i) Evaluate contractor's requests for Government property and for changes to existing Government property, and provide appropriate recommendations to the contracting officer;
 - (ii) Ensure required screening of Government property before acquisition by the contractor;
 - (iii) Evaluate the use of Government property on a non-interference basis in accordance with the clause at 52.245-9, Use and Charges;
 - (iv) Ensure contractor payment of any rental due; and
 - (v) Modify contracts to reflect the addition of Government-furnished property and ensure appropriate consideration.
- (31) Perform production support, surveillance, and status reporting, including timely reporting of potential and actual slippages in contract delivery schedules.
- (32) Perform preaward surveys (see part 9).

(33) Advise and assist contractors regarding their priorities and allocations responsibilities and assist contracting offices in processing requests for special assistance and for priority ratings for privately owned capital equipment (see part 11).

(34) Monitor contractor industrial labor relations matters under the contract; apprise the contracting officer and, if designated by the agency, the cognizant labor relations advisor, of actual or potential labor disputes; and coordinate the removal of urgently required material from the strikebound contractor's plant upon instruction from, and authorization of, the contracting officer.

(35) Perform traffic management services, including issuance and control of Government bills of lading and other transportation documents.

(36) Review the adequacy of the contractor's traffic operations.

(37) Review and evaluate preservation, packaging, and packing.

(38) Ensure contractor compliance with contractual quality assurance requirements (see part 46).

(39) Ensure contractor compliance with contractual safety requirements.

(40) Perform engineering surveillance to assess compliance with contractual terms for schedule, cost, and technical performance in the areas of design, development, and production.

(41) Evaluate for adequacy and perform surveillance of contractor engineering efforts and management systems that relate to design, development, production, engineering changes, subcontractors, tests, management of engineering resources, reliability and maintainability, data control systems, configuration management, and independent research and development.

(42) Review and evaluate for technical adequacy, the contractor's logistics support, maintenance, and modification programs.

(43) Report to the contracting office any inadequacies noted in specifications.

(44) Perform engineering analyses of contractor cost proposals.

(45) Review and analyze contractor-proposed engineering and design studies and submit comments and recommendations to the contracting office, as required.

(46) Review engineering change proposals for proper classification, and when required, for need, technical adequacy of design, producibility, and impact on quality, reliability, schedule, and cost; submit comments to the contracting office.

(47) Assist in evaluating and make recommendations for acceptance or rejection of waivers and deviations.

(48) Evaluate and monitor the contractor's procedures for complying with procedures regarding restrictive markings on data.

(49) Monitor the contractor's value engineering program.

(50) Review, approve or disapprove, and maintain surveillance of the contractor's purchasing system (see part 44).

(51) Consent to the placement of subcontracts (see part 44).

(52) Review, evaluate, and approve plant or division-wide small, small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business master subcontracting plans.

(53) Obtain the contractor's currently approved company- or division-wide plans for small, small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business subcontracting for its commercial products. If there is no currently approved plan, assist the contracting officer in evaluating the plans for those products.

(54) Assist the contracting officer, upon request, in evaluating an offeror's proposed small, small disadvantaged women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business subcontracting plans, including documentation of compliance with similar plans under prior contracts.

(55) By periodic surveillance, ensure the contractor's compliance with small, small disadvantaged, women-owned, veteran-owned, HUBZone, and service-disabled veteran-owned small business subcontracting plans and any labor surplus area contractual requirements; maintain documentation of the contractor's performance under and compliance with these plans and requirements; and provide advice and assistance to the firms involved, as appropriate.

(56) Maintain surveillance of flight operations.

(57) Assign and perform supporting contract administration.

(58) Ensure timely submission of required reports.

(59) Issue administrative changes, correcting errors or omissions in typing, contractor address, facility or activity code, remittance address, computations which do not require additional contract funds, and other such changes (see part 43).

(60) Administer and release shipments from the contractor's plants according to the shipping instructions. When applicable, the order of assigned priority must be followed; shipments within the same priority will be determined by date of the instruction.

(61) Obtain contractor proposals for any contract price adjustments resulting from amended shipping instructions. Review all amended shipping instructions on a periodic, consolidated basis to ensure that adjustments are timely. Except when the ACO has settlement authority, the ACO will forward the proposal to the contracting officer for contract modification. The ACO will not delay shipments pending completion and formalization of negotiations of revised shipping instructions.

(62) Negotiate and/or execute supplemental agreements making changes in packaging subcontractors or contract shipping points.

(63) Cancel unilateral purchase orders when rejected by the contractor. The CAO must notify the contracting officer when the purchase order is canceled.

(64) Negotiate and execute one-time supplemental agreements providing for the extension of contract delivery schedules up to 90 days on contracts with an assigned Criticality Designator of C (see 42.804). The CAO must provide notification that the contract delivery schedule is being extended to the contracting office. Subsequent extensions on any individual contract must have concurrence of the contracting office.

(65) Perform administrative closeout procedures (see part 4).

(66) Determine that the contractor has a drug-free workplace program and drug-free awareness program (see part 26).

(67) Support the program, product, and project offices for program reviews, program status, program performance and actual or anticipated program problems.

(68) Monitor the contractor's environmental practices for adverse impact on contract performance or contract cost, and for compliance with environmental requirements specified in the contract. ACO responsibilities include-

(i) Requesting environmental technical assistance, if needed;

(ii) Monitoring contractor compliance with specifications or other contractual requirements requiring the delivery, use, or furnishing of sustainable products in accordance with the clause at 52.223-23. This occurs as part of the quality assurance procedures set forth in part 46; and

(iii) As required in the contract, ensuring that the contractor complies with the reporting requirements relating to recovered material content (see 52.223-9) and biobased products (see 52.223-2) utilized in contract performance.

(69) Administer commercial financing provisions and monitor contractor security to ensure its continued adequacy to cover outstanding payments, when on-site review is required (see part 32).

(70) Deobligate excess funds after final price determination.

(71) Ensure that the contractor has implemented the requirements of 52.203-13, Contractor Code of Business Ethics and Conduct.

(b) The CAO may perform the following functions only when and to the extent specifically authorized by the contracting office:

(1) Negotiate and execute supplementals agreements incorporating contractor proposals resulting from change orders issued under the Changes clause. Before completing negotiations, coordinate any delivery schedule change with the contracting office.

(2) Negotiate prices and execute priced exhibits for unpriced orders issued by the contracting officer under basic ordering agreements.

(3) Negotiate and execute supplementals agreements changing contract delivery schedules.

(4) Negotiate and execute supplemental agreements providing for the deobligation of unexpended dollar balances considered excess to known contract requirements.

(5) Issue amended shipping instructions and, when necessary, negotiate and execute resultant supplemental agreements incorporating contractor proposals.

(6) Negotiate changes to interim billing prices.

(7) Negotiate and definitize adjustments to contract prices resulting from exercise of an economic price adjustment clause (see part 16).

(8) Issue change orders and negotiate and execute resulting supplemental agreements under contracts for ship construction, conversion, and repair.

(9) Execute supplemental agreements on firm-fixed-price supply contracts to reduce required line item quantities and deobligate excess funds when notified by the contractor of an inconsequential delivery shortage, but only when the action is—

(i) Determined to be in the best interests of the Government;

(ii) Supported by a written request of the contractor; and

(iii) A total downward contract price adjustment resulting from an inconsequential delivery shortage. This action must not exceed \$250.00 or 5 percent of the contract price, whichever is less.

(10) Execute supplemental agreements to permit a change in place of inspection at origin specified in firm-fixed-price supply contracts awarded to nonmanufacturers, as deemed necessary to protect the Government's interests.

(11) Prepare evaluations of contractor performance in accordance with subpart 42.11.

(c) Any additional contract administration functions not listed in 42.302(a) and (b), or not otherwise delegated, remain the responsibility of the contracting office unless in accordance with 42.202 Assignment of contract administration(c).

Subpart 42.4 - Corporate Administrative Contracting Officer

42.401 General.

Contractors with more than one operational location (e.g., division, plant, or subsidiary) often have corporate-wide policies, procedures, and activities requiring Government review and approval and affecting the work of more than one administrative contracting officer (ACO). In these circumstances, the CFA may assign a corporate administrative contracting officer (CACO) to deal with corporate management and to perform selected contract administration functions on a corporate-wide basis.

42.402 Assignment and location.

(a) A CACO may be assigned only when the—

(1) Contractor has at least two locations with resident ACOs; or

(2) Agency head or designee approves the assignment. For this purpose ((a)(2) of this paragraph), a nonresident ACO is considered as resident if at least 75 percent of the ACO's effort is devoted to a single contractor. The agency head or designee may also designate a resident ACO to perform the CACO functions.

(b) Agencies must base decisions to initiate or discontinue a CACO assignment on such factors as the-

(1) Benefits of coordination and liaison at the corporate level;

(2) Volume of Government sales;

(3) Degree of control exercised by the contractor's corporate office over Government-oriented lower-tier operating elements; and

(4) Impact of corporate policies and procedures on those elements.

(c) The CASD referenced in 42.203 includes a listing of CACOs and the contractors to whom they are assigned responsibility.

42.403 Responsibilities.

(a) The CACO will perform, on a corporate-wide basis, the contract administration functions as designated by the responsible agency. Typical CACO functions include-

(1) The determination of final indirect cost rates for cost-reimbursement contracts;

(2) Establishment of advance agreements or recommendations on corporate/home office expense allocations; and

(3) Administration of CAS applicable to corporate-level and corporate-directed accounting practices.

(b) The CACO must-

(1) Fully utilize the responsible contract audit agency financial and advisory accounting services, including-

(i) Advice regarding the acceptability of corporate-wide policies; and

(ii) Advisory audit reports;

- (2) Keep cognizant ACOs and auditors informed of important matters under consideration and determinations made; and
- (3) Solicit advice and participation from cognizant ACOs and auditors as appropriate.

Subpart 42.5 - Indirect Cost Rates

42.500 Scope of subpart.

This subpart prescribes policies and procedures for establishing-

- (a) Billing rates; and
- (b) Final indirect cost rates.

42.501 Definition.

Billing rate, as used in this subpart, means an indirect cost rate-

- (1) Established temporarily for interim reimbursement of incurred indirect costs; and
- (2) Adjusted as necessary until final indirect cost rates are established.

42.502 Purpose.

(a) Establishing final indirect cost rates under this subpart provides-

- (1) Uniformity of approach with a contractor when more than one contract or agency is involved;
- (2) Economy of administration; and
- (3) Timely settlement under cost-reimbursement contracts.

(b) Establishing billing rates provides a method for interim reimbursement of indirect costs at estimated rates subject to adjustment during contract performance and at the time the final indirect cost rates are established.

42.503 General.

42.503-1 Policy.

(a) A single agency (see 42.505-1) is responsible for establishing final indirect cost rates for each business unit. These rates are binding on all agencies and their contracting offices, unless specifically prohibited by statute. Agencies cannot audit indirect cost rates when the audit objectives can reasonably be met by accepting the results of an audit by another department or agency of the Federal Government (10 U.S.C. 3841(e) and 41 U.S.C. 4706(e)).

(b) Contracting officers must use billing rates and final indirect cost rates to reimburse indirect costs under cost-reimbursement contracts and make progress payments under fixed-price contracts.

(c) To ensure compliance with 10 U.S.C. 3743(a) and 41 U.S.C. 4303(a) use final indirect cost rates for -

(1) Contract closeout for a business unit, unless the quick-closeout procedure in 42.507 is used. These final rates are binding for all cost-reimbursement contracts at the business unit, subject to any specific limitation in a contract or advance agreement; and

(2) Negotiating the final price of fixed-price incentive and fixed-price redeterminable contracts and in other situations requiring that indirect costs be settled before contract prices are established, unless the quick-closeout procedure in 42.507 is used.

42.503-2 Certificate of indirect costs.

(a) *General.* In accordance with 10 U.S.C. 3747 and 41 U.S.C. 4307, the Government must not accept a proposal or agree to establish final indirect cost rates unless the contractor certifies the costs are allowable.

(b) *Waiver of certification.*

(1) The agency head, or designee, may waive the certification requirement when-

(i) It is determined to be in the interest of the United States; and

(ii) The reasons for the determination are put in writing and made available to the public.

(2) A waiver may be appropriate for a contract with-

- (i) A foreign government or international organization, such as a subsidiary body of the North Atlantic Treaty Organization;
- (ii) A State or local government subject to the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendices V and VII;
- (iii) An educational institution (defined as an institution of higher education in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001) subject to the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix III; and
- (iv) A nonprofit organization (as defined in the OMB Uniform Guidance at 2 CFR part 200) subject to the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix IV.

(c) *Failure to certify.*

(1) If the contractor has not certified its proposal for final indirect cost rates and a waiver is not appropriate, the contracting officer may unilaterally establish the rates.

(2) Unilateral rates should be-

- (i) Based on audited historical data or other available data if unallowable costs are excluded; and
- (ii) Set low enough to ensure that unallowable costs are not reimbursed.

(d) *False certification.* Consult with legal counsel to determine appropriate action when a contractor's certificate of final indirect costs is thought to be false.

(e) *Penalties for unallowable costs.* 10 U.S.C. 3743 and 41 U.S.C.4303 prescribe penalties for submission of unallowable costs in final indirect cost rate proposals (see 42.508 for penalties and contracting officer responsibilities).

(f) *Contract clause.*

(1) Except as provided in paragraph (f)(2) of this section, use the clause at 52.242-4, Certification of Final Indirect Costs, in all solicitations and contracts which provide for establishment of final indirect cost rates.

(2) The Department of Energy may provide an alternate clause in its agency supplement for its Management and Operating contracts.

42.504 Billing rates.

(a) The contracting officer (or cognizant Federal agency official) or auditor responsible under 42.505 for establishing the final indirect cost rates must also determine the billing rates.

(b) The contracting officer (or cognizant Federal agency official) or auditor must establish billing rates on the basis of information resulting from recent review, previous rate audits or experience, or similar reliable data or experience of other contracting activities. When establishing billing rates, ensure that the billing rates are as close as possible to the final indirect cost rates anticipated for the contractor's fiscal period, as adjusted for any unallowable costs. When the contracting officer (or cognizant Federal agency official) or auditor determines that the dollar value of contracts requiring use of billing rates does not warrant submission of a detailed billing rate proposal, the billing rates may be established by making appropriate adjustments from the prior year's indirect cost experience to eliminate unallowable and nonrecurring costs and to reflect new or changed conditions.

(c) Once established, billing rates may be prospectively or retroactively revised by mutual agreement of the contracting officer (or cognizant Federal agency official) or auditor and the contractor at either party's request, to prevent substantial overpayment or underpayment. When agreement cannot be reached, the contracting officer (or cognizant Federal agency official) may unilaterally determine the billing rates.

(d) Do not construe the elements of indirect cost and the base or bases used in computing billing rates as determinative of the indirect costs to be distributed or of the bases of distribution to be used in the final settlement.

(e) When the contractor provides to the cognizant contracting officer the certified final indirect cost rate proposal in accordance with 42.505-1(b) or 42.505-2(b), the contractor and the Government may mutually agree to revise billing rates to reflect the proposed indirect cost rates, as approved by the Government to reflect historically disallowed amounts from prior years' audits, until the proposal has been audited and settled. The cognizant contracting officer (see 42.505-1(b)) or auditor (see 42.505-2(b)) will determine the historical decrement.

42.505 Final indirect cost rates.

(a) Establish final indirect cost rates based on-

(1) Contracting officer determination procedure (see 42.505-1), or

(2) Auditor determination procedure (see 42.505-2).

(b) Within 120 days (or longer period, if approved in writing by the contracting officer,) after, settlement of the final annual indirect cost rates for all years of a physically complete contract, the contractor must submit a completion invoice or voucher reflecting the settled amounts and rates. To determine whether a period longer than 120 days is appropriate, the contracting officer should consider whether there are extenuating circumstances, such as the following:

(1) Pending closeout of subcontracts awaiting Government audit.

(2) Pending contractor, subcontractor, or Government claims.

(3) Delays in the disposition of Government property.

(4) Delays in contract reconciliation.

(5) Any other pertinent factors.

(c)

(1) If the contractor does not submit a completion invoice or voucher within the time specified in paragraph (b) of this section, the contracting officer may-

(i) Determine the amounts due to the contractor under the contract; and

(ii) Record this determination in a unilateral modification to the contract.

(2) This contracting officer determination must be issued as a final decision in accordance with part 33.

42.505-1 Contracting officer determination procedure.

(a) *Applicability and responsibility.* Contracting officer determination will be used for the following, with the indicated cognizant contracting officer (or cognizant Federal agency official) responsible for establishing the final indirect cost rates:

(1) Business units of a multidivisional corporation under the cognizance of a corporate administrative contracting officer (CACO) (see subpart 42.4), with that officer responsible for the determination, assisted, as required, by the administrative contracting officers assigned to the individual business units. Negotiations may be conducted on a coordinated or centralized basis, depending upon the degree of centralization within the contractor's organization.

(2) Business units not under the cognizance of a CACO but having a resident ACO (see subpart 42.4), with that officer responsible for the determination. For this purpose, a nonresident ACO is considered as resident if they spend at least 75 percent of their time devoted to a single contractor.

(3) For business units not included in paragraph (a)(1) or (a)(2) of this subsection, the contracting officer (or cognizant Federal agency official) will determine whether the rates will be contracting officer or auditor determined.

(4) Educational institutions (see 42.505-3).

(5) State and local governments (see 42.505-4).

(6) Nonprofit organizations other than educational and state and local governments (see 42.505-5).

(b) *Procedures.*

(1) *Contractor proposal.* In accordance with the Allowable Cost and Payment clause at 52.216-7, the contractor must submit an adequate final indirect cost rate proposal to the cognizant contracting officer (or cognizant Federal agency official) and to the cognizant auditor.

(i) The required content of the proposal and supporting data will vary depending on such factors as business type, size, and accounting system capabilities. The contractor, contracting officer, and auditor must work together to make the proposal, audit, and negotiation process as efficient as possible.

(ii) Each contractor must submit the final indirect cost rate proposal within the six-month period following the expiration of each of its fiscal years. The contracting officer may grant, in writing, reasonable extensions, for exceptional circumstances only, when requested in writing by the contractor.

(iii) Upon receipt of the proposal—

(A) The cognizant auditor will review the adequacy of the contractor's proposal for audit in support of negotiating final indirect cost rates and a written description of any inadequacies to the contractor and contracting officer.

(B) If the auditor and contractor are unable to resolve the proposal's inadequacies identified by the auditor, the auditor will elevate the issue to the contracting office to resolve the inadequacies.

(iv) The proposal must be supported with adequate supporting data. Additional supporting data may be required after finding that the proposal is adequate in support of negotiating final indirect cost rates. See the clause at 52.216-7(d)(2) for the description of an adequate final indirect cost rate proposal and supporting data.

(2) *Audit*. Once a proposal has been determined to be adequate for audit in support of negotiating final indirect cost rates, the auditor will audit the proposal and prepare an advisory audit report to the contracting officer (or cognizant Federal agency official), including a listing of any relevant advance agreements or restrictive terms of specific contracts.

(3) *Negotiation team*. The contracting officer (or cognizant Federal agency official) heads the Government negotiating team. The team develops a negotiation position. The team includes:

(i) The cognizant auditor;

(ii) Technical or functional personnel as required.;

(iii) Contracting offices with significant dollar interest must be invited to participate in the negotiation and in the preliminary discussion of critical issues.;

(iv) Parties that have provided a significant input to the Government position should be invited to attend.

(4) *Negotiation position*. The team develops a negotiation position. Pursuant to 10 U.S.C. 3745 and 41 U.S.C.4305, the contracting officer will -

(i) Not resolve any questioned costs until obtaining-

(A) Adequate documentation on the costs; and

(B) The contract auditor's opinion on the allowability of the costs.

(ii) Whenever possible, invite the contract auditor to serve as an advisor at any negotiation or meeting with the contractor on the determination of the contractor's final indirect cost rates.

(5) The cognizant contracting officer must-

(i) Conduct negotiations;

(ii) Prepare a written indirect cost rate agreement conforming to the requirements of the contracts;

(iii) Prepare, sign, and place in the contractor general file a negotiation memorandum covering—

(A) The disposition of significant matters in the advisory audit report,

(B) Reconciliation of all costs questioned, with identification of items and amounts allowed or disallowed in the final settlement as well as the disposition of period costing or allocability issues,

(C) Reasons why any recommendations of the auditor or other Government advisors were not followed, and

(D) Identification of certified cost or pricing data submitted during the negotiations and relied upon in reaching a settlement; and

(iv) The contracting officer must promptly distribute executed copies of the indirect cost rate agreement to the contractor and to each affected contracting agency and include copies of the agreement in the contract file. The contracting officer must include a copy of the negotiation memorandum described in 42.501(b)(5)(iii) in the contract file and furnish, as appropriate, to the affected contracting offices and Government auditor.

(v) Notify the contractor of the individual costs which were considered unallowable and the respective amounts of the disallowance.

42.505-2 Auditor determination procedure.

(a) Applicability and responsibility.

(1) The cognizant Government auditor must establish final indirect cost rates for business units not covered in 42.505-1(a).

(2) Auditor determination may also be used for business units that are covered in 42.505-1(a) when the contracting officer (or cognizant Federal agency official) and auditor agree that the indirect costs can be settled with little difficulty and any of the following circumstances apply:

(i) The business unit primarily has fixed-price contracts, with only minor involvement in cost-reimbursement contracts.

(ii) The administrative cost of contracting officer determination would exceed the expected benefits.

(iii) The business unit does not have a history of disputes and there are few cost problems.

(iv) The contracting officer (or cognizant Federal agency official) and auditor agree that special circumstances require auditor determination.

(b) *Procedures.*

(1) The contractor must submit to the cognizant contracting officer (or cognizant Federal agency official) and auditor a final indirect cost rate proposal in accordance with 42.505-1(b)(1).

(2) Once a proposal has been determined to be adequate for audit in support of negotiating final indirect cost rates, the auditor will-

(i) Audit the proposal and prepare an advisory audit report, including a listing of any relevant advance agreements or restrictive terms of specific contracts. Copies of the audit report must be furnished to the affected contracting offices;

(ii) Seek agreement on indirect costs with the contractor;

(iii) Prepare an indirect cost rate agreement conforming to the requirements of the contracts. The agreement must be signed by the contractor and the auditor. A copy of the agreement must be distributed to the contractor and to each affected contracting agency;

(iv) If agreement with the contractor is not reached, forward the audit report to the contracting officer (or cognizant Federal agency official) identified in the Directory of Contract Administration Services Components (see 42.203), who will then resolve the disagreement; and

(v) Promptly distribute resultant documents.

42.505-3 Educational institutions.

(a) *General.*

(1) Postdetermined final indirect cost rates must be used to settle indirect costs for all cost-reimbursement contracts with educational institutions, unless predetermined final indirect cost rates are authorized and used (see paragraph (b) of this subsection).

(2) The OMB Uniform Guidance at 2 CFR part 200, appendix III assigns each educational institution (defined as an institution of higher education in the OMB Uniform Guidance at 2 CFR part 200, subpart A, and 20 U.S.C. 1001) to a single Government agency for the negotiation of indirect cost rates; all Federal agencies accept those rates. Cognizant Government agencies and educational institutions are listed in the CASD (see 42.202).

(3) The cognizant agency for indirect costs establishes billing rates and final indirect cost rates at the educational institutions, using the procedures at 42.505-1 (b).

(4) If the cognizant agency is unable to reach agreement with an institution, the cognizant agency will resolve disputes in accordance with agency procedures and the OMB Uniform Guidance.

(b) Predetermined final indirect cost rates.

(1) Agencies may use predetermined rates for cost-reimbursement research and development contracts with universities, colleges, or other educational institutions (41 U.S.C. 4708). If established, they extend to all the institution's Government contracts.

(2) In deciding whether the use of predetermined rates are appropriate, consider the stability of indirect costs and bases over a period of years and anticipated changes.

(3) Unless approved at a level in the cognizant agency higher than the contracting officer, do not use predetermined rates when-

(i) There has been no recent audit of the indirect costs;

(ii) There have been frequent or wide fluctuations in the indirect cost rates and the bases over a period of years; or

(iii) The estimated reimbursable costs for any individual contract are expected to exceed \$1 million annually.

(4) If no predetermined rates exist for the institution's current fiscal year-

(i) The institution must provide the agency a proposal for predetermined rates.

(ii) If the proposal is found to be generally acceptable, the agency must negotiate the predetermined rates with the institution. The rates should be based on an audit of the institution's costs for the year immediately preceding year that the rates are being negotiated. If this is not possible, or, if not available, earlier audits, if determined appropriate by the cognizant agency may be used, but appropriate steps should be taken to identify and evaluate significant variations in costs incurred or in bases used

that may have a bearing on the reasonableness of the proposed rates. However, in the case of smaller contracts (i.e., contracts that do not exceed the simplified acquisition threshold), an audit made at an earlier date is acceptable if-

(A) There have been no significant changes in the contractor's organization; and

(B) It is reasonably apparent that another audit would have little effect on the rates finally agreed upon and the potential for overpayment of indirect cost is relatively insignificant.

(5) If predetermined rates are used-

(i) The contracting officer must include the negotiated rates and bases in the contract Schedule; and

(ii) See part 16, which prescribes the clause at 52.216-15, Predetermined Indirect Cost Rates.

(6) Predetermined indirect cost rates are applicable for a period of not more than four years. The agency must obtain new rate proposals sufficiently in advance so that the new rates, based on current data, may be promptly negotiated near the beginning of the next fiscal year or other period agreed to by the parties (see paragraphs (b) and (d) of the clause at 52.216-15, Predetermined Indirect Cost Rates).

(7) Use billing rates for periods not covered by predetermined rates.

(8) The OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix III, provides additional guidance on how long predetermined rates may be used.

42.505-4 State and local governments.

The OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix V, concerning cost principles for state and local governments (see part 31) establishes the procedures for determining the cognizant agency for State and local government indirect costs associated with federally-funded programs and activities. Rates approved by the cognizant agency for indirect costs must be used by all Federal agencies that also award contracts to these same State and local governments.

42.505-5 Nonprofit organizations other than educational institutions and state and local governments.

The OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix V, establishes the procedures for determining the cognizant agency for State and local government indirect costs associated with federally-funded programs and activities. Rates approved by the cognizant agency must be used by all Federal agencies.

42.506 Cost-sharing rates and limitations on indirect cost rates.

(a) *Rate ceilings in cost sharing.* Cost-sharing arrangements, when authorized, may call for the contractor to participate in the costs of the contract by accepting indirect cost rates lower than the anticipated actual rates. In such cases, a negotiated indirect cost rate ceiling may be incorporated into the contract for prospective application.

(b) *Other rate ceilings.* Other situations may warrant the use of final indirect cost rate ceilings, such as when the contractor-

(1) Is a new or recently reorganized company with no indirect cost history;

(2) Has rapidly increasing indirect cost rates due to declining sales without a commensurate decline in indirect expenses; or

(3) Seeks a competitive advantage by basing its proposal on unrealistically low indirect cost rates, likely to result in a cost overrun.

(c) When ceiling provisions are utilized, the contract must also provide that-

(1) The Government is not obligated to pay any additional amount should the final rates exceed the negotiated ceiling rates, and

(2) If final rates are less than the ceiling rates, the rates will be reduced to conform with the lower rates.

42.507 Quick-closeout procedure.

(a) The contracting officer responsible for contract closeout may negotiate the settlement of direct and indirect costs for a specific contract, task order, or delivery order prior to the determination of final indirect cost rates, as set forth 42.505, if-

(1) The contract, task order, or delivery order is physically complete;

(2) The amount of unsettled direct costs and indirect costs to be allocated to the contract, task order, or delivery order is relatively insignificant. Cost amounts will be considered relatively insignificant when the (total unsettled direct costs and indirect

costs to be allocated to any one contract, task order, or delivery order does not exceed the lesser of \$1,000,000 or 10 percent of the total contract amount).

(3) The contracting officer performs a risk assessment and determines quick-closeout procedures are appropriate. The risk assessment must include-

(i) Consideration of the contractor's accounting, estimating, and purchasing systems;

(ii) Other concerns of the cognizant contract auditors; and

(iii) Any other pertinent information, such as, documented history of Federal Government approved indirect cost rate agreements, changes to contractor's rate structure, volatility of rate fluctuations during affected periods, mergers or acquisitions, special contract provisions limiting contractor's recovery of otherwise allowable indirect costs under cost reimbursement or time-and-materials contracts; and

(4) Agreement can be reached on a reasonable estimate of allocable dollars.

(b) A determination of final indirect costs under the quick-closeout procedure provided for by the Allowable Cost and Payment clause at 52.216-7 is final for the contract it covers and no adjustment will be made to other contracts for over- or under-recoveries of costs allocated or allocable to the contract covered by the agreement.

(c) Indirect cost rates used in the quick closeout of a contract will not be considered a binding precedent when establishing the final indirect cost rates for other contracts.

42.508 Penalties for Unallowable Costs.

42.508-1 Scope.

(a) This section implements 10 U.S.C. 3743 and 41 U.S.C. 4303. It covers the assessment of penalties against contractors which include unallowable indirect costs in-

(1) Final indirect cost rate proposals; or

(2) The final statement of costs incurred or estimated to be incurred under a fixed-price incentive contract.

(b) This section applies to all contracts in excess of \$800,000, except fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of commercial products or commercial services.

42.508-2 General.

(a) The following penalties apply to contracts covered by this section:

(1) If the indirect cost is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the penalty is equal to-

(i) The amount of the disallowed costs allocated to contracts that are subject to this section for which an indirect cost proposal has been submitted; plus

(ii) Interest on the paid portion, if any, of the disallowance.

(2) If the indirect cost was determined to be unallowable for that contractor before proposal submission, the penalty is two times the amount in paragraph (a)(1)(i) of this section.

(b) These penalties are in addition to other administrative, civil, and criminal penalties provided by law.

(c) Penalties may be assessed even if the unallowable costs were not paid to the contractor.

42.508-3 Responsibilities.

(a) The cognizant contracting officer is responsible for determining whether the penalties in 42.508-2(a) should be assessed and determining if such penalties should be waived pursuant to 42.508-6.

(b) The contract auditor is responsible for reviews and/or making determinations of final indirect cost proposals for contracts subject to this section, identifying costs that may be subject to penalty, and providing rationale and supporting documentation for any recommendations

(c) Both contracting officers and contract auditors have a duty to refer matters to the appropriate criminal investigative organization for review and coordination of remedies if there is evidence that the contractor knowingly submitted unallowable costs.

42.508-4 Assessing the penalty.

Unless a waiver is granted pursuant to 42.508-6, the cognizant contracting officer must-

- (a) Assess the penalty in 42.508-2(a)(1), when the submitted cost is expressly unallowable under a cost principle in the FAR or an executive agency supplement that defines the allowability of specific selected costs; or
- (b) Assess the penalty in 42.508-2(a)(2), when the submitted cost was determined to be unallowable for that contractor prior to submission of the proposal. Prior determinations of unallowability may be evidenced by-
 - (1) A DCAA Form 1, Notice of Contract Costs Suspended and/or Disapproved (see 48 CFR 242.705-2), or any similar notice which the contractor elected not to appeal and was not withdrawn by the cognizant Government agency;
 - (2) A contracting officer final decision which was not appealed;
 - (3) A prior executive agency Board of Contract Appeals or court decision involving the contractor, which upheld the cost disallowance; or
 - (4) A determination or agreement of unallowability under part 31.
- (c) The contracting officer must issue a final decision (see part 33) which includes a demand for payment any penalty assessed under paragraph (a) or (b) of this section. The letter must state that the determination is a final decision under the Disputes clause of the contract. The demand for payment of the penalty is separate from a demand for repayment of any paid portion of the disallowed cost.

42.508-5 Computing Interest.

For 42.508-2(a)(1)(ii), compute interest on any paid portion of the disallowed cost as follows:

- (a) Consider the overpayment to have occurred, and interest to have begun accumulating, from the midpoint of the contractor's fiscal year. Use an alternate equitable method if the cost was not paid evenly over the fiscal year.
- (b) Use the interest rate specified by the Secretary of the Treasury pursuant to 41 U.S.C. 7109.
- (c) Compute interest from the date of overpayment to the date of the demand letter for payment of the penalty.
- (d) Determine the paid portion of the disallowed costs in consultation with the contract auditor.

42.508-6 Waiver of the penalty.

The cognizant contracting officer must waive the penalties at 42.508-2(a) when—

- (a) The contractor withdraws the proposal before formal audit initiation (written notice to the contractor or an entrance conference with the contractor is held, indicating that audit work on a specific final indirect cost proposal has begun) and submits a revised proposal as required by 41 U.S.C. 4303(c) and 10 U.S.C. 3743(c).;
- (b) The unallowable costs subject to the penalty are \$10,000 or less; or
- (c) The contractor demonstrates, to the cognizant contracting officer's satisfaction, that-
 - (1) It has established policies and personnel training and an internal control and review system that provide assurance that unallowable costs subject to penalties are precluded from being included in the contractor's final indirect cost rate proposals; and
 - (2) The unallowable costs subject to the penalty were inadvertently included into the proposal despite due care.

42.508-7 Contract clause.

Use the clause at 52.242-3, Penalties for Unallowable Costs, in all solicitations and contracts over \$800,000 except fixed-price contracts without cost incentives or any firm-fixed-price contract for the purchase of commercial products or commercial services. Generally, covered contracts are those which contain one of the clauses at 52.216-7, 52.216-16, or 52.216-17, or a similar clause from an executive agency's supplement to the FAR.

Subpart 42.6 - Disallowance of Costs

42.600 Scope of subpart.

This subpart prescribes policies and procedures for-

- (a) Issuing notices of intent to disallow costs; and
- (b) Disallowing costs already incurred during the course of performance.

42.601 Notice of intent to disallow costs.

(a) Contracting officers must make reasonable efforts to proactively address potentially unallowable costs with contractors. If unable to settle the matter through discussion, the cognizant contracting officer responsible for administering the contract may issue the contractor a written notice of intent to disallow specified costs incurred or planned for incurrence during the performance of the following contract types:

- (1) Cost-reimbursement contracts.
- (2) Cost-reimbursement portions of fixed-price contracts.
- (3) Letter contracts that provides for reimbursement of costs.
- (4) Time-and-material and labor-hour contracts.
- (5) Fixed-price incentive contracts.

(b) A notice of intent to disallow such costs usually results from monitoring contractor costs. The purpose of the notice is to notify the contractor as early as practicable during contract performance that the cost is considered unallowable under the contract terms and to provide for timely resolution of any resulting disagreement. In case of disagreement, the contractor may submit to the contracting officer a written response. Any such response must be answered by withdrawal of the notice or by making a written decision within 60 days.

(c) As a minimum, the notice must-

- (1) Refer to the contract's Notice of Intent to Disallow Costs clause;
- (2) State the contractor's name and list the numbers of the affected contracts;
- (3) Describe the costs to be disallowed, including estimated dollar value by item and applicable time periods, and state the reasons for the intended disallowance;
- (4) Describe the potential impact on billing rates and forward pricing rate agreements;
- (5) State the notice's effective date and the date by which written response must be received;
- (6) List the recipients of copies of the notice; and
- (7) Request the contractor to acknowledge receipt of the notice.

(d) The contracting officer issuing the notice must furnish copies to all contracting officers cognizant of any segment of the contractor's organization.

(e) If the notice involves elements of indirect cost, it must not be issued without coordination with the contracting officer or auditor having authority for final indirect cost settlement (see 42.505).

(f) In the event the contractor submits a response that disagrees with the notice (see paragraph (b) of this section), the contracting officer who issued the notice must either withdraw the notice or issue the written decision, except when elements of indirect cost are involved, in which case the contracting officer responsible under 42.505 for determining final indirect cost rates must issue the decision.

42.602 Contract clause.

The contracting officer must insert the clause at 52.242-1, Notice of Intent to Disallow Costs, in solicitations and contracts when a cost-reimbursement contract, a fixed-price incentive contract, or a contract providing for price redetermination is contemplated.

42.603 Disallowing costs after incurrence.

The contracting officer must apply the following procedures when disallowing costs which the contractor has already incurred:

(a) *Contracting officer receipt of vouchers.* Contracting officers should follow agency procedures when they receive vouchers directly from the contractor.

(b) *Auditor receipt of vouchers.*

(1) When authorized by agency regulations, the contract auditor may—

(i) Receive reimbursement vouchers directly from contractors,

(ii) Approve acceptable vouchers for payment, and

(iii) Suspend payment of questionable costs.

(2) The auditor must forward approved vouchers for payment to the cognizant contracting, finance, or disbursing officer, as appropriate under the agency's procedures.

(3) If a voucher raises allowability questions, the auditor may issue a notice of contract costs suspended and or disapproved to the contractor and the disbursing officer. A

copy must be provided to the cognizant contracting officer. This action after informal discussion and when authorized by agency regulations, permits deduction from current payments for costs claimed but not considered reimbursable.

(4) If the contractor disagrees with the deduction from current payments, they may-

(i) Submit a written request to the cognizant contracting officer to consider whether the unreimbursed costs should be paid and discuss findings;

(ii) File a claim under the Disputes clause, which the cognizant contracting officer will process in accordance with agency procedures; or

(iii) Do both options listed above.

Subpart 42.7 – Bankruptcy

42.700 Scope of subpart.

This subpart prescribes policies and procedures for actions to be taken when a contractor enters into proceedings relating to bankruptcy. It requires contractors to notify the contracting officer upon filing a petition for bankruptcy and establishes minimum requirements for agencies to follow in the event of a contractor bankruptcy.

42.701 General.

The contract administration office must take prompt action to determine the potential impact of a contractor bankruptcy to protect the interests of the Government.

42.702 Procedures.

(a) When notified of bankruptcy proceedings, agencies must, at a minimum-

(1) Furnish the notice of bankruptcy to legal counsel and other appropriate agency offices (e.g., contracting, financial, property) and affected buying activities;

(2) Determine the amount of the Government's potential claim against the contractor (in assessing this impact, identify and review any contracts that have not been closed out, including those physically completed or terminated);

(3) Take actions necessary to protect the Government's financial interests and safeguard Government property; and

(4) Furnish pertinent contract information to the legal counsel representing the Government.

(b) The contracting officer will consult with legal counsel, whenever possible, prior to taking any action regarding the contractor's bankruptcy proceedings.

42.703 Solicitation provision and contract clause.

The contracting officer must insert the clause at 52.242-13, Bankruptcy, in all solicitations and contracts exceeding the simplified acquisition threshold.

Subpart 42.8 - Production Surveillance and Reporting

42.801 General.

Production surveillance is a contract administration function used to determine contractor progress and to identify any factors that may delay performance. Production surveillance involves Government review and analysis of-

(a) Contractor performance plans, schedules, controls, and industrial processes; and

(b) The contractor's actual performance under them.

42.802 Applicability.

This subpart applies to all contracts other than construction contracts and Federal Supply Schedule contracts.

42.803 Surveillance requirements.

(a) The contract administration office determines the extent of production surveillance on the basis of-

(1) The criticality (degree of importance to the Government) assigned by the contracting officer (see 42.804) to the supplies or services; and

(2) Consideration of the following factors:

(i) Contract requirements for reporting production progress and performance.

- (ii) The contract performance schedule.
- (iii) The contractor's production plan.
- (iv) The contractor's history of contract performance.
- (v) The contractor's experience with the contract supplies or services.
- (vi) The contractor's financial capability.
- (vii) Any supplementary written instructions from the contracting office.
- (b) Contracts at or below the simplified acquisition threshold should not normally require production surveillance.
- (c) In planning and conducting surveillance, contract administration offices must make maximum use of any reliable contractor production control or data management systems.
- (d) In performing surveillance, contract administration office personnel must avoid any action that may-
 - (1) Be inconsistent with any contract requirement; or
 - (2) Result in claims of waivers, of changes, or of other contract modifications.

42.804 Assignment of criticality designator.

Contracting officers must assign a criticality designator to each contract in the space for designating the contract administration office in the contract, as follows:

42.805 Contract clause.

- (a) Insert the clause at 52.242-2, Production Progress Reports, in solicitations and contracts when production progress reporting is required; unless a construction contract, or a Federal Supply Schedule contract is contemplated.
- (b) When the clause at 52.242-2 is used, specify appropriate reporting instructions in the Schedule.

Subpart 42.9 - Novation and Change-of-Name Agreements

42.900 Scope of subpart.

This subpart prescribes policies and procedures for-

- (a) Recognition of a successor in interest to Government contracts when contractor assets are transferred;
- (b) Recognition of a change in a contractor's name; and
- (c) Execution of novation agreements and change-of-name agreements by the responsible contracting officer.

42.901 Responsibility for executing agreements.

The contracting officer responsible for processing and executing novation and change-of-name agreements will be determined as follows:

- (a) If any of the affected contracts held by the transferor have been assigned to an administrative contracting officer (ACO) (see part 2 and 42.202 of this part), the responsible contracting officer will be-

- (1) The assigned ACO; or
- (2) The ACO responsible for the corporate office, if affected contracts are in more than one plant or division of the transferor.

- (b) If none of the affected contracts held by the transferor have been assigned to an ACO, the contracting officer responsible for the largest unsettled (unbilled plus billed but unpaid) dollar balance of contracts will be the responsible contracting officer.

- (c) If several transferors are involved, the responsible contracting officer is-

- (1) The ACO administering the largest unsettled dollar balance; or
- (2) The contracting officer designated by the agency having the largest unsettled dollar balance, if none of the affected contracts have been assigned to an ACO.

42.902 Processing agreements.

- (a) If a contractor wishes the Government to recognize a successor in interest to its contracts or a name change, the contractor must submit a written request to the responsible contracting officer (see 42.901). If the contractor is an AbilityOne Nonprofit

Agency, paragraphs (a) through (g) of this section do not apply. The Committee will provide a notice of change to the cognizant contracting officer for execution of an SF-30 in accordance with paragraph (h).

(b) The responsible contracting officer will-

(1) Identify and request that the contractor submit information necessary to evaluate the proposed agreement for recognizing a successor in interest or a name change. This information should include the items identified in 42.903(e) and (f) or 42.904(a), as applicable;

(2) Notify each contract administration office and contracting office affected by a proposed agreement for recognizing a successor in interest, and provide those offices with a list of all affected contracts; and

(3) Request submission of any comments or objections to the proposed transfer within 30 days after notification. Any submission should be accompanied by supporting documentation.

(c) Upon receipt of the necessary information, the responsible contracting officer will determine whether it is in the Government's interest to recognize the proposed successor in interest on the basis of-

(1) The comments received from the affected contract administration offices and contracting offices;

(2) The proposed successor's responsibility under part 9; and

(3) Any factor relating to the proposed successor's performance of Government contracts that the Government determines would impair the proposed successor's ability to perform the contract satisfactorily.

(d) The execution of a novation agreement does not preclude the use of any other method available to the contracting officer to resolve any other issues related to a transfer of contractor assets, including the treatment of costs.

(e) Any separate agreement between the transferor and transferee regarding the assumption of liabilities (e.g., long-term incentive compensation plans, cost accounting standards noncompliances, environmental cleanup costs, and final overhead costs) should be referenced specifically in the novation agreement.

(f) Before novation and change-of-name agreements are executed, the responsible contracting officer must ensure that Government counsel has reviewed them for legal sufficiency.

(g) The responsible contracting officer must-

(1) Forward a signed copy of the executed novation or change-of-name agreement to the transferor and to the transferee and

(2) Retain a signed copy in the case file.

(h) Following distribution of the agreement, the responsible contracting officer must-

(1) Prepare a Standard Form 30, Amendment of Solicitation/Modification of Contract, incorporating a summary of the agreement and attaching a complete list of contracts affected;

(2) Retain the original Standard Form 30 with the attached list in the case file;

(3) Send a signed copy of the Standard Form 30, with attached list to the transferor and to the transferee; and

(4) Send a copy of this Standard Form 30 with attached list to each contract administration office or contracting office involved, which will be responsible for further appropriate distribution.

42.903 Applicability of novation agreements.

(a) 41 U.S.C.6305 prohibits transfer of Government contracts from the contractor to a third party. The Government may, when in its interest, recognize a third party as the successor in interest to a Government contract when the third party's interest in the contract arises out of the transfer of-

(1) All the contractor's assets; or

(2) The entire portion of the assets involved in performing the contract. (See part 14 for the effect of novation agreements after bid opening but before award.) Examples of such transactions include, but are not limited to-

(i) Sale of these assets with a provision for assuming liabilities;

(ii) Transfer of these assets incident to a merger or corporate consolidation; and

(iii) Incorporation of a proprietorship or partnership, or formation of a partnership.

(b) A novation agreement is unnecessary when there is a change in the ownership of a contractor as a result of a stock purchase, with no legal change in the contracting party, and when that contracting party remains in control of the assets and is the party performing the contract. However, whether there is a purchase of assets or a stock purchase, there may be issues related to the change in ownership that appropriately should be addressed in a formal agreement between the contractor and the Government (see 42.902(e)).

(c) When it is in the Government's interest not to concur in the transfer of a contract from one company to another company, the original contractor remains under contractual obligation to the Government, and the contract may be terminated for reasons of default, should the original contractor not perform.

(d) When considering whether to recognize a third party as a successor in interest to Government contracts, the responsible contracting officer must identify and evaluate any significant organizational conflicts of interest in accordance with part 9. If the responsible contracting officer determines that a conflict of interest cannot be resolved but approving the novation request is in the Government's interest, a waiver request may be submitted in accordance with part 9.

(e) When a contractor asks the Government to recognize a successor in interest, the contractor must submit to the responsible contracting officer three signed copies of the proposed novation agreement and one copy each, as applicable, of the following:

(1) The document describing the proposed transaction, e.g., purchase or sale agreement or memorandum of understanding.

(2) A list of all affected contracts between the transferor and the Government, as of the date of sale or transfer of assets, showing for each, as of that date, the-

(i) Contract number and type;

(ii) Name and address of the contracting office;

(iii) Total dollar value, as amended; and

(iv) Approximate remaining unpaid balance.

(3) Evidence of the transferee's capability to perform.

(4) Any other relevant information requested by the responsible contracting officer.

(f) Except as provided in paragraph (g) of this section, the contractor must submit to the responsible contracting officer one copy of each of the following documents, as applicable, as the documents become available:

(1) An authenticated copy of the instrument effecting the transfer of assets (e.g., bill of sale, certificate of merger, contract, deed, agreement, or court decree).

(2) A certified copy of each resolution of the corporate parties' boards of directors authorizing the transfer of assets.

(3) A certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets.

(4) An authenticated copy of the transferee's certificate and articles of incorporation, if a corporation was formed for the purpose of receiving the assets involved in performing the Government contracts.

(5) The opinion of legal counsel for the transferor and transferee stating that the transfer was properly effected under applicable law and the effective date of transfer.

(6) Balance sheets of the transferor and transferee as of the dates immediately before and after the transfer of assets, audited by independent accountants.

(7) Evidence that any security clearance requirements have been met.

(8) The consent of sureties on all contracts listed under paragraph (e)(2) of this section if bonds are required, or a statement from the transferor that none are required.

(g) If the Government has acquired the documents during its participation in the pre-merger or pre-acquisition review process, or the Government's interests are adequately protected with an alternative formulation of the information, the responsible contracting officer may modify the list of documents to be submitted by the contractor.

(h) When recognizing a successor in interest to a Government contract is consistent with the Government's interest, the responsible contracting officer must execute a novation agreement with the transferor and the transferee. It must ordinarily provide in part that-

(1) The transferee assumes all the transferor's obligations under the contract;

(2) The transferor waives all rights under the contract against the Government;

(3) The transferor guarantees performance of the contract by the transferee (a satisfactory performance bond may be accepted instead of the guarantee); and

(4) Nothing in the agreement will relieve the transferor or transferee from compliance with any Federal law.

(i) The responsible contracting officer must use the following format for agreements when the transferor and transferee are corporations, and all the transferor's assets are transferred. This format may be adapted to fit specific cases and may be used as a guide in preparing similar agreements for other situations.

(a) THE PARTIES AGREE TO THE FOLLOWING FACTS:

(1) The Government, represented by various Contracting Officers of the _____ [*insert name(s) of agency(ies)*], has entered into certain contracts with the Transferor, namely: _____ [*insert contract or purchase order identifications*]; [*or delete "namely" and insert "as shown in the attached list marked 'Exhibit A' and incorporated in this Agreement by reference."*]. The term *the contracts*, as used in this Agreement, means the above contracts and purchase orders and all other contracts and purchase orders, including all modifications, made between the Government and the Transferor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Transferor has any remaining rights, duties, or obligations under these contracts and purchase orders). Included in the term *the contracts* are also all modifications made under the terms and conditions of these contracts and purchase orders between the Government and the Transferee, on or after the effective date of this Agreement.

(2) As of _____, 20__, the Transferor has transferred to the Transferee all the assets of the Transferor by virtue of a _____ [*insert term descriptive of the legal transaction involved*] between the Transferor and the Transferee.

(3) The Transferee has acquired all the assets of the Transferor by virtue of the above transfer.

(4) The Transferee has assumed all obligations and liabilities of the Transferor under the contracts by virtue of the above transfer.

(5) The Transferee is in a position to fully perform all obligations that may exist under the contracts.

(6) It is consistent with the Government's interest to recognize the Transferee as the successor party to the contracts.

(7) Evidence of the above transfer has been filed with the Government.

(8) A certificate dated _____, 20__, signed by the Secretary of State of _____ [*insert State*], to the effect that the corporate name of EFG CORPORATION was changed to XYZ CORPORATION on _____, 20__, has been filed with the Government.

(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT BY THIS AGREEMENT—

(1) The Transferor confirms the transfer to the Transferee, and waives any claims and rights against the Government that it now has or may have in the future in connection with the contracts.

(2) The Transferee agrees to be bound by and to perform each contract in accordance with the conditions contained in the contracts. The Transferee also assumes all obligations and liabilities of, and all claims against, the Transferor under the contracts as if the Transferee were the original party to the contracts.

(3) The Transferee ratifies all previous actions taken by the Transferor with respect to the contracts, with the same force and effect as if the action had been taken by the Transferee.

(4) The Government recognizes the Transferee as the Transferor's successor in interest in and to the contracts. The Transferee by this Agreement becomes entitled to all rights, titles, and interests of the Transferor in and to the contracts as if the Transferee were the original party to the contracts. Following the effective date of this Agreement, the term *Contractor*, as used in the contracts, shall refer to the Transferee.

(5) Except as expressly provided in this Agreement, nothing in it shall be construed as a waiver of any rights of the Government against the Transferor.

(6) All payments and reimbursements previously made by the Government to the Transferor, and all other previous actions taken by the Government under the contracts, shall be considered to have discharged those parts of the Government's obligations under the contracts. All payments and reimbursements made by the Government after the date of this Agreement in the name of or to the Transferor shall have the same force and effect as if made to the Transferee and shall constitute a

complete discharge of the Government's obligations under the contracts, to the extent of the amounts paid or reimbursed.

(7) The Transferor and the Transferee agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement, other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts.

(8) The Transferor guarantees payment of all liabilities and the performance of all obligations that the Transferee (i) assumes under this Agreement or (ii) may undertake in the future should these contracts be modified under their terms and conditions. The Transferor waives notice of, and consents to, any such future modifications.

(9) The contracts shall remain in full force and effect, except as modified by this Agreement. Each party has executed this Agreement as of the day and year first above written.

NOVATION AGREEMENT

The ABC CORPORATION (Transferor), a corporation duly organized and existing under the laws of _____ *[insert State]* with its principal office in _____ *[insert city]*; the XYZ CORPORATION (Transferee), *[if appropriate add "formerly known as the EFG Corporation"]* a corporation duly organized and existing under the laws of _____ *[insert State]* with its principal office in _____ *[insert city]*; and the UNITED STATES OF AMERICA (Government) enter into this Agreement as of _____ *[insert the date transfer of assets became effective under applicable State law]*.

[When a change of name is also involved; e.g., a prior or concurrent change of the Transferee's name, an appropriate statement shall be inserted (see example in paragraph (8) below)].

UNITED STATES OF AMERICA,

By

Title

ABC CORPORATION,

By

Title

[CORPORATE SEAL]

XYZ CORPORATION,

By

Title

[CORPORATE SEAL]

CERTIFICATE

I, _____, certify that I am the Secretary of ABC CORPORATION; that _____, who signed this Agreement for this corporation, was then _____ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of this corporation this _____ day of _____ 20__.

By

[CORPORATE SEAL]

CERTIFICATE

I, _____, certify that I am the Secretary of XYZ CORPORATION; that _____, who signed this Agreement for this corporation, was then _____ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of this corporation this _____ day of _____ 20__.

By

[CORPORATE SEAL]

42.904 Agreement to recognize contractor's change of name.

(a) If only a change of the contractor's name is involved and the Government's and contractor's rights and obligations remain unaffected, the parties must execute an agreement to reflect the name change. The contractor must forward to the responsible contracting officer three signed copies of the Change-of-Name Agreement, and one copy each of the following:

(1) The document effecting the name change, authenticated by a proper official of the State having jurisdiction.

(2) The opinion of the contractor's legal counsel stating that the change of name was properly effected under applicable law and showing the effective date.

(3) A list of all affected contracts and purchase orders remaining unsettled between the contractor and the Government, showing for each the contract number and type, and name and address of the contracting office. The contracting officer may request the total dollar value as amended and the remaining unpaid balance for each contract.

(b) The following suggested format for an agreement may be adapted for specific cases:

Change-of-Name Agreement

The ABC CORPORATION (Contractor), a corporation duly organized and existing under the laws of _____ [insert State], and the UNITED STATES OF AMERICA (Government), enter into this Agreement as of _____ [insert date when the change of name became effective under applicable State law].

(a) THE PARTIES AGREE TO THE FOLLOWING FACTS:

(1) The Government, represented by various Contracting Officers of the _____ [insert name(s) of agency(ies)], has entered into certain contracts and purchase orders with the XYZ CORPORATION, namely: _____ [insert contract or purchase order identifications]; [or delete "namely" and insert "as shown in the attached list marked 'Exhibit A' and incorporated in this Agreement by reference."]. The term the contracts, as used in this Agreement, means the above contracts and purchase orders and all other contracts and purchase orders, including all modifications, made by the Government and the Contractor before the effective date of this Agreement (whether or not performance and payment have been completed and releases executed if the Government or the Contractor has any remaining rights, duties, or obligations under these contracts and purchase orders).

(2) The XYZ CORPORATION, by an amendment to its certificate of incorporation, dated _____, 20__, has changed its corporate name to ABC CORPORATION.

(3) This amendment accomplishes a change of corporate name only and all rights and obligations of the Government and of the Contractor under the contracts are unaffected by this change.

(4) Documentary evidence of this change of corporate name has been filed with the Government.

(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT—

(1) The contracts covered by this Agreement are amended by substituting the name “ABC CORPORATION” for the name “XYZ CORPORATION” wherever it appears in the contracts; and

(2) Each party has executed this Agreement as of the day and year first above written.

UNITED STATES OF AMERICA,

By

Title

ABC CORPORATION,

By

Title

[CORPORATE SEAL]

CERTIFICATE

I, _____, certify that I am the Secretary of ABC CORPORATION; that _____, who signed this Agreement for this corporation, was then _____ of this corporation; and that this Agreement was duly signed for and on behalf of this corporation by authority of its governing body and within the scope of its corporate powers.

Witness my hand and the seal of this corporation this ____ day of _____ 20__.

By

[CORPORATE SEAL]

Subpart 42.10 - Suspension of Work, Stop-Work Orders, and Government Delay of Work

42.1001 General.

Situations may occur during contract performance that cause the Government to order a suspension of work or result in a work stoppage.

42.1002 Suspension of work.

A suspension of work under a construction or architect-engineer contract may be ordered by the contracting officer for a reasonable period of time. If the suspension is unreasonable, the contractor may submit a written claim for increases in the cost of performance, excluding profit.

42.1003 Stop-work orders.

(a) Stop-work orders may be used, when appropriate, in any negotiated fixed-price or cost-reimbursement supply, research and development, or service contract if work stoppage may be required for reasons such as advancement in the state-of-the-art, production or engineering breakthroughs, or realignment of programs.

(b) Generally, a stop-work order will be issued only if it is advisable to suspend work pending a decision by the Government and a supplemental agreement providing for the suspension is not feasible. Issuance of a stop-work order must be approved at a level higher than the contracting officer. Stop-work orders will not be used in place of a termination notice after a decision to terminate has been made.

(c) Stop-work orders should include-

(1) A description of the work to be suspended;

(2) Instructions concerning the contractor's issuance of further orders for materials or services;

(3) Guidance to the contractor on action to be taken on any subcontracts; and

(4) Other suggestions to the contractor for minimizing costs.

(d) Promptly after issuing the stop-work order, the contracting officer should discuss the stop-work order with the contractor and modify the order, if necessary, in light of the discussion.

(e) As soon as feasible after a stop-work order is issued, but before its expiration, the contracting officer must take appropriate action to-

(1) Terminate the contract;

(2) Cancel the stop-work order (any cancellation of a stop-work order is subject to the same approvals as were required for its issuance); or

(3) Extend the period of the stop-work order if it is necessary and if the contractor agrees (any extension of the stop-work order must be done by a supplemental agreement).

42.1004 Government delay of work.

(a) The clause at 52.242-17, Government Delay of Work, provides for the administrative settlement of contractor claims that arise from delays and interruptions in the contract work caused by the acts, or failures to act, of the contracting officer. This clause is not applicable if the contract otherwise specifically provides for an equitable adjustment because of the delay or interruption, e.g., when the Changes clause is applicable.

(b) The clause does not authorize the contracting officer to order a suspension, delay, or interruption of the contract work and it must not be used as the basis or justification of such an order.

(c) If the contracting officer has notice of an unordered delay or interruption covered by the clause, the contracting officer must act to end the delay or take other appropriate action as soon as practicable.

(d) The contracting officer must retain in the file a record of all negotiations leading to any adjustment made under the clause, and related certified cost or pricing data, or data other than certified cost or pricing data.

42.1005 Contract clauses.

(a) Insert the clause at 52.242-14, Suspension of Work, in solicitations and contracts when a fixed-price construction or architect-engineer contract is contemplated. Contracting officers may reduce the 90-day period in the clause, as appropriate.

(b)

(1) The contracting officer may, when contracting by negotiation, insert the clause at 52.242-15, Stop-Work Order, in solicitations and contracts for supplies, services, or research and development.

(2) If a cost-reimbursement contract is contemplated, use the clause with its Alternate I.

(c) Insert the clause at 52.242-17, Government Delay of Work, in solicitations and contracts when a fixed-price contract is contemplated for supplies other than commercial or modified-commercial products. The clause use is optional when a fixed-price contract is contemplated for services, or for supplies that are commercial or modified-commercial products.

Subpart 42.11 - Contractor Performance Information

42.1100 Scope of subpart.

This subpart provides policies and establishes responsibilities for recording and maintaining contractor performance information.

42.1101 General.

(a) Past performance information (including the ratings and supporting narratives) is relevant information, for future purposes, regarding a contractor's actions under previously awarded contracts or orders. It includes, for example, the contractor's record of-

- (1) Conforming to requirements and to standards of good workmanship;
- (2) Forecasting and controlling costs;
- (3) Adherence to schedules, including the administrative aspects of performance;
- (4) Reasonable and cooperative behavior and commitment to customer satisfaction;
- (5) Complying with the requirements of the small business subcontracting plan (see part 19), including:
 - (i) Favorable consideration of a mentor with an SBA-approved mentor-protégé agreement (see 13 CFR 125.9) that subcontracts to its protégé, and
 - (ii) That protégé is a covered territory business or that protégé's principal office is located in the Commonwealth of Puerto Rico (see 15 U.S.C. 632(ff));
- (6) Reporting into databases (see part 4, and reporting requirements in the solicitation provisions and clauses referenced in part 9);

(7) Integrity and business ethics (see part 9); and

(8) Business-like concern for the interest of the customer.

(b) Agencies must monitor their compliance with the past performance evaluation requirements (see 42.1102) and use the Contractor Performance Assessment Reporting System (CPARS) metric tools to measure the quality and timely reporting of past performance information. CPARS is the official source for past performance information.

42.1102 Policy.

(a) *General.* Past performance evaluations must be prepared at least annually and at the time the work under a contract or order is completed. Interim evaluations are permissible.

(1) Past performance evaluations are required for contracts and orders as specified in paragraphs (b) through (f) of this section, including contracts and orders performed outside the United States.

(2) Past performance evaluations are completed for the entity, division, or unit that performed the contract or order.

(3) Agencies must enter past performance information into CPARS, the Governmentwide evaluation reporting tool for all past performance reports on contracts and orders. Instructions for submitting evaluations into CPARS are available at <http://www.cpars.gov/>.

(b) *Contracts.*

(1) Except as provided in paragraphs (e), (f), and (h) of this section, agencies must prepare evaluations of contractor performance for each contract and order that exceeds the simplified acquisition threshold and for each order that exceeds the simplified acquisition threshold.

(2) Agencies must prepare an evaluation if a modification to the contract causes the dollar amount to exceed the simplified acquisition threshold.

(c) *Orders under multiple-agency contracts.*

(1) Agencies must prepare an evaluation of contractor performance for each order that exceeds the simplified acquisition threshold that placed under a Federal Supply

Schedule contract or placed under a task-order contract, or a delivery-order contract awarded by another agency (*i.e.*, Governmentwide acquisition contract or multi-agency contract).

(2)

(i) Agencies placing orders under their own multiple-agency contract must prepare evaluations for their own orders. This evaluation must not consider the requirements under paragraph (g) of this section.

(ii) Agencies must prepare an evaluation if a modification to an order causes the value to exceed the simplified acquisition threshold.

(d) *Orders under single-agency contracts.* For single-agency task-order and delivery-order contracts, the contracting officer may require performance evaluations for each order in excess of the simplified acquisition threshold when such evaluations would produce more meaningful past performance information for source selection officials than that contained in the overall contract evaluation (e.g., when the scope of the basic contract is very broad and the nature of individual orders could be significantly different). This evaluation does not have to consider the requirements under paragraph (g) of this section unless the contracting officer deems it appropriate.

(e) *Construction contracts.* Agencies must prepare past performance evaluations for each construction contract of \$750,000 or more, and for each construction contract terminated for default regardless of contract value. Past performance evaluations may also be prepared for construction contracts below \$750,000.

(f) *Architect-engineer services contracts.* Past performance evaluations must be prepared for each architect-engineer services contract of \$35,000 or more, and for each architect-engineer services contract that is terminated for default regardless of contract value. Past performance evaluations may also be prepared for architect-engineer services contracts below \$35,000.

(g) *Content.* Past performance evaluations must include an assessment of the contractor's—

(1) Performance against, and efforts to achieve, the goals identified in the small business subcontracting plan when the contract includes the clause at 52.219-9, Small Business Subcontracting Plan; and

(2) Reduced or untimely payments (as defined in part 19), made to small business subcontractors, determined by the contracting officer to be unjustified. The contracting officer must—

(i) Consider and evaluate a contractor's written explanation for a reduced or an untimely payment when determining whether the reduced or untimely payment is justified; and

(ii) Determine that a history of unjustified reduced or untimely payments has occurred when the contractor has reported three or more occasions of unjustified reduced or untimely payments under a single contract within a 12-month period (see 42.1503(h)(1)(vi) and the evaluation ratings in Table 42-2). The following payment or nonpayment situations are not considered to be unjustified:

(A) There is a contract dispute on performance.

(B) A partial payment is made for amounts not in dispute.

(C) A payment is reduced due to past overpayments.

(D) There is an administrative mistake.

(E) Late performance by the subcontractor leads to later payment by the prime contractor.

(h) Agencies must promptly report other contractor information in accordance with 42.1103(g).

42.1103 Procedures.

Note 1: Plus or minus signs may be used to indicate an improving (+) or worsening (–) trend insufficient to change the evaluation status.

Note 2: N/A (not applicable) should be used if the ratings are not going to be applied to a particular area for evaluation.

NOTE 1: Plus or minus signs may be used to indicate an improving (+) or worsening (–) trend insufficient to change evaluation status.

NOTE 2: Zero percent is not a goal unless the contracting officer determined when negotiating the subcontracting plan that no subcontracting opportunities exist in a particular socio-economic category. In such cases, the contractor will be considered to

have met the goal for any socio-economic category where the goal negotiated in the plan was zero.

(a)

(1) Agencies must assign responsibility and management accountability for the completeness of past performance submissions. Agency procedures for the past performance evaluation system must—

(i) Generally, provide for input to the evaluations from the technical office, contracting office, program management office, and, where appropriate, quality assurance and end users of the product or service;

(ii) Identify and assign past performance evaluation roles and responsibilities to those individuals responsible for preparing and reviewing interim evaluations, if prepared, and final evaluations (e.g., contracting officers, contracting officer representatives, project managers, and program managers). Those individuals identified may obtain information for the evaluation of performance from the program office, administrative contracting office, audit office, end users of the product or service, and any other technical or business advisor, as appropriate; and

(iii) Address management controls and appropriate management reviews of past performance evaluations, to include accountability for documenting past performance on CPARS.

(b)

(1)

(i) The evaluation must include a clear, non-technical description of the principal purpose of the contract or order.

(ii) The evaluation must reflect how the contractor performed.

(iii) The evaluation must include clear relevant information that accurately depicts the contractor's performance and be based on objective facts supported by program and contract or order performance data.

(iv) Tailor each evaluation to the contract type, size, content, and complexity of the contractual requirements.

(2) Evaluation factors for each assessment must include, at a minimum, the following:

- (i) Technical (quality of product or service);
- (ii) Cost control (not applicable for firm-fixed-price or fixed-price with economic price adjustment arrangements);
- (iii) Schedule/timeliness;
- (iv) Management or business relations;
- (v) Small business subcontracting, including reduced or untimely payments to small business subcontractors when part 19 requires a subcontracting plan (as applicable, see Table 42-2); and
- (vi) Other (as applicable) (e.g., trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions, defective cost or pricing data, terminations, suspension and debarments, and failure to comply with limitations on subcontracting).

(3) Evaluation factors may include subfactors.

(4) Each factor and subfactor used must be evaluated and a supporting narrative provided. Each evaluation factor, as listed in this paragraph ((b)(2)), must be rated in accordance with a five-scale rating system (*i.e.*, exceptional, very good, satisfactory, marginal, and unsatisfactory). The ratings and narratives must reflect the definitions in the tables 42-1 or 42-2 of this section.

(c)

(1) When the contract provides for incentive fees, the incentive-fee contract performance evaluation must be entered into CPARS.

(2) When the contract provides for award fee, the award fee-contract performance adjectival rating as described in part 16 must be entered into CPARS.

(d)

(1) Agency evaluations of contractor performance, including both negative and positive evaluations, prepared under this subpart must be provided to the contractor as soon as practicable after completion of the evaluation. The contractor will receive a CPARS-system generated notification when an evaluation is ready for comment.

(2) Contractors must be afforded up to 14 calendar days from the date of notification of availability of the past performance evaluation to submit comments, rebutting statements, or additional information.

(3) While the evaluation is an agency decision, agencies must provide for review at a level above the contracting officer in the event of disagreements between the parties.

(4) Evaluations of contractor performance developed on contracts awarded prior to April 1, 2026 should be marked "Source Selection Information."

(5) Evaluations used in determining award or incentive fee payments may also be used to satisfy the requirements of this subpart.

(6) Agencies must provide a copy of the annual or final past performance evaluation to the contractor as soon as it is finalized.

(e)

(1) Agencies must prepare and submit all past performance evaluations electronically in CPARS at <https://www.cpars.gov>.

(2) The agency must make the past performance evaluation, including any contractor response, including any contractor-submitted information (with indication whether agency review is pending), available to source selection officials in the CPARS system within 14 days after the contractor notification of the evaluation's availability for comment.

(3) Contractors must be given 14 calendar days from notification to submit comments, rebutting statements, or additional information.

(4) The Government must update CPARS with any contractor comments provided within the 14-day timeframe given to contractors in this paragraph (e), as well as any subsequent agency review of comments received.

(5) Past performance evaluations for classified contracts and special access programs must not be reported in CPARS but will be reported as stated in this subpart and in accordance with agency procedures.

(6) Agencies must ensure that appropriate management and technical controls are in place to ensure that only authorized personnel have access to the data and the information safeguarded in accordance with paragraph (d) of this section.

(f) Agencies must use the past performance information in CPARS that is within 3 years (6 years for construction and architect-engineer contracts) of the completion of performance of the evaluated contract or order, and information contained in responsibility/qualification reports in the System Award Management (SAM), at SAM.gov, e.g., terminations for default or cause.

(g)

(1) Agencies use integrity records to support responsibility determinations, as addressed in part 9. Agencies must ensure information is accurately reported in the FAPIIS module of CPARS within 3 calendar days after a contracting officer—

(i) Issues a final determination that a contractor has submitted defective cost or pricing data;

(ii) Makes a subsequent change to the final determination concerning defective cost or pricing data pursuant to part 15;

(iii) Issues a final termination for cause or default notice;

(iv) Makes a subsequent withdrawal or a conversion of a termination for default to a termination for convenience;

(v) Receives a final determination after an administrative proceeding, in accordance with part 22, that substantiates an allegation of a violation of the trafficking in persons prohibitions in part 22 and 52.222-50(b); or

(vi) Determines that a contractor has a history of three or more unjustified reduced or untimely payments to small business subcontractors under a single contract within a 12-month period (see 42.1102(g)(2)).

(2) The information posted in accordance with this paragraph (g) is information relating to contractor performance but does not constitute a “past performance review”, which would be exempted from public availability in accordance with section 3010 of the Supplemental Appropriations Act, 2010 (Pub. L. 111-212). Therefore, all such information posted in FAPIIS will be publicly available, unless covered by a disclosure exemption under the Freedom of Information Act (see part 9).

(3) Agencies must establish CPARS focal points who will register users to report data into the FAPIIS module of CPARS (available at <https://www.cpars.gov>).

(4) The contracting officer must follow the procedures in part 9 when handling information that may be covered by a disclosure exemption under the Freedom of Information Act.

42.1104 Contract clause.

Insert the clause at 52.242-5, Payments to Small Business Subcontractors, in all solicitations and contracts containing the clause at 52.219-9, Small Business Subcontracting Plan.

Subpart 42.12 - Small Business Contract Administration

42.1201 General.

The contracting officer must make every reasonable effort to respond in writing within 30 days to any written request to the contracting officer from a small business concern regarding a contract administration matter. In the event the contracting officer cannot respond to the request within the 30-day period, the contracting officer must, within the period, communicate to the contractor a written notification of the specific date the contracting officer expects to respond. This provision does not apply to a request for a contracting officer decision under 41 U.S.C. chapter 71, Contract Disputes.

Subpart 42.13 - Forward Pricing Rate Agreements

42.1301 Procedures.

(a) The contracting officer, administrative contracting officer (ACO), or the contractor may initiate a request for a forward pricing rate agreement (FPRA). Normally, FPRAs are negotiated only with contractors having a significant volume of Government contract proposals. The cognizant Federal agency should determine whether to establish an

FPRA by considering whether the benefits to be derived from the agreement are commensurate with the effort of establishing and monitoring it.

(b) The ACO must obtain the contractor's forward pricing rate proposal and require that it include cost or pricing data that are accurate, complete, and current as of the date of submission, but must not require a certification (see part 15). The ACO must invite the cognizant contract auditor and contracting offices having a significant interest to participate in developing a Government objective and in the negotiations. Upon completing negotiations, the ACO must prepare a price negotiation memorandum (PNM) (see part 15) and forward copies of the PNM and FPRA to the cognizant auditor and to all contracting offices that are known to be affected by the FPRA.

(c) The FPRA must provide specific terms and conditions covering expiration, application, and data requirements for systematic monitoring to ensure the validity of the rates. The agreement must provide for cancellation at the choice of either party and must require the contractor to submit to the ACO and to the cognizant contract auditor any significant change in cost or pricing data used to support the FPRA.

(d) When an FPRA is invalid, the contractor should submit and negotiate a new proposal to reflect the changed conditions. If an FPRA has not been established or has been invalidated, the ACO will issue a forward pricing rate recommendation (FPRR) to buying activities with documentation to assist negotiators. In the absence of an FPRA or FPRR, the ACO must provide support to the contracting officer for rates utilized.

(e) The ACO may negotiate continuous updates to the FPRA. The FPRA will provide specific terms and conditions covering notification, application, and data requirements for systematic monitoring to ensure the validity of the rates.

Part 52 - Solicitation Provisions and Contract Clauses

52.242 [Reserved]

52.242-1 Notice of Intent to Disallow Costs.

52.242-2 Production Progress Reports.

52.242-3 Penalties for Unallowable Costs.

52.242-4 Certification of Final Indirect Costs.

52.242-5 Payments to Small Business Subcontractors.

52.242-6 [Reserved]

52.242-7 [Reserved]

52.242-8 [Reserved]

52.242-9 [Reserved]

52.242-10 [Reserved]

52.242-11 [Reserved]

52.242-12 [Reserved]

52.242-13 Bankruptcy.

52.242-14 Suspension of Work.

52.242-15 Stop-Work Order.

52.242-16 [Reserved]

52.242-17 Government Delay of Work.

52.242 [Reserved]

52.242-1 Notice of Intent to Disallow Costs.

As prescribed in 42.802 , insert the following clause in solicitations and contracts when a cost-reimbursement contract, a fixed-price incentive contract, or a contract providing for price redetermination is contemplated:

Notice of Intent to Disallow Costs (Apr 1984)

(a) Notwithstanding any other clause of this contract-

(1) The Contracting Officer may at any time issue to the Contractor a written notice of intent to disallow specified costs incurred or planned for incurrence under this contract that have been determined not to be allowable under the contract terms; and

(2) The Contractor may, after receiving a notice under paragraph (a)(1) of this clause, submit a written response to the Contracting Officer, with justification for allowance of the costs. If the Contractor does respond within 60 days, the Contracting Officer will, within 60 days of receiving the response, either make a written withdrawal of the notice or issue a written decision.

(b) Failure to issue a notice under this Notice of Intent to Disallow Costs clause does not affect the Government's rights to take exception to incurred costs.

(End of clause)

52.242-2 Production Progress Reports.

As prescribed in 42.1107(a), insert the following clause:

Production Progress Reports (Apr 1991)

(a) The Contractor must prepare and submit to the Contracting Officer the production progress reports specified in the contract Schedule.

(b) During any delay in furnishing a production progress report required under this contract, the Contracting Officer may withhold from payment an amount not exceeding \$25,000 or 5 percent of the amount of this contract, whichever is less.

(End of clause)

52.242-3 Penalties for Unallowable Costs.

As prescribed in 42.508-7, use the following clause:

Penalties for Unallowable Costs (DATE)

(a) *Definition. Proposal*, as used in this clause, means either—

(1) A final indirect cost rate proposal submitted by the Contractor after the expiration of its fiscal year which—

(i) Relates to any payment made on the basis of billing rates; or

(ii) Will be used in negotiating the final contract price; or

(2) The final statement of costs incurred and estimated to be incurred under the Incentive Price Revision clause (if applicable), which is used to establish the final contract price.

(b) Contractors which include unallowable indirect costs in a proposal may be subject to penalties. The penalties are prescribed in 10 U.S.C. 3748 or 41 U.S.C. chapter 43, as applicable, which is implemented in section 42.508 of the Federal Acquisition Regulation (FAR).

(c) The Contractor will not include in any proposal any cost that is unallowable in the FAR or an executive agency supplement to the FAR.

(d) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal is expressly unallowable under a cost principle in the FAR, or an executive agency supplement to the FAR, that defines the allowability of specific selected costs, the Contractor must be assessed a penalty equal to—

(1) The amount of the disallowed cost allocated to this contract; plus

(2) Simple interest, to be computed—

(i) On the amount the Contractor was paid (whether as a progress or billing payment) in excess of the amount to which the Contractor was entitled; and

(ii) Using the applicable rate effective for each six-month interval prescribed by the Secretary of the Treasury pursuant to 41 U.S.C. 7109.

(e) If the Contracting Officer determines that a cost submitted by the Contractor in its proposal includes a cost previously determined to be unallowable for that Contractor, then the Contractor will be assessed a penalty in an amount equal to two times the amount of the disallowed cost allocated to this contract.

(f) Determinations under paragraphs (d) and (e) of this clause are final decisions within the meaning of 41 U.S.C. chapter 71, Contract Disputes.

(g) Pursuant to the criteria in FAR 42.709-6, the Contracting Officer may waive the penalties in paragraph (d) or (e) of this clause.

(h) Payment by the Contractor of any penalty assessed under this clause does not constitute repayment to the Government of any unallowable cost which has been paid by the Government to the Contractor.

(End of clause)

52.242-4 Certification of Final Indirect Costs.

As prescribed in 42.703-2(f), insert the following clause:

Certification of Final Indirect Costs (Jan 1997)

(a) The Contractor shall-

(1) Certify any proposal to establish or modify final indirect cost rates;

(2) Use the format in paragraph (c) of this clause to certify; and

(3) Have the certificate signed by an individual of the Contractor's organization at a level no lower than a vice president or chief financial officer of the business segment of the Contractor that submits the proposal.

(b) Failure by the Contractor to submit a signed certificate, as described in this clause, may result in final indirect costs at rates unilaterally established by the Contracting Officer.

(c) The certificate of final indirect costs shall read as follows:

Certificate of Final Indirect Costs

This is to certify that I have reviewed this proposal to establish final indirect cost rates and to the best of my knowledge and belief:

1. All costs included in this proposal (identify proposal and date) to establish final indirect cost rates for (identify period covered by rate) are allowable in accordance with the cost principles of the Federal Acquisition Regulation (FAR) and its supplements applicable to the contracts to which the final indirect cost rates will apply; and

2. This proposal does not include any costs which are expressly unallowable under applicable cost principles of the FAR or its supplements.

Firm: _____

Signature: _____

Name of Certifying Official: _____

Title: _____

Date of Execution: _____

(End of clause)

52.242-5 Payments to Small Business Subcontractors.

As prescribed in 42.1504 , insert the following clause:

Payments to Small Business Subcontractors (Jan 2017)

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

Reduced payment means a payment that is for less than the amount agreed upon in a subcontract in accordance with its terms and conditions, for supplies and services for which the Government has paid the prime contractor.

Untimely payment means a payment that is more than 90 days past due under the terms and conditions of a subcontract, for supplies and services for which the Government has paid the prime contractor.

(b) *Notice.* The Contractor shall notify the Contracting Officer, in writing, not later than 14 days after-

(1) A small business subcontractor was entitled to payment under the terms and conditions of the subcontract; and

(2) The Contractor-

(i) Made a reduced or untimely payment to the small business subcontractor; or

(ii) Failed to make a payment, which is now untimely.

(c) *Content of notice.* The Contractor shall include the reason(s) for making the reduced or untimely payment in any notice required under paragraph (b) of this clause.

(End of clause)

52.242-6 [Reserved]

52.242-7 [Reserved]

52.242-8 [Reserved]

52.242-9 [Reserved]

52.242-10 [Reserved]

52.242-11 [Reserved]

52.242-12 [Reserved]

52.242-13 Bankruptcy.

As prescribed in 42.903 , insert the following clause:

Bankruptcy (July 1995)

In the event the contractor enters into proceedings relating to bankruptcy, whether voluntary or involuntary, the contractor agrees to furnish, by certified mail or electronic commerce method authorized by the contract, written notification of the bankruptcy to the contracting officer responsible for administering the contract. This notification shall be furnished within fivedays of the initiation of the proceedings relating to bankruptcy filing. This notification shall include the date on which the bankruptcy petition was filed, the identity of the court in which the bankruptcy petition was filed, and a listing of government contract numbers and contracting offices for all government contracts against which final payment has not been made. This obligation remains in effect until final payment under this contract.

(End of clause)

52.242-14 Suspension of Work.

As prescribed in 42.1305(a), insert the following clause in solicitations and contracts when a fixed-price construction or architect-engineer contract is contemplated:

Suspension of Work (Apr 1984)

(a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1)by an act of the Contracting Officer in the administration of this contract, or (2)by the Contracting Officer's failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or

interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.

(c) A claim under this clause shall not be allowed-

(1) For any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order); and

(2) Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the contract.

(End of clause)

52.242-15 Stop-Work Order.

As prescribed in 42.1305(b), insert the following clause. The "90-day" period stated in the clause may be reduced to less than 90 days.

Stop-Work Order (Aug 1989)

(a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either-

(1) Cancel the stop-work order; or

(2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

(b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if-

(1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and

(2) The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; provided, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon the claim submitted at any time before final payment under this contract.

(c) If a stop-work order is not canceled and the work covered by the order is terminated for the convenience of the Government, the Contracting Officer shall allow reasonable costs resulting from the stop-work order in arriving at the termination settlement.

(d) If a stop-work order is not canceled and the work covered by the order is terminated for default, the Contracting Officer shall allow, by equitable adjustment or otherwise, reasonable costs resulting from the stop-work order.

(End of clause)

Alternate I (Apr 1984). If this clause is inserted in a cost-reimbursement contract, substitute in paragraph (a)(2) the words "the Termination clause of this contract" for the words "the Default, or the Termination for Convenience of the Government clause of this contract." In paragraph (b) substitute the words "an equitable adjustment in the delivery schedule, the estimated cost, the fee, or a combination thereof, and in any other terms of the contract that may be affected" for the words "an equitable adjustment in the delivery schedule or contract price, or both."

52.242-16 [Reserved]

52.242-17 Government Delay of Work.

As prescribed in 42.1305(c), insert the following clause:

Government Delay of Work (Apr 1984)

(a) If the performance of all or any part of the work of this contract is delayed or interrupted (1) by an act of the Contracting Officer in the administration of this contract that is not expressly or impliedly authorized by this contract, or (2) by a failure of the Contracting Officer to act within the time specified in this contract, or within a reasonable time if not specified, an adjustment (excluding profit) shall be made for any increase in the cost of performance of this contract caused by the delay or interruption and the contract shall be modified in writing accordingly. Adjustment shall also be made in the delivery or performance dates and any other contractual term or condition affected by the delay or interruption. However, no adjustment shall be made under this clause for any delay or interruption to the extent that performance would have been delayed or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an adjustment is provided or excluded under any other term or condition of this contract.

(b) A claim under this clause shall not be allowed-

(1) For any costs incurred more than 20 days before the Contractor shall have notified the Contracting Officer in writing of the act or failure to act involved; and

(2) Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the delay or interruption, but not later than the day of final payment under the contract.

(End of clause)