Part 228 - BONDS AND INSURANCE

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Parent topic: Defense Federal Acquisition Regulation

Subpart 228.1 - BONDS AND OTHERFINANCIAL PROTECTIONS

228.102 Performance and payment bonds and alternative payment

protections for construction contracts.

228.102-1 General.

The requirement for performance and payment bonds is waived for cost-reimbursement contracts. However, for cost-type contracts with fixed-price construction subcontracts over $40,000, require the prime contractor to obtain from each of its construction subcontractors performance and payment protections in favor of the prime contractor as follows:

(1) For fixed-price construction subcontracts over $40,000, but not exceeding $150,000, payment protection sufficient to pay labor and material costs, using any of the alternatives listed at FAR 28.102-1(b)(1).

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

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

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

228.102-70 Defense Environmental Restoration Program construction contracts.

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

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

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

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

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

228.105 Other types of bonds.

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

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

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

228.106 Administration.

228.106-7 Withholding contract payments.

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

Subpart 228.3 - INSURANCE

228.304 Risk-pooling arrangements.

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

228.305 Overseas workers' compensation and war-hazard insurance.

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

228.307 Insurance under cost-reimbursement contracts.

228.307-1 Group insurance plans.

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

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

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

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

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

228.311-1 Contract clause.

Use the clause at FAR 52.228-7, Insurance—Liability to Third Persons, in solicitations and contracts, other than those for construction and those for architect-engineer services, when a cost-

reimbursement contract is contemplated, unless the head of the contracting activity waives the requirement for use of the clause.

228.370 Ground and flight risk.

228.370-1 Definitions.

As used in this section—

“Aircraft” means,unless otherwise provided in the contract Schedule, any item, other than a rocket or missile, intended for flight (e.g., fixed-winged aircraft, blended wing/lifting bodies, helicopters, vertical take-off or landing aircraft, lighter-than-air airships, and unmanned aerial vehicles), including emerging technologies that would commonly be considered aircraft. New production articles become aircraft at a stage of manufacture or production when a wing, portion of a wing, or engine is attached to a fuselage. Blended wing/lifting bodies become aircraft at a stage of manufacture or production when the center portion and a lifting surface become attached.

“Civil aircraft” means an aircraft other than a public aircraft or state aircraft.

“Contractor managerial personnel” means the contractor’s directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of—

(1) All, or substantially all, of the contractor’s business;

(2) All, or substantially all, of the contractor’s operation at any one plant or separate location; or

(3) A separate and complete major industrial operation.

“Covered aircraft” means an aircraft owned by or to be delivered to the Government and, when determined by the contracting officer and specifically identified as such in the contract Schedule, may include contractor-furnished aircraft that are not intended for induction into the DoD inventory, including—

(1) Aircraft furnished by the Government to the contractor under a contract while in the contractor’s possession, care, custody, or control regardless of their location or state of disassembly or reassembly;

(2) Items removed from a Government-furnished aircraft that are—

(i) Intended for reinstallation on that particular aircraft, which retain their status as covered aircraft while awaiting installation; and

(ii) Not intended for reinstallation on that particular aircraft, which lose their status as covered aircraft once removal is complete;

(3) New production aircraft when wholly outside of buildings on the contractor’s premises or other places described in the contract Schedule (e.g., hush houses, run stations, and paint facilities); and

(4) Commercial aircraft, to include commercially available off-the-shelf aircraft, become covered aircraft when the commercial aircraft arrives at the contractor’s place of performance for modification under the terms of the contract.

“Crew member” means, unless otherwise provided in the contract Schedule, personnel required in the flight manual, assigned for the purpose of conducting any flight on behalf of the contractor. It also includes any operator of an unmanned aerial vehicle.

“Flight” means any flight approved in writing by the Government flight representative, to include taxi test made in the performance of the contract, or flight for the purpose of safeguarding the aircraft. All aircraft off the contractor's premises shall be considered to be in flight when on the ground or water for reasonable periods of time following emergency landings, landings made in performance of the contract, or landings approved in writing by the contracting officer.

“Public aircraft” means an aircraft that meets the definition in 49 U.S.C. 40102(a)(41) and the qualifications in 49 U.S.C. 40125. Specifically, a public aircraft means any of the following:

(1) An aircraft used only for the Government, except as provided in paragraphs (5) and (7) of this definition.

(2) An aircraft owned by the Government and operated by any person for purposes related to crew training, equipment development, or demonstration, except as provided in paragraph (7) of this definition.

(3) An aircraft owned and operated by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in paragraph (7) of this definition.

(4) An aircraft exclusively leased for at least 90 continuous days by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in paragraph (7) of this definition.

(5) An aircraft owned or operated by the armed forces or chartered to provide transportation or other commercial air service to the armed forces under the conditions specified by 49 U.S.C. 40125(c). In the preceding sentence, the term “other commercial air service” means an aircraft operation that—

(i) Is within the United States territorial airspace;

(ii) The Administrator of the Federal Aviation Administration determines is available for compensation or hire to the public; and

(iii) Must comply with all applicable civil aircraft rules under title 14, Code of Federal Regulations.

(6) An unmanned aircraft that is owned and operated by, or exclusively leased for at least 90 continuous days by, an Indian Tribal government, as defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122), except as provided in paragraph (7) of this definition.

(7) As described in 49 U.S.C. 40125(b), an aircraft described in paragraph (1), (2), (3), or (4) of this definition does not qualify as a public aircraft in situations where the aircraft is used for commercial purposes or to carry an individual other than a crew member or a qualified non-crew member.

“Public aircraft operation” means operation of an aircraft that meets the legal definition of public aircraft established in 49 U.S.C. 40102(a)(41) and the legal qualifications for public aircraft status outlined in 49 U.S.C. 40125.

“State aircraft” means an aircraft operated by the Government for sovereign, noncommercial purposes such as military, customs, and police services. Military aircraft are afforded status as state aircraft. In very rare circumstances, DoD-contracted aircraft may be designated, in writing, by a responsible Government official pursuant to DoD Directive 4500.54E, DoD Foreign Clearance Program, to be operated in state aircraft status, and States may choose to treat them as deemed state aircraft when they are operating under a Government contract.

“Workmanship error” means damage to the aircraft that is the result of an incorrectly performed skill-based task, operation, or action that was originally planned or intended.

228.370-2 General.

(a) *Assignment of a Government flight representative.* See PGI 228.370-2(a) for procedures on assigning a Government flight representative (GFR) when using the clauses at 252.228-7001 and 252.228-7007.

(b) *Preaward survey*. Before awarding any contract using the clause at 252.228-7001, Ground and Flight Risk, the contracting officer should obtain a preaward survey of the offeror’s proposed aircraft flight and ground operations facility. If the offeror proposed subcontracting any aircraft work, the preaward survey should include a review of the subcontractor’s facility. For acquisitions falling under the exceptions at 228.371(b)(1)(iii), (iv), and (vi), the contracting officer shall review the documentation the offeror submitted with the proposal in response to the DD Form 1423, Contract Data Requirements List, to ensure the offeror’s commercial insurance provides the appropriate coverage required by the clause at 252.228-7001.

(c) *Foreign military sales*. The exception for foreign military sales (FMS) contracts at 228.371(b)(1)(iii) only applies to FMS cases where the FMS customer has explicitly refused assumption of risk of loss. If the FMS customer has accepted the standard Letter of Offer and Acceptance Standard Terms and Conditions, as described in DoD 5105.38-M, Security Assistance Management Manual, they have assumed risk of loss.

(d) *Commercial derivative aircraft*. The exception at 228.371(b)(1)(iv) for commercial derivative aircraft only applies if the contractor is a licensed and certified Federal Aviation Administration (FAA) repair station for the specific model of aircraft under contract, when work is being performed pursuant to the FAA license under 14 CFR part 145. The FAA’s repair station search tool is available at https://av-info.faa.gov/repairstation.asp. All aircraft flying public aircraft operations operate under airworthiness certificates maintained by the military services. The FAA airworthiness certificate in the exception in this paragraph (d) underlies the military service certificate.

(e) *Insurance*. The clause at 252.228-7001, Ground and Flight Risk, is intended to reduce acquisition costs by eliminating the costs of commercial insurance premiums. This clause also is intended to encourage the contractor to perform safe and effective operations through inclusion of a contractor’s share of loss (i.e., a deductible). Additionally, the clause requires compliance with the combined regulation/instruction entitled “Contractor’s Flight and Ground Operations” (Air Force Instruction 10-220, Army Regulation 95-20, Naval Air Systems Command (NAVAIR) Instruction 3710.1 (Series), Coast Guard Instruction M13020.3 (Series), and Defense Contract Management Agency Instruction 8210-1 (Series)), which provides procedures to mitigate the risk of loss to the Government. For this reason, paragraph (e)(4)(ii) of the clause at 252.228-7001 specifies that insurance premium costs are unallowable. In addition, paragraph (d)(4) of the clause provides that the Government’s assumption of risk does not apply where the loss or damage is covered by

available insurance.

(f) *Damage to Government aircraft*.

(1) Whenever damage to Government aircraft is reported, each incident should be evaluated on its own merits. When the cost of repair exceeds the contractor's share of loss provisions, the contracting officer shall make a liability determination in accordance with paragraph (g) of this section.

(2) Contracting officers should consult with the requiring activity and the assigned contract administration office on replacement, repair, or beyond economic repair decisions.

(3) See PGI 228.370-2(f) for an example of accident or mishap damage versus workmanship-error damage.

(g) *Contracting officer determination of liability.*

(1) When making a liability determination, the contracting officer should seek input from the GFR and legal counsel, as needed.

(2) The Government's assumption of risk shall not extend to damage, loss, or destruction of covered aircraft that—

(i) Is the result of willful misconduct or lack of good faith on the part of the contractor's managerial personnel, including the contractor's oversight of subcontractors;

(ii) Is sustained during flight if either the flight or the crew members have not been approved in advance and in writing by the GFR, who has been authorized in accordance with the combined regulation/instruction entitled "Contractor's Flight and Ground Operations";

(iii) Occurs in the course of transportation by rail, or by conveyance on public streets, highways, or waterways, unless the transportation is limited to the vicinity of the contractor's premises, and incidental to work performed under the contract as described in the Schedule;

(iv) Is covered by insurance;

(v) Occurs after the contracting officer has, in writing, revoked the Government's assumption of risk; or

(vi) Is sustained due to workmanship errors.

(h) *Notice of revocation of the Government's assumption of risk*. The liability provisions of the clause at FAR 52.245-1, Government Property, do not apply to the aircraft impacted by a notice of revocation.

(1) *Preliminary notice of revocation*.

(i) When finding that contractor managerial personnel have failed to comply with the combined regulation/instruction, as required by paragraph (b) of the clause at 252.228-7001, including finding the covered aircraft are exposed to unreasonable conditions, the contracting officer shall issue a preliminary notice of revocation of the Government's assumption of risk to the contractor and shall require the contractor to comply with contract requirements. Factors for the contracting officer to consider in determining exposure to unreasonable conditions include, but are not limited to, the

following:

(A) Lack of adequate hangar fire suppression or firefighting vehicles;

(B) Failure to provide adequate procedures to the GFR; or

(C) Systemic failure to comply with approved procedures.

(ii) The preliminary notice of revocation will state the timeframe for the contractor to correct the noncompliance or conditions.

(2) *Notice of revocation*. If the contractor fails to correct the cited noncompliance or conditions within the specified timeframe, the contracting officer shall issue to the contractor a notice of revocation of the Government's assumption of risk for any covered aircraft.

(i) Thereafter the contractor assumes the entire risk for damage, loss, or destruction of the previously covered aircraft.

(ii) Any costs incurred by the contractor, including the costs of the contractor's self-insurance, insurance premiums paid to insure the contractor's assumption of risk, deductibles associated with such purchased insurance, etc., to mitigate its risk are unallowable costs.

(iii) The notice of revocation does not relieve the contractor of its obligation to comply with all other provisions of the clause at 252.228-7001, including the combined regulation/instruction entitled "Contractor's Flight and Ground Operations."

(iv) Within 3 days of receipt of the contractor's notice of correction, the contracting officer shall notify the contractor whether the Government will resume risk of loss. The contracting officer shall determine that the noncompliance or cited conditions have been corrected prior to resuming assumption of risk.

(v) Any disputes regarding the contracting officer's notice of revocation shall be subject to FAR clause 52.233-1, Disputes.

(i) *Procedures in the event of damage, loss, or destruction of covered aircraft.*

(1) In the event of damage, loss, or destruction of covered aircraft, except in cases covered by paragraph (j)(2) of this section, the contracting officer shall evaluate the contractor's statement of—

(i) The damaged, lost, or destroyed aircraft;

(ii) The time and origin of the damage, loss, or destruction;

(iii) All known interests in commingled property of which aircraft are a part; and

(iv) The insurance, if any, covering the interest in commingled property.

(2) If a new production aircraft is damaged, lost, or destroyed before it has become a covered aircraft, the Government bears no responsibility for risk of loss.

(3) If a new production aircraft is damaged, lost, or destroyed after it has become a covered aircraft, the contracting officer shall provide written direction to the contractor to take action in accordance with the contracting officer's written direction that the aircraft shall be—

(i) Replaced;

(ii) Repaired to the condition immediately prior to the damage; or

(iii) Considered beyond economic repair. The contracting officer shall decide whether further actions are required under the contract.

(4) If a covered aircraft that has been furnished by the Government to the contractor is damaged, lost, or destroyed while covered, the contracting officer shall provide written direction to the contractor that the aircraft shall be—

(i) Repaired; or

(ii) Considered beyond economic repair. The contracting officer shall decide further actions required under the contract.

(5) The contracting officer shall make an equitable adjustment for expenditures made in performing the obligations under paragraph (h) of the clause at 252.228-7001.

(j) *Contracting officer determination of the contractor's share of loss*.

(1) The contractor's share of loss or damage to covered aircraft, except for loss or damage caused by negligence of Government personnel, is the least of—

(i) $200,000;

(ii) 20 percent of the price or estimated acquisition cost of affected aircraft; or

(iii) 20 percent of the price or estimated cost of the contract, task order, or delivery order.

(2) If the Government requires covered aircraft to be replaced or repaired by the contractor, any resulting equitable adjustment shall not include reimbursement of the contractor's share of loss.

(3) In the event the Government does not decide to replace or repair the covered aircraft, the clause at 252.228-7001 requires the contractor to credit the contract price or pay the Government, as directed by the contracting officer, the least of—

(i) $200,000;

(ii) 20 percent of the price or estimated acquisition cost of affected aircraft; or

(iii) 20 percent of the price or estimated cost of the contract, task order, or delivery order.

(4) The costs incurred by the contractor for its share of the loss and for insuring against that loss are unallowable costs, including but not limited to—

(i) The contractor's share of loss under the Government's self-insurance;

(ii) The costs of the contractor's self-insurance;

(iii) The deductible for any contractor-purchased insurance;

(iv) Insurance premiums paid for contractor-purchased insurance; and

(v) Costs associated with determining, litigating, and defending against the contractor’s liability.

(k) *Reimbursement from a third party.* If the contracting officer finds or has reason to believe that the contractor has been reimbursed or otherwise compensated by a third party for damage, loss, or destruction of covered aircraft and has also been compensated by the Government, then the contracting officer shall demand an equitable reimbursement. If the contracting officer requests that the contractor provide reasonable assistance in obtaining recovery, such effort shall be an allowable expense of the contractor.

228.370-3 Aircraft not owned by or to be delivered to the Government.

(a) When a contract involves aircraft not owned by or to be delivered to the Government, the contracting officer may use the clause at 252.228-7001 only if the contracting officer determines that it is in the best interest of the Government.

(b) Potential factors for the contracting officer to consider when deciding which course of action is in the best interest of the Government include, but are not limited to, whether—

(1) The cost of hull insurance exceeds the replacement cost of the aircraft;

(2) Insurance is not available (e.g., high-risk experimental flights and operations of aircraft in a war zone); or

(3) Ground or flight activities that involve contractor-owned and contractor-operated aircraft may pose risk to Government aircraft (e.g., due to close proximity in flight).

228.371 Additional clauses.

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

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

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

(b) Use the clause at 252.228-7001 , Ground and Flight Risk, in solicitations and contracts–

(1) For the acquisition, development, production, modification, maintenance, repair, flight, or overhaul of aircraft owned by or to be delivered to the Government, except those solicitations and contracts

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

(ii) That are awarded for purchase under FAR part 12 procedures;

(iii) For which a non-DoD customer (including an FMS customer per 225.7305) has decided to allow the use of commercial insurance or other self-insurance; has not agreed to assume the risk for loss

or destruction of, or damages to, the aircraft; or

(iv) For commercial derivative aircraft with an FAA certificate of airworthiness maintained to FAA standards. when the work will be performed at a licensed FAA repair station. Performance under the exception in this paragraph (b)(1)(iv) must be at a licensed and certified FAA repair station rated for the type of aircraft and work to be maintained. This exception does not apply to contracts requiring flights with contractor crewmembers;

(v) Under which the aircraft are to be dismantled and removed from the inventory; or

(vi) Under which the aircraft are classified as Group 1 or 2 unmanned aircraft systems per DoD Instruction (DoDI) 6055.07, Mishap Notification, Investigation, Reporting, and Record Keeping, and the purchase price of the air vehicle, including installed Government-furnished equipment, is below the cost threshold for a Class C mishap per DoDI 6055.07; or

(2) Involving aircraft not owned by or to be delivered to the Government, only if the contracting officer determines that it is in the best interest of the Government. See 228.370-3.

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

(d) Use the clause at 252.228-7005 , Mishap Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles, in solicitations and contracts that involve the manufacture, modification, overhaul, or repair of aircraft, missiles, and space launch vehicles.

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

(f) Use the clause at 252.228-7007, Public Aircraft and State Aircraft Operations-Liability, in solicitations and contracts that do not include the clause at 252.228-7001 but involve public aircraft operations or state aircraft operations.