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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 [Reserved]

42.002 Interagency agreements.

(a) Agencies *shall* avoid duplicate audits, reviews, *inspections*, and examinations of contractors or subcontractors, by more than one agency, through the use of interagency agreements.

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

(c) When an interagency agreement is established, the agencies are encouraged to consider establishing procedures for the resolution of issues that *may* arise under the agreement.

42.003 Cognizant Federal agency.

(a) For contractors other than educational institutions and nonprofit organizations, the *cognizant Federal agency* normally will be the agency with the largest dollar amount of negotiated contracts, including *options*. 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), the *cognizant Federal agency* for *indirect costs* is established according to 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 cognizant for at least 5 years to ensure continuity and ease of administration. If, at the end of the 5-year period, another agency has the largest dollar amount of negotiated contracts, including *options*, the two agencies *shall* coordinate and determine which will assume cognizance. However, if circumstances warrant it and the affected agencies agree, cognizance *may* transfer prior to the expiration of the 5-year period.

Subpart 42.1 - Contract Audit Services

42.101 Contract audit responsibilities.

(a) The auditor is responsible for-

(1) Submitting information and advice to the requesting activity, based on the auditor’s analysis of the contractor’s financial and accounting records or other related data as to 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, for contractors other than educational institutions and nonprofit organizations, 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 *shall* 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, subpart F.

42.102 Assignment of contract audit services.

(a) As provided in agency procedures or interagency agreements, *contracting officers may* request audit services directly from the *responsible audit agency* cited in the Directory of Federal Contract Audit Offices. The audit request *should* include a suspense date and *should* 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 resources of the audit agency are inadequate to accomplish the tasks. Declinations *shall* be *in writing*.

42.103 Contract audit services directory.

(a) DCAA maintains and distributes the Directory of Federal Contract Audit Offices. The directory identifies cognizant audit offices and the contractors over which they have cognizance. Changes to audit cognizance *shall* be provided to DCAA so that the directory can be updated.

(b) Agencies *may* obtain a copy of the directory or information concerning cognizant audit offices by contacting the-

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.

(a) For each contract assigned for administration, the *contract administration office* (CAO) (see 2.101) *shall*-

(1) Perform the functions listed in 42.302(a) to the extent that they apply to the contract, except for the functions specifically withheld;

(2) Perform the functions listed in 42.302(b) only when and to the extent specifically authorized by the *contracting officer*; and

(3) Request supporting contract administration under 42.202(e) and (f) when it is required.

(b) The Defense Contract Management Agency and other agencies *offer* a wide variety of contract administration and support services.

42.202 Assignment of contract administration.

(a) *Delegating functions*. As provided in agency procedures, *contracting officers may* delegate contract administration or specialized support services, either through interagency agreements or by direct request to the cognizant CAO listed in the Federal Directory of Contract Administration Services *Components*. The delegation *should* include-

(1) The name and address of the CAO designated to perform the administration (this information also *shall* 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* also *shall* 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 office may* delegate to the CAO functions not listed in 42.302, 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 functions pertaining to cost accounting standards and negotiation of forward *pricing* rates and *indirect cost rates* (also see 42.003). The *requesting agency must* coordinate with the ACO 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 under paragraph (a) or (c) of this section, or a *contracting office* retaining contract administration, *may* request supporting contract administration from the CAO cognizant of the contractor location where performance of specific contract administration functions is required. The request *shall*-

(i) Be *in writing*;

(ii) Clearly state the specific 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 *shall* not be used for subcontracts unless-

(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 *shall* 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 resources of the agency are inadequate to accomplish the tasks. Declinations *shall* be *in writing*.

42.203 Contract administration services directory.

The Defense Contract Management Agency (DCMA) maintains the Federal Directory of Contract Administration Services *Components*. The directory lists the names and telephone numbers of those DCMA and other agency offices that *offer* contract administration services within designated geographic areas and at specified contractor plants. *Federal agencies may* access it on the Internet at https://piee.eb.mil/pcm/xhtml/unauth/index.xhtml. For additional information contact-

Defense Contract Management Agency 3901 A Avenue Building 10500 Ft. Lee, VA 23801-1809.

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) *shall* perform contract administration functions in accordance with 48 CFR Chapter 1, the contract terms, and, unless otherwise agreed to in an interagency agreement (see 42.002), 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, unless the *cognizant Federal agency* (see 2.101) has

designated the *contracting officer* to perform these functions.

(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 negotiation will be accomplished by the *contracting officer*, furnish comments and recommendations to that officer.

(5) Negotiate *forward pricing rate agreements* (see 15.407-3).

(6) Negotiate advance agreements applicable to treatment of costs under contracts currently assigned for administration (see 31.109).

(7) Determine the allowability of costs suspended or disapproved as required (see subpart 42.8), 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 42.8).

(9) Establish *final indirect cost rates* and billing rates for those contractors meeting the criteria for *contracting officer* determination in subpart 42.7.

(10) Attempt to resolve issues in controversy, using ADR procedures when appropriate (see subpart 33.2); 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 (see 30.601 and 48 CFR chapter 99)-

(i) Determine the adequacy of the contractor's disclosure statements;

(ii) Determine whether disclosure statements are in compliance with Cost Accounting Standards and part 31;

(iii) Determine the contractor's compliance with Cost Accounting Standards and disclosure statements, if applicable; and

(iv) Negotiate price adjustments and execute *supplemental agreements* under the Cost Accounting Standards 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 Cost Accounting Standards (CAS), affect the quality and validity of the contractor data upon which the Government *must* rely for its management oversight of the contractor and contract performance.

(13) Review and approve or disapprove the contractor's requests for payments under the progress payments or performance-based payments clauses.

(14) Make payments on assigned contracts when prescribed in agency *acquisition* regulations.

(15) Manage special bank accounts.

(16) Ensure timely notification by the contractor 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 take action in accordance with subpart 32.6 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 those portions of the applicable industrial security program delegated to the CAO (see subpart 4.4).

(22) Issue work requests under maintenance, overhaul, and modification 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 contractual documents for settlement of partial and complete contract terminations for convenience, except as otherwise prescribed by part 49.

(25) Negotiate and execute contractual documents settling cancellation charges under multiyear contracts.

(26) Process and execute novation and change of name agreements under subpart 42.12.

(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. When the ACO determines it to be in the Government's interests, the services *may* be secured from a contractor other than the contractor in possession of the property.

(30) When contractors request Government property-

(i) Evaluate the 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 payment by the contractor 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 subpart 9.1).

(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.

(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.

(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*, or, 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 43.101).

(60) Cause release of *shipments* from contractor's plants according to the shipping instructions. When applicable, the order of assigned priority *shall* be followed; *shipments* within the same priority *shall* 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 made. Except when the ACO has settlement authority, the ACO *shall* forward the proposal to the *contracting officer* for *contract modification*. The ACO *shall* not delay *shipments* pending completion and formalization of negotiations of revised shipping instructions.

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

(63) Cancel unilateral *purchase orders* when notified of nonacceptance by the contractor. The CAO *shall* 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 42.1105). Notification that the contract delivery schedule is being extended *shall* be provided to the *contracting office*. Subsequent extensions on any individual contract *shall* be authorized only upon concurrence of the *contracting office*.

(65) Accomplish administrative closeout procedures (see 4.804-5).

(66) Determine that the contractor has a *drug-free workplace* program and drug-free awareness program (see subpart 26.5).

(67) Support the program, product, and project offices regarding 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 and services* (as defined in 2.101) in accordance with the clause at 52.223-23. This *must* occur 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.

(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 *shall* perform the following functions only when and to the extent specifically authorized by the *contracting office*:

(1) Negotiate or negotiate and execute *supplemental 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 or negotiate and execute *supplemental agreements* changing contract delivery schedules.

(4) Negotiate or 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 *supplemental*

agreements incorporating contractor proposals resulting from these instructions.

(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 subpart 16.2).

(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, and it is determined that such action is in the best interests of the Government, notwithstanding the default provisions of the contract. Such action will be taken only upon the written request of the contractor and, in no event, *shall* the total downward contract price adjustment resulting from an inconsequential delivery shortage 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 42.15.

(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*.

Subpart 42.4 - Correspondence and Visits

42.401 Contract correspondence.

(a) The *contracting officer* (or other *contracting* agency personnel) normally *shall* (1) forward correspondence relating to assigned contract administration functions through the cognizant *contract administration office* (CAO) to the contractor, and (2) provide a copy for the CAO's file. When urgency requires sending such correspondence directly to the contractor, a copy *shall* be sent concurrently to the CAO.

(b) The CAO *shall* send the *contracting office* a copy of pertinent correspondence conducted between the CAO and the contractor.

42.402 Visits to contractors' facilities.

(a) Government personnel planning to visit a contractor's facility in connection with one or more Government contracts *shall* provide the cognizant CAO with the following information, sufficiently in advance to permit the CAO to make necessary arrangements. Such notification is for the purpose of eliminating duplicative reviews, requests, investigations, and audits relating to the contract administration functions in subpart 42.3 delegated to CAO's and *shall*, as a minimum, include the following (see also paragraph (b) of this section):

(1) Visitors' names, official positions, and security clearances.

(2) Date and duration of visit.

(3) Name and address of contractor and personnel to be contacted.

(4) Contract number, program involved, and purpose of visit.

(5) If desired, visitors to a contractor's plant *may* request that a representative of the CAO accompany them. In any event, the CAO has final authority to decide whether a representative *shall* accompany a visitor.

(b) If the visit will result in reviewing, auditing, or obtaining any information from the contractor relating to contract administration functions, the prospective visitor *shall* identify the information in sufficient detail so as to permit the CAO, after consultation with the contractor and the cognizant audit office, to determine whether such information, adequate to fulfill the requirement, has recently been reviewed by or is available within the Government. If so, the CAO will discourage the visit and refer the prospective visitor to the Government office where such information is located. Where the office is the CAO, such information will be immediately forwarded or otherwise made available to the requestor.

(c) Visitors *shall* fully inform the CAO of any agreements reached with the contractor or other results of the visit that *may* affect the CAO.

42.403 Evaluation of contract administration offices.

Onsite *inspections* or evaluations of the performance of the assigned functions of a *contract administration office shall* be accomplished only by or under the direction of the agency of which that office is a part.

Subpart 42.5 - Postaward Orientation

42.500 Scope of subpart.

This subpart prescribes policies and procedures for the postaward orientation of contractors and subcontractors through-

(a) A conference; or

(b) A letter or other form of written communication.

42.501 General.

(a) A postaward orientation aids both Government and contractor personnel to (1) achieve a clear and mutual understanding of all contract requirements, and (2) identify and resolve potential problems. However, it is not a substitute for the contractor's fully understanding the work requirements at the time *offers* are submitted, nor is it to be used to alter the final agreement

arrived at in any negotiations leading to contract award.

(b) Postaward orientation is encouraged to assist (see part 19)-

(1) Small business concerns;

(2) *Small disadvantaged business concerns*;

(3) Veteran-owned small business concerns;

(4) Service-disabled veteran-owned small business concerns;

(5) *HUBZone* small business concerns; and

(6) *Women-owned small business concerns* (including economically disadvantaged *women-owned small business concerns* and *women-owned small business concerns* eligible under the Women-Owned Small Business Program).

(c) While cognizant Government or contractor personnel *may* request the *contracting officer* to arrange for orientation, it is up to the *contracting officer* to decide whether a postaward orientation in any form is necessary.

(d) Maximum benefits will be realized when orientation is conducted promptly after award.

42.502 Selecting contracts for postaward orientation.

When deciding whether postaward orientation is necessary and, if so, what form it *shall* take, the *contracting officer shall* consider, as a minimum, the-

(a) Nature and extent of the *preaward survey* and any other prior discussions with the contractor;

(b) Type, value, and complexity of the contract;

(c) Complexity and *acquisition* history of the product or service;

(d) Requirements for spare parts and related equipment;

(e) Urgency of the delivery schedule and relationship of the product or service to critical programs;

(f) Length of the planned production cycle;

(g) Extent of subcontracting;

(h) Contractor’s performance history and experience with the product or service;

(i) Contractor’s status, if any, as a small business, small disadvantaged, women-owned, veteran-owned, *HUBZone*, or service-disabled veteran-owned small business concern;

(j) Contractor’s performance history with small, small disadvantaged, women-owned, veteran-owned, *HUBZone*, and service-disabled veteran-owned small business subcontracting programs;

(k) Safety precautions required for hazardous materials or operations; and

(l) Complex financing arrangements, such as progress payments, advance payments, or guaranteed loans.

42.503 Postaward conferences.

42.503-1 Postaward conference arrangements.

(a) The *contracting officer* who decides that a conference is needed is responsible for-

(1) Establishing the time and place of the conference;

(2) Preparing the agenda, when necessary;

(3) Notifying appropriate Government representatives (*e.g., contracting/contract administration office*) and the contractor;

(4) Designating or acting as the chairperson;

(5) Conducting a preliminary meeting of Government personnel; and

(6) Preparing a summary report of the conference.

(b) When the *contracting office* initiates a conference, the arrangements *may* be made by that office or, at its request, by the *contract administration office*.

42.503-2 Postaward conference procedure.

The chairperson of the conference *shall* conduct the meeting. Unless a contract change is contemplated, the chairperson *shall* emphasize that it is not the purpose of the meeting to change the contract. The *contracting officer may* make commitments or give directions within the scope of the *contracting officer*'s authority and *shall* put *in writing* and sign any commitment or direction, whether or not it changes the contract. Any change to the contract that results from the postaward conference *shall* be made only by a *contract modification* referencing the applicable terms of the contract. Participants without authority to bind the Government *shall* not take action that in any way alters the contract. The chairperson *shall* include in the summary report (see 42.503-3) all information and guidance provided to the contractor.

42.503-3 Postaward conference report.

The chairperson *shall* prepare and sign a report of the postaward conference. The report *shall* cover all items discussed, including areas requiring resolution, controversial matters, the names of the participants assigned responsibility for further actions, and the due dates for the actions. The chairperson *shall* furnish copies of the report to the *contracting office*, the *contract administration office*, the contractor, and others who require the information.

42.504 Postaward letters.

In some circumstances, a letter or other written form of communication to the contractor *may* be adequate postaward orientation (in lieu of a conference). The letter *should* identify the Government representative responsible for administering the contract and cite any unusual or significant contract requirements. The rules on changes to the contract in 42.503-2 also apply here.

42.505 Postaward subcontractor conferences.

(a) The prime contractor is generally responsible for conducting postaward conferences with subcontractors. However, the prime contractor *may* invite Government representatives to a conference with subcontractors, or the Government *may* request that the prime contractor initiate a conference with subcontractors. The prime contractor *should* ensure that representatives from involved *contract administration offices* are invited.

(b) Government representatives-

(1) *Must* recognize the lack of privity of contract between the Government and subcontractors;

(2) *Shall* not take action that is inconsistent with or alters subcontracts; and

(3) *Shall* ensure that any changes in direction or commitment affecting the prime contract or contractor resulting from a subcontractor conference are made by written direction of the *contracting officer* to the prime contractor in the same manner as described in 42.503-2.

Subpart 42.6 - Corporate Administrative Contracting Officer

42.601 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, effective and consistent contract administration *may* require the assignment of a corporate administrative *contracting officer* (CACO) to deal with corporate management and to perform selected contract administration functions on a corporate-wide basis.

42.602 Assignment and location.

(a) A CACO *may* be assigned only when (1) the contractor has at least two locations with resident ACO's or (2) the need for a CACO is approved by the *agency head* or designee (for this purpose, a nonresident ACO will be considered as resident if at least 75 percent of the ACO's effort is devoted to a single contractor). One of the resident ACO's *may* be designated to perform the CACO functions, or a full-time CACO *may* be assigned. In determining the location of the CACO, the responsible agency *shall* take into account such factors as the location(s) of the corporate records, corporate office, major plant, cognizant government auditor, and overall cost effectiveness.

(b) A decision to initiate or discontinue a CACO assignment *should* be based 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) Responsibility for assigning a CACO *shall* be determined as follows:

(1) When all locations of a corporate entity are under the contract administration cognizance of a single agency, that agency is responsible.

(2) When the locations are under the contract administration cognizance of more than one agency, the agencies concerned *shall* agree on the responsible agency (normally on the basis of the agency with the largest dollar balance, including *options*, of affected contracts). In such cases, agencies *may* also consider geographic location.

(d) The directory of contract administration services *components* referenced in 42.203 includes a listing of CACO's and the contractors for which they are assigned responsibility.

42.603 Responsibilities.

(a) The CACO *shall* 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 Cost Accounting Standards (CAS) applicable to corporate-level and corporate-directed accounting practices.

(b) The CACO *shall*-

(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 ACO's and auditors informed of important matters under consideration and determinations made; and

(3) Solicit their advice and participation as appropriate.

Subpart 42.7 - Indirect Cost Rates

42.700 Scope of subpart.

This subpart prescribes policies and procedures for establishing-

(a) *Billing rates*; and

(b) *Final indirect cost rates*.

42.701 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 pending establishment of *final indirect cost rates*.

42.702 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.

42.703 General.

42.703-1 Policy.

(a) A single agency (see 42.705-1) *shall* be responsible for establishing *final indirect cost rates* for each *business unit*. These rates *shall* be binding on all agencies and their *contracting offices*, unless otherwise specifically prohibited by statute. An agency *shall* not perform an audit of *indirect cost rates* when the *contracting officer* determines that the objectives of the audit can reasonably be met by accepting the results of an audit that was conducted by any other department or agency of the Federal Government (10 U.S.C. 3841(e) and 41 U.S.C. 4706(e)).

(b) *Billing rates* and *final indirect cost rates shall* be used in reimbursing *indirect costs* under cost-reimbursement contracts and in determining progress payments under fixed-price contracts.

(c) To ensure compliance with 10 U.S.C. 3743(a) and 41 U.S.C. 4303(a)-

(1) *Final indirect cost rates shall* be used for contract closeout for a *business unit*, unless the quick-closeout procedure in 42.708 is used. These final rates *shall* be binding for all cost-reimbursement contracts at the *business unit*, subject to any specific limitation in a contract or advance agreement; and

(2) Established *final indirect cost rates shall* be used in 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 42.708 is used.

42.703-2 Certificate of indirect costs.

(a) *General.* In accordance with 10 U.S.C. 3747 and 41 U.S.C.4307, a proposal *shall* not be accepted and no agreement *shall* be made to establish *final indirect cost rates* unless the costs have been certified by the contractor.

(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) Rates established unilaterally *should* be-

(i) Based on audited historical data or other available data as long as *unallowable costs* are excluded; and

(ii) Set low enough to ensure that *unallowable costs* will not be reimbursed.

(d) *False certification.* The *contracting officer should* 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 42.709 for penalties and *contracting officer* responsibilities).

(f) *Contract clause*.

(1) Except as provided in paragraph (f)(2) of this subsection, the clause at 52.242-4, Certification of Final *Indirect Costs*, *shall* be incorporated into 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.

42.704 Billing rates.

(a) The *contracting officer* (or *cognizant Federal agency* official) or auditor responsible under 42.705 for establishing the *final indirect cost rates* also *shall* be responsible for determining the *billing rates*.

(b) The *contracting officer* (or *cognizant Federal agency* official) or auditor *shall* 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*. In establishing *billing rates*, the *contracting officer* (or *cognizant Federal agency* official) or auditor *should* 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 *billing rates may* be unilaterally determined by the *contracting officer* (or *cognizant Federal agency* official).

(d) The elements of *indirect cost* and the base or bases used in computing *billing rates shall* not be construed 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 42.705-1(b) or 42.705-2(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 historical decrement will be determined by either the cognizant

contracting officer (42.705-1(b)) or the cognizant auditor (42.705-2(b)).

42.705 Final indirect cost rates.

(a) *Final indirect cost rates shall* be established on the basis of-

(1) *Contracting officer* determination procedure (see 42.705-1), or

(2) Auditor determination procedure (see 42.705-2).

(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 fails to 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 33.211.

42.705-1 Contracting officer determination procedure.

(a) *Applicability and responsibility. Contracting officer* determination *shall* 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* (see subpart 42.6), 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 corporate administrative *contracting officer*, but having a resident administrative *contracting officer* (see 42.602), with that officer responsible for the determination. For this purpose, a nonresident administrative *contracting officer* is considered as resident if at least 75 percent of the administrative *contracting officer*'s time is 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 42.705-3).

(5) State and local governments (see 42.705-4).

(6) Nonprofit organizations other than educational and state and local governments (see 42.705-5).

(b) Procedures.

(1) In accordance with the Allowable Cost and Payment clause at 52.216-7, the contractor is required to submit an adequate *final indirect cost rate* proposal to the *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 is required to 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 will provide 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, some of which *may* be required subsequent to finding that the proposal is adequate for audit in support of negotiating *final indirect cost rates* (*e.g.*, during the course of the performance of the advisory audit). See the clause at 52.216-7(d)(2) for the description of an adequate *final indirect cost rate* proposal and supporting data.

(2) 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) The *contracting officer* (or *cognizant Federal agency* official) *shall* head the Government negotiating team, which includes the cognizant auditor and technical or functional personnel as required. *Contracting offices* having significant dollar interest *shall* be invited to participate in the negotiation and in the preliminary discussion of critical issues. Individuals or offices that have provided a significant input to the Government position *should* be invited to attend.

(4) The Government negotiating team *shall* develop a negotiation position. Pursuant to 10 U.S.C. 3745 and 41 U.S.C.4305, the *contracting officer shall*-

(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 shall*-

(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 (see 4.801(c)(3)) 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) Distribute resulting documents in accordance with 42.706.

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

42.705-2 Auditor determination procedure.

(a) Applicability and responsibility.

(1) The cognizant Government auditor *shall* establish *final indirect cost rates* for *business units* not covered in 42.705-1(a).

(2) In addition, auditor determination *may* be used for *business units* that are covered in 42.705-1(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* has primarily 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 *shall* submit to the cognizant *contracting officer* (or *cognizant Federal agency* official) and auditor a *final indirect cost rate* proposal in accordance with 42.705-1(b)(1).

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

(i) Audit the proposal and prepare an advisory audit report, including a listing of any relevant advance agreements or restrictive terms of specific contracts;

(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 *shall* be signed by the contractor and the auditor;

(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) Distribute resulting documents in accordance with 42.706.

42.705-3 Educational institutions.

(a) General.

(1) Postdetermined *final indirect cost rates shall* be used in the settlement of *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* and provides that those rates *shall* be accepted by all *Federal agencies*. Cognizant Government agencies and educational institutions are listed in the Directory of Federal Contract Audit Offices (see 42.103).

(3) The cognizant agency for *indirect costs shall* establish the *billing rates* and *final indirect cost rates* at the educational institution (defined as an institution of higher education in 2 CFR 200, subpart A, and 20 U.S.C. 1001) consistent with the requirements of this subpart, subpart 31.3, and the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix III. The agency *shall* follow the procedures outlined in 42.705-1(b).

(4) If the cognizant agency is unable to reach agreement with an institution, the appeals system of the cognizant agency *shall* be followed for resolution of the dispute.

(b) Predetermined *final indirect cost rates*.

(1) Under cost-reimbursement research and development contracts with universities, colleges, or other educational institutions (41 U.S.C. 4708), payment for reimbursable *indirect costs may* be made on the basis of predetermined *final indirect cost rates*. The cognizant agency is not required to establish predetermined rates, but if they are established, their use *must* be extended to all the institution's Government contracts.

(2) In deciding whether the use of predetermined rates would be appropriate for the educational institution concerned, the agency *should* consider both the stability of the institution's *indirect costs* and bases over a period of years and any anticipated changes in the amount of the direct and *indirect costs*.

(3) Unless their use is approved at a level in the agency (see paragraph (a)(2) of this subsection) higher than the *contracting officer*, predetermined rates *shall* not be used 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)

(i) If predetermined rates are to be used and no rates have been previously established for the institution's current fiscal year, the agency *shall* obtain from the institution a proposal for predetermined rates.

(ii) If the proposal is found to be generally acceptable, the agency *shall* 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 the year in which the rates are being negotiated. If this is not possible, an earlier audit *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 shall* include the negotiated rates and bases in the contract Schedule; and

(ii) See 16.307(g), which prescribes the clause at 52.216-15, Predetermined *Indirect Cost Rates*.

(6) Predetermined *indirect cost rates shall* be applicable for a period of not more than fouryears. The agency *shall* obtain the contractor's proposal for new predetermined rates sufficiently in advance so that the new rates, based on current data, *may* be promptly negotiated near the beginning of the new 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) *Contracting officers shall* use *billing rates* established by the agency to reimburse the contractor for work performed during a period 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.

42.705-4 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 subpart 31.6) establishes the cognizant agency concept and the procedures for determining a cognizant agency for approving State and local government *indirect costs* associated with federally-funded programs and activities. The *indirect cost rates* negotiated and approved by the cognizant agency for *indirect costs* will be used by all *Federal agencies* that also award contracts to these same State and local governments.

42.705-5 Nonprofit organizations other than educational and state and local governments.

(See the OMB Uniform Guidance at 2 CFR part 200, subpart E and appendix IV; but see appendix VIII for nonprofit organizations exempt from subpart E.)

42.706 Distribution of documents.

(a) The *contracting officer* or auditor *shall* promptly distribute executed copies of the *indirect cost rate* agreement to the contractor and to each affected *contracting* agency and *shall* provide copies of the agreement for the contract files, in accordance with the guidance for *contract modifications* in subpart 4.2, Contract Distribution.

(b) Copies of the negotiation memorandum prepared under *contracting officer* determination or audit report prepared under auditor determination *shall* be furnished, as appropriate, to the *contracting offices* and Government audit offices.

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

(a) 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. For *cost sharing* under research and development contracts, see 35.003(b).

(b)

(1) Other situations *may* make it prudent to provide a *final indirect cost rate* ceiling in a contract. Examples of such circumstances are when the proposed contractor-

(i) Is a new or recently reorganized company, and there is no past or recent record of incurred *indirect costs*;

(ii) Has a recent record of a rapidly increasing *indirect cost rate* due to a declining volume of sales without a commensurate decline in indirect expenses; or

(iii) Seeks to enhance its competitive position in a particular circumstance by basing its proposal on *indirect cost rates* lower than those that *may* reasonably be expected to occur during contract performance, thereby causing a cost overrun.

(2) In such cases, an equitable ceiling covering the *final indirect cost rates may* be negotiated and specified in the contract.

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

(1) The Government will not be obligated to pay any additional amount *should* the *final indirect cost rates* exceed the negotiated ceiling rates, and

(2) In the event the *final indirect cost rates* are less than the negotiated ceiling rates, the negotiated rates will be reduced to conform with the lower rates.

42.708 Quick-closeout procedure.

(a) The *contracting officer* responsible for contract closeout *shall* negotiate the settlement of direct and *indirect costs* for a specific contract, *task order*, or *delivery order* to be closed, in advance of the determination of final *direct costs* and indirect rates set forth in 42.705, 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-

(i) $1,000,000; or

(ii) 10 percent of the total contract, *task order*, or *delivery order* amount;

(3) The *contracting officer* performs a risk assessment and determines that the use of the quick-closeout procedure is appropriate. The risk assessment *shall* 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) Determinations of final *indirect costs* under the quick-closeout procedure provided for by the Allowable Cost and Payment clause at 52.216-7 *shall* be final for the contract it covers and no adjustment *shall* 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 *shall* not be considered a binding precedent when establishing the *final indirect cost rates* for other contracts.

42.709 Penalties for Unallowable Costs.

42.709-1 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 $1 million, except fixed-price contracts without cost incentives or any firm-fixed-price contracts for the purchase of *commercial products* or *commercial services*.

42.709-2 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) It is not necessary for *unallowable costs* to have been paid to the contractor in order to assess a penalty.

42.709-3 Responsibilities.

(a) The cognizant *contracting officer* is responsible for—

(1) Determining whether the penalties in 42.709-2(a) *should* be assessed;

(2) Determining whether such penalties *should* be waived pursuant to 42.709-6; and

(3) Referring the matter to the appropriate criminal investigative organization for review and for appropriate coordination of remedies, if there is evidence that the contractor knowingly submitted *unallowable costs*.

(b) The contract auditor, in the review and/or the determination of final *indirect cost* proposals for contracts subject to this section, is responsible for—

(1) Recommending to the *contracting officer* which costs *may* be unallowable and subject to the penalties in 42.709-2(a);

(2) Providing rationale and supporting documentation for any recommendation; and

(3) Referring the matter to the appropriate criminal investigative organization for review and for appropriate coordination of remedies, if there is evidence that the contractor knowingly submitted *unallowable costs*.

42.709-4 Assessing the penalty.

Unless a waiver is granted pursuant to 42.709-6, the cognizant *contracting officer shall-*

(a) Assess the penalty in 42.709-2(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 42.709-2(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 Form1, 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 31.201-6.

(c) Issue a final decision (see 33.211) which includes a demand for payment of any penalty assessed under paragraph (a) or (b) of this section. The letter *shall* state that the determination is a final decision under the Disputes clause of the contract. (Demanding payment of the penalty is separate from demanding repayment of any paid portion of the disallowed cost.)

42.709-5 Computing Interest.

For 42.709-2(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 Pub.L.92-41 (85 Stat. 97).

(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.

42.709-6 Waiver of the penalty.

The cognizant *contracting officer shall* waive the penalties at 42.709-2(a) when—

(a) The contractor withdraws the proposal before the Government formally initiates an audit of the proposal and the contractor submits a revised proposal (an audit will be deemed to be formally initiated when the Government provides the contractor with written notice, or holds an entrance conference, indicating that audit work on a specific final *indirect cost* proposal has begun);

(b) The amount of the *unallowable costs* under the proposal which are subject to the penalty is $10,000 or less (*i.e.,* if the amount of expressly or previously determined *unallowable costs* which would be allocated to the contracts specified in 42.709-1(b) is $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 (*e.g.,* the types of controls required for satisfactory participation in the Department of Defense sponsored self governance programs, specific accounting controls over *indirect costs*, compliance tests which demonstrate that the controls are effective, and Government audits which have not disclosed recurring instances of expressly *unallowable costs*); and

(2) The *unallowable costs* subject to the penalty were inadvertently incorporated into the proposal; *i.e.,* their inclusion resulted from an unintentional error, notwithstanding the exercise of due care.

42.709-7 Contract clause.

Use the clause at 52.242-3, Penalties for *Unallowable Costs*, in all *solicitations* and contracts over $1 million 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 42.8 - Disallowance of Costs

42.800 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.

42.801 Notice of intent to disallow costs.

(a) At any time during the performance of a contract of a type referred to in 42.802, 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. However, before issuing the notice, the *contracting officer* responsible for administering the contract *shall* make every reasonable effort to reach a satisfactory settlement through discussions with the contractor.

(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 the event of disagreement, the contractor *may* submit to the *contracting officer* a written response. Any such response *shall* be answered by withdrawal of the notice or by making a written decision within 60 days.

(c) As a minimum, the notice *shall*-

(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 *shall* 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 *shall* not be issued without coordination with the *contracting officer* or auditor having authority for final *indirect cost* settlement (see 42.705).

(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 *shall* 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 42.705 for determining *final indirect cost rates shall* issue the decision.

42.802 Contract clause.

The *contracting officer shall* 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.

42.803 Disallowing costs after incurrence.

Cost-reimbursement contracts, the cost-reimbursement portion of fixed-price contracts, letter contracts that provide for reimbursement of costs, and time-and-material and labor-hour contracts provide for disallowing costs during the course of performance after the costs have been incurred. The following procedures *shall* apply:

(a) *Contracting officer receipt of vouchers.* When *contracting officers* receive vouchers directly from the contractor and, with or without auditor assistance, approve or disapprove them, the process *shall* be conducted in accordance with the normal procedures of the individual agency.

(b) Auditor receipt of vouchers.

(1) When authorized by agency regulations, the contract auditor *may* be authorized to (i) receive reimbursement vouchers directly from contractors, (ii) approve for payment those vouchers found acceptable, and (iii)suspend payment of questionable costs. The auditor *shall* forward approved vouchers for payment to the cognizant *contracting*, finance, or disbursing officer, as appropriate under the agency's procedures.

(2) If the examination of a voucher raises a question regarding the allowability of a cost under the contract terms, the auditor, after informal discussion as appropriate, *may*, where authorized by agency regulations, issue a notice of contract costs suspended and/or disapproved simultaneously to the contractor and the disbursing officer, with a copy to the cognizant *contracting officer*, for deduction from current payments with respect to costs claimed but not considered reimbursable.

(3) If the contractor disagrees with the deduction from current payments, the contractor *may*-

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

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

(iii) Do both of the above.

Subpart 42.9 - Bankruptcy

42.900 Scope of subpart.

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

42.901 General.

The *contract administration office shall* take prompt action to determine the potential impact of a contractor bankruptcy on the Government in order to protect the interests of the Government.

42.902 Procedures.

(a) When notified of bankruptcy proceedings, agencies *shall*, as 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 shall* consult with legal counsel, whenever possible, prior to taking any action regarding the contractor's bankruptcy proceedings.

42.903 Solicitation provision and contract clause.

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

Subpart 42.10 - [Reserved]

Subpart 42.11 - Production Surveillance and Reporting

42.1101 General.

Production surveillance is a function of contract administration 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.

42.1102 Applicability.

This subpart applies to all contracts for *supplies* or services other than *construction* contracts, and Federal Supply Schedule contracts. See part 37, especially subpart 37.6, regarding surveillance of contracts for services.

42.1103 Policy.

The contractor is responsible for timely contract performance. The Government will maintain surveillance of contractor performance as necessary to protect its interests. When the *contracting office* retains a contract for administration, the *contracting officer* administering the contract *shall* determine the extent of surveillance.

42.1104 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 42.1105) 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 shall* make maximum use of any reliable contractor production control or data management systems.

(d) In performing surveillance, *contract administration office* personnel *shall* 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*.

42.1105 Assignment of criticality designator.

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

Criticality Designator	Criterion
A	Critical contracts, including DX-rated contracts (see subpart 11.6), contracts citing the authority in 6.302-2 (unusual and compelling urgency), and contracts for *major systems*.
B	Contracts (other than those designated "A") for items needed to maintain a Government or contractor production or repair line, to preclude out-of-stock conditions or to meet user needs for nonstock items.
C	All contracts other than those designated "A" or "B."

42.1106 Reporting requirements.

(a) When information on contract performance status is needed, *contracting officers may* require contractors to submit production progress reports (see 42.1107(a)). Reporting requirements *shall* be limited to that information essential to Government needs and *shall* take maximum advantage of data output generated by contractor management systems.

(b) *Contract administration offices shall* review and verify the accuracy of contractor reports and advise the *contracting officer* of any required action. The accuracy of contractor-prepared reports *shall* be verified either by a program of continuous surveillance of the contractor’s report-preparation system or by individual review of each report.

(c) The *contract administration office may* at any time initiate a report to advise the *contracting officer* (and the inventory manager, if one is designated in the contract) of any potential or actual delay in performance. This advice *shall*-

(1) Be *in writing*;

(2) Be provided in sufficient time for the *contracting officer* to take necessary action; and

(3) Provide a definite recommendation, if action is appropriate.

42.1107 Contract clause.

(a) The *contracting officer shall* 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, the *contracting officer shall* specify appropriate reporting instructions in the Schedule (see 42.1106(a)).

Subpart 42.12 - Novation and Change-of-Name Agreements

42.1200 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*.

42.1201 [Reserved]

42.1202 Responsibility for executing agreements.

The *contracting officer* responsible for processing and executing novation and *change-of-name agreements shall* 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 2.1 and 42.202), the responsible *contracting officer shall* be-

(1) This 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 *shall* be the responsible *contracting officer*.

(c) If several transferors are involved, the responsible *contracting officer shall* be-

(1) The ACO administering the largest unsettled dollar balance; or

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

42.1203 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 42.1202). If the contractor received its contract under subpart 8.7 under 41 U.S.C. chapter 85, Committee for Purchase from People Who Are Blind or Severely Disabled, use the procedures at 8.716 instead.

(b) The responsible *contracting officer shall-*

(1) Identify and request that the contractor submit the 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 42.1204(e) and (f) or 42.1205(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 shall* determine whether or not 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 subpart 9.1, *Responsible Prospective Contractors*; and

(3) Any factor relating to the proposed successor's performance of contracts with the Government 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 shall* ensure that Government counsel has reviewed them for legal sufficiency.

(g) The responsible *contracting officer shall*-

(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 shall*-

(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 *shall* be responsible for further appropriate distribution.

42.1204 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 14.404-2(l) 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 42.1203(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 shall* identify and evaluate any significant organizational conflicts of interest in accordance with subpart 9.5. If the responsible *contracting officer* determines that a conflict of interest cannot be resolved, but that it is in the best interest of the Government to approve the novation request, a request for a waiver *may* be submitted in accordance with the procedures at 9.503.

(e) When a contractor asks the Government to recognize a successor in interest, the contractor *shall* 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/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 *shall* 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 shall* execute a *novation agreement* with the transferor and the transferee. It *shall* 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 *shall* relieve the transferor or transferee from compliance with any Federal law.

(i) The responsible *contracting officer shall* 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.

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*].

(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. [*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) of this Agreement)*].

(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.

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*]

42.1205 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 *shall* execute an agreement to reflect the name change. The contractor *shall* 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 42.13 - Suspension of Work, Stop-Work Orders, and Government Delay of Work

42.1301 General.

Situations *may* occur during contract performance that cause the Government to order a *suspension* of work, or a work stoppage. This subpart provides clauses to meet these situations and a clause for settling contractor *claims* for unordered Government caused delays that are not otherwise covered in the contract.

42.1302 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.

42.1303 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 *shall* be approved at a level higher than the *contracting officer*. Stop-work orders *shall* 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 shall* take appropriate action to-

(1) Terminate the contract;

(2) Cancel the stop-work order (any cancellation of a stop-work order *shall* be 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 *shall* be by a *supplemental agreement*).

42.1304 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 *shall* 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 shall* act to end the delay or take other appropriate action as soon as practicable.

(d) The *contracting officer shall* 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*.

42.1305 Contract clauses.

(a) The *contracting officer shall* 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.

(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, the *contracting officer shall* use the clause with its AlternateI.

(c) The *contracting officer shall* 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 42.14 - [Reserved]

Subpart 42.15 - Contractor Performance Information

42.1500 Scope of subpart.

This subpart provides policies and establishes responsibilities for recording and maintaining contractor performance information. This subpart does not apply to procedures used by agencies in determining fees under award or incentive fee contracts. See subpart 16.4. However, the fee amount paid to contractors *should* be reflective of the contractor's performance and the *past performance* evaluation *should* closely parallel and be consistent with the fee determinations.

42.1501 General.

(a) *Past performance* information (including the ratings and supporting narratives) is relevant information, for future source selection 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 19.705-7(b)), including favorable consideration of a mentor with an SBA-approved mentor-protégé agreement (see 13 CFR 125.9) that subcontracts to its protégé, and 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. 657r(a));

(6) Reporting into databases (see subpart 4.14, and reporting requirements in the *solicitation* provisions and clauses referenced in 9.104-7);

(7) Integrity and business ethics; and

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

(b) Agencies *shall* monitor their compliance with the *past performance* evaluation requirements (see 42.1502), 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.

42.1502 Policy.

(a) General. *Past performance* evaluations *shall* be prepared at least annually and at the time the work under a contract or order is completed. *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*. These evaluations are generally for the entity, division, or unit that performed the contract or order. *Past performance* information *shall* be entered 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. Except as provided in paragraphs (e), (f), and (h) of this section, agencies *shall* prepare evaluations of contractor performance for each contract (as defined in FAR part 2) that exceeds the *simplified acquisition threshold* and for each order that exceeds the *simplified acquisition threshold*. Agencies are required to 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. Agencies *shall* prepare an evaluation of contractor performance for each order that exceeds the *simplified acquisition threshold* that is 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*). Agencies placing orders under their own multiple-agency contract *shall* also prepare evaluations for their own orders. This evaluation *shall* not consider the requirements under paragraph (g) of this section. Agencies are required to prepare an evaluation if a modification to the order causes the dollar amount 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 useful *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 need not consider the requirements under paragraph (g) of this section unless the *contracting officer* deems it appropriate.

(e) *Past performance* evaluations *shall* be prepared for each *construction* contract of $900,000 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 $900,000.

(f) *Past performance* evaluations *shall* be prepared for each *architect-engineer services* contract of $45,000 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 $45,000.

(g) *Past performance* evaluations *shall* 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 19.701), made to *small business subcontractors*, determined by the *contracting officer* to be unjustified. The *contracting officer shall-*

(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 *shall* not evaluate performance for contracts awarded under subpart 8.7.

(i) Agencies *shall* promptly report other contractor information in accordance with 42.1503(h).

42.1503 Procedures.

(a)

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

(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.

(2) If agency procedures do not specify the individuals responsible for *past performance* evaluation duties, the *contracting officer* is responsible for this function.

(3) Interim evaluations *may* be prepared as required, in accordance with agency procedures.

(b)

(1) The evaluation *should* include a clear, non-technical description of the principal purpose of the contract or order. The evaluation *should* reflect how the contractor performed. The evaluation *should* 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. The evaluations *should* be tailored to the contract type, size, content, and complexity of the contractual requirements.

(2) Evaluation factors for each assessment *shall* 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 19.702(a) requires a subcontracting plan (as applicable, see Table 42-2).

(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 *shall* be evaluated and a supporting narrative provided. Each evaluation factor, as listed in paragraph (b)(2) of this section, *shall* 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 Table 42-1 or Table 42-2 of this section.

(c)

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

(2) When the contract provides for award fee, the award fee-contract performance adjectival rating as described in 16.401(e)(3) *shall* be entered into CPARS.

(d) Agency evaluations of contractor performance, including both negative and positive evaluations, prepared under this subpart *shall* 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. Contractors *shall* 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. Agencies *shall* provide for review at a level above the *contracting officer* to consider disagreements between the parties regarding the evaluation. The ultimate conclusion on the performance evaluation is a decision of the *contracting* agency. Copies of the evaluation, contractor response, and review comments, if any, *shall* be retained as part of the evaluation. These evaluations *may* be used to support future award decisions, and *should* therefore be marked "*Source Selection Information*". Evaluation of Federal Prison Industries (FPI) performance *may* be used to support a waiver request (see 8.604) when FPI is a mandatory source in accordance with subpart 8.6. The completed evaluation *shall* not be released to other than Government personnel and the contractor whose performance is being evaluated during the period the information *may* be used to provide *source selection information*. Disclosure of such information could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations. Evaluations used in determining award or incentive fee payments *may* also be used to satisfy the requirements of this subpart. A copy of the annual or final *past performance* evaluation *shall* be provided to the contractor as soon as it is finalized.

(e) Agencies *shall* require frequent evaluation (*e.g.*, monthly, quarterly) of agency compliance with the reporting requirements in 42.1502, so agencies can readily identify delinquent *past performance* reports and monitor their reports for quality control.

(f) Agencies *shall* prepare and submit all *past performance* evaluations electronically in CPARS at https://www.cpars.gov. These evaluations, including any contractor-submitted information (with indication whether agency review is pending), become available for source selection officials not later than 14 days after the date on which the contractor is notified of the evaluation's availability for comment. The Government *shall* update CPARS with any contractor comments provided after 14 days, as well as any subsequent agency review of comments received. *Past performance* evaluations for *classified contracts* and special access programs *shall* not be reported in CPARS, but will be reported as stated in this subpart and in accordance with agency procedures. Agencies *shall* 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 42.1503(d).

(g) Agencies *shall* use the *past performance* information in CPARS. that is within three years (six for *construction* and architect-engineer contracts) of the completion of performance of the evaluated contract or order, and information contained in the Federal Awardee Performance and Integrity

Information System (FAPIIS), *e.g.*, terminations for default or cause.

(h) Other contractor performance information.

(1) Agencies *shall* 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 15.407-1(d);

(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 22.1704(d)(1), that substantiates an allegation of a violation of the trafficking in persons prohibitions in 22.1703(a) 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 42.1502(g)(2)).

(2) The information to be posted in accordance with this paragraph (h) 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 9.105-2(b)(2)).

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

(4) With regard to information that *may* be covered by a disclosure exemption under the Freedom of Information Act, the *contracting officer shall* follow the procedures at 9.105-2(b)(2)(iv).

Table 42-1 -Evaluation Rating Definitions

Rating	Definition	Note
(a) Exceptional	Performance meets contractual requirements and exceeds many to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with few minor problems for which corrective actions taken by the contractor were highly effective.	To justify an Exceptional rating, identify multiple significant events and state how they were of benefit to the Government. A singular benefit, however, could be of such magnitude that it alone constitutes an Exceptional rating. Also, there *should* have been NO significant weaknesses identified.

Rating	Definition	Note
(b) Very Good	Performance meets contractual requirements and exceeds some to the Government's benefit. The contractual performance of the element or sub-element being evaluated was accomplished with some minor problems for which corrective actions taken by the contractor were effective.	To justify a Very Good rating, identify a significant event and state how it was a benefit to the Government. There *should* have been no significant weaknesses identified.
(c) Satisfactory	Performance meets contractual requirements. The contractual performance of the element or sub-element contains some minor problems for which corrective actions taken by the contractor appear or were satisfactory.	To justify a Satisfactory rating, there *should* have been only minor problems, or major problems the contractor recovered from without impact to the contract/order. There *should* have been NO significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be evaluated with a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.
(d) Marginal	Performance does not meet some contractual requirements. The contractual performance of the element or sub-element being evaluated reflects a serious problem for which the contractor has not yet identified corrective actions. The contractor's proposed actions appear only marginally effective or were not fully implemented.	To justify Marginal performance, identify a significant event in each category that the contractor had trouble overcoming and state how it impacted the Government. A Marginal rating *should* be supported by referencing the management tool that notified the contractor of the contractual deficiency (e.g., management, quality, safety, or environmental deficiency report or letter).

Rating	Definition	Note
(e) Unsatisfactory	Performance does not meet most contractual requirements and recovery is not likely in a timely manner. The contractual performance of the element or sub-element contains a serious problem(s) for which the contractor's corrective actions appear or were ineffective.	To justify an Unsatisfactory rating, identify multiple significant events in each category that the contractor had trouble overcoming and state how it impacted the Government. A singular problem, however, could be of such serious magnitude that it alone constitutes an unsatisfactory rating. An Unsatisfactory rating *should* be supported by referencing the management tools used to notify the contractor of the contractual deficiencies (e.g., management, quality, safety, or environmental deficiency reports, or letters).

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.

Table 42-2 -Evaluation Rating Definitions [For the small business subcontracting evaluation factor, when 52.219-9 is used]

Rating	Definition	Note
(a) Exceptional	Exceeded all statutory goals or goals as negotiated. Had exceptional success with initiatives to assist, promote, and utilize small business (SB), small disadvantaged business (SDB), women-owned small business (WOSB), *HUBZone* small business, veteran-owned small business (VOSB) and service disabled veteran owned small business (SDVOSB). Complied with FAR 52.219-8, Utilization of Small Business Concerns. Exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Went above and beyond the required elements of the subcontracting plan and other small business requirements of the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to *small business subcontractors* within a 12-month period.	To justify an Exceptional rating, identify multiple significant events and state how they were a benefit to small business utilization. A singular benefit, however, could be of such magnitude that it constitutes an Exceptional rating. Small businesses *should* be given meaningful and innovative work directly related to the contract, and opportunities *should* not be limited to indirect work such as cleaning offices, *supplies*, landscaping, etc. Also, there *should* have been no significant weaknesses identified.

Rating	Definition	Note
(b) Very Good	Met all of the statutory goals or goals as negotiated. Had significant success with initiatives to assist, promote and utilize SB, SDB, WOSB, *HUBZone*, VOSB, and SDVOSB. Complied with FAR 52.219-8, Utilization of Small Business Concerns. Met or exceeded any other small business participation requirements incorporated in the contract/order, including the use of small businesses in mission critical aspects of the program. Endeavored to go above and beyond the required elements of the subcontracting plan. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to *small business subcontractors* within a 12-month period.	To justify a Very Good rating, identify a significant event and state how it was a benefit to small business utilization. Small businesses *should* be given meaningful and innovative opportunities to participate as subcontractors for work directly related to the contract, and opportunities *should* not be limited to indirect work such as cleaning offices, *supplies*, landscaping, etc. There *should* be no significant weaknesses identified.
(c) Satisfactory	Demonstrated a good faith effort to meet all of the negotiated subcontracting goals in the various socio-economic categories for the current period. Complied with FAR 52.219-8, Utilization of Small Business Concerns. Met any other small business participation requirements included in the contract/order. Fulfilled the requirements of the subcontracting plan included in the contract/order. Completed and submitted Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate and timely manner. Did not have a history of three or more unjustified reduced or untimely payments to *small business subcontractors* within a 12-month period.	To justify a Satisfactory rating, there *should* have been only minor problems, or major problems the contractor has addressed or taken corrective action. There *should* have been no significant weaknesses identified. A fundamental principle of assigning ratings is that contractors will not be assessed a rating lower than Satisfactory solely for not performing beyond the requirements of the contract/order.

Rating	Definition	Note
(d) Marginal	Deficient in meeting key subcontracting plan elements. Deficient in complying with FAR 52.219-8, Utilization of Small Business Concerns, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Failed to satisfy one or more requirements of a corrective action plan currently in place; however, does show an interest in bringing performance to a satisfactory level and has demonstrated a commitment to apply the necessary resources to do so. Required a corrective action plan. Did not have a history of three or more unjustified reduced or untimely payments to *small business subcontractors* within a 12-month period.	To justify a Marginal rating, identify a significant event that the contractor had trouble overcoming and how it impacted small business utilization. A Marginal rating *should* be supported by referencing the actions taken by the Government that notified the contractor of the contractual deficiency.
(e) Unsatisfactory	Noncompliant with FAR 52.219-8 and 52.219-9, and any other small business participation requirements in the contract/order. Did not submit Individual Subcontract Reports and/or Summary Subcontract Reports in an accurate or timely manner. Showed little interest in bringing performance to a satisfactory level or is generally uncooperative. Required a corrective action plan. Had a history of three or more unjustified reduced or untimely payments to *small business subcontractors* within a 12-month period.	To justify an Unsatisfactory rating, identify multiple significant events that the contractor had trouble overcoming and state how it impacted small business utilization. A singular problem, however, could be of such serious magnitude that it alone constitutes an Unsatisfactory rating. An Unsatisfactory rating *should* be supported by referencing the actions taken by the Government to notify the contractor of the deficiencies. When an Unsatisfactory rating is justified, the *contracting officer must* consider whether the contractor made a good faith effort to comply with the requirements of the subcontracting plan required by FAR 52.219-9 and follow the procedures outlined in 52.219-16, Liquidated Damages-Subcontracting Plan.

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

NOTE 2: Generally, 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 *shall* be considered to have met the goal for any socio-economic category where the goal negotiated in the plan was zero.

42.1504 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 42.16 - Small Business Contract Administration

42.1601 General.

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

Subpart 42.17 - Forward Pricing Rate Agreements

42.1701 Procedures.

(a) Negotiation of *forward pricing rate agreements* (FPRA's) *may* be requested by the *contracting officer* or the contractor or initiated by the administrative *contracting officer* (ACO). In determining whether or not to establish such an agreement, the ACO *should* consider whether the benefits to be derived from the agreement are commensurate with the effort of establishing and monitoring it. Normally, FPRA's *should* be negotiated only with contractors having a significant volume of Government contract proposals. The cognizant contract administration agency *shall* determine whether an FPRA will be established.

(b) The ACO *shall* 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 see 15.407-3(c)). The ACO *shall* 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 *shall* prepare a price negotiation memorandum (PNM) (see 15.406-3) 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 *shall* provide specific terms and conditions covering expiration, application, and data requirements for systematic monitoring to ensure the validity of the rates. The agreement *shall* provide for cancellation at the *option* of either party and *shall* 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 *shall* include support 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.