

22:30 1 JULY 1976

SERVICE CONTRACTS

Part 9—Educational Service Agreements

22-900 Scope of Part. This Part prescribes procurement procedures for agreements with established schools, colleges, or universities, or other educational institutions for educational services using the institution's facilities, standard courses, and prevailing tuition and fees applicable to the general public. As used in this Part, "facilities" does not include the institution's dining rooms or dormitories. Also, as used in this Part, "fees" does not include charges for meals or lodging. Tuition assistance agreements, i.e., payment by the Government of partial tuition under the off-duty educational program, are not included under this Part. Except in connection with the detailing of commissioned officers to law schools pursuant to 10 U.S.C. 2004, no agreement shall be made under this Part which will provide for, or results in, payment of Government funds for tuition or other expenses in connection with training in any legal profession. The format and clauses for educational service agreements are set forth in 16-501.

22-901 Definition of Educational Service Agreement. An educational service agreement is one which calls for educational services to be provided under the following conditions:

- (i) the Government pays all normal tuition and fees for educational services provided to a student by the contractor under its regularly established schedule of tuition and fees applicable to all students generally; and
- (ii) enrollment is at the contractor's institution under his regular rules and in courses and curricula which the institution offers to all students meeting the contractor's admission requirements, with no special courses or special fees applicable to Government students.

22-902 Method of Procurement.

(a) An educational service agreement is not a contract, but is a continuing offer which may be accepted by the Government by the placing of requests for services. Each request for services results in a separate contract.

(b) The terms of the educational service agreement provide that requests for services are negotiated under the authority of 10 U.S.C. 2304(a)(5) when the contractor is in the United States, its possessions, or Puerto Rico, or (6) if elsewhere.

22-903 Duration. Educational service agreements shall be for an indefinite duration and shall remain in effect until terminated. However, the issuing activity shall establish procedures to review each educational service agreement at least once each year (with due regard to the institution's academic calendar and at least 30 days before the beginning of a term) for the purpose of incorporating changes to reflect requirements of any Statute, Executive Order, or this regulation. If the parties do not agree on such required changes, the contracting officer shall terminate the agreement in accordance with its terms.

22-903

ARMED SERVICES PROCUREMENT REGULATION

9 F.R. DOCUMENT PREPARING OFFICE: 1982-31-330-104

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BILLING CODE 5010-01-C

32 CFR Parts 1-39

(DAC 76-40)

Defense Acquisition Regulation

AGENCY: Department of Defense.

ACTION: Final rule.

SUMMARY: This document publishes changes to the Defense Acquisition Regulation contained in the Code of Federal Regulations. The changes are the same as those in Defense Acquisition Circular 76-40. Some of the changes include use of specifications and standards in materiel acquisition; Prompt Payment Act; small purchase threshold; quality program requirements of DoD Directive 4155.1; and editorial corrections. Also included in this document are two items for information and guidance: (1) Certain DAR deviations have been authorized without established terms. Others have been, or may be, approved for terms extending beyond the effective date of the Federal Acquisition Regulation (FAR). All such deviations shall, notwithstanding their stated terms, terminate no later than the effective date of the FAR. The foregoing does not affect DAR deviations incorporated in contracts awarded prior to the effective date of the FAR. (2) Changes were made to the DAR by DAC 76-36, "... to reflect the elimination of a long-standing policy of using prompt payment discounts in the evaluation of offers." * * * While not expressly stated, the change in policy was intended to apply equally to advertised and negotiated awards, including simplified small purchases.

EFFECTIVE DATE: November 26, 1982.

FOR FURTHER INFORMATION CONTACT: J. Brannan, Director, Defense Acquisition Regulatory Council, Room 3C257, Pentagon, Washington, D.C. 20301, Telephone (202) 697-7266.

SUPPLEMENTARY INFORMATION:

Background

The Defense Acquisition Regulation (DAR) is codified in Title 32, Parts 1-39, Volumes I, II, and III, of the Code of Federal Regulations (CFR). The September 1, 1982 revision of the CFR is the most recent edition of that title. It reflects amendments to the 1976 edition of the DAR made by Defense Acquisition Circulars 76-1 through 76-36.

The Department of Defense announced the promulgation of the 1979 CFR edition in the Federal Register of December 31, 1979 (44 FR 77158), and also announced at that time that subsequent amendments to the DAR

would be published in the Federal Register.

Defense Acquisition Circular 76-40

This document contains amendments to the Defense Acquisition Regulation in the form of replacement pages which were included in DAC 76-40, issued November 26, 1982. The following is a summary of the amendments:

Use of Specifications and Standards in Materiel Acquisition. DAR Section I, Part 12, is revised to clarify description of the tailoring process. Related changes are made to 4-105(b) and 4-106.2.

Prompt Payment Act. The Invoices clause at 7-103.30, prescribed for use by Item IV of DAC 76-39 and previously through Departmental channels, is listed as a required clause for fixed price service contracts and for fixed price research and development contracts.

Small Purchase Threshold. When Public Law 97-86 raised the small purchase threshold from \$10,000 to \$25,000, various sections of the DAR were revised by Departmental instructions. Because of the urgency to effect those changes which had the most immediate impact on Department of Defense procurement, the changes published by Departmental instructions did not represent a complete list of every citation where the threshold figure had to be increased. With this DAC, Sections I, III, IV, VI, VII, VIII, IX, X, XI, XIV, XVI, and XVIII are revised consistent with Pub. L. 97-86. Also increased is the threshold at DAR 3-604, Competition and Price Reasonableness, from \$500 to \$1,000. Changes have been made as appropriate to other sections of the DAR which are related to this increased threshold. It should be noted that those portions of the above-referenced Departmental instructions which deal with the threshold increase are superseded by the replacement pages furnished with this DAC.

Quality Program Requirements of DoD Directive 4155.1. By publication of DoD Directive 4155.1, "Quality Program," a major change was made in the Department of Defense acquisition policy regarding quality of materiel being supplied to the Government. Revisions are made to DAR Sections I, VII, and XIV consistent with the change in policy. Of particular significance in the revised coverage are provisions for holding the contractor responsible for the quality of products and services by: (1) Assuring that contracts are not awarded to contractors with histories of providing supplies and services of unsatisfactory quality; (2) contract provisions which place the quality responsibility on contractors; and (3)

exercising the Government's right to reject or return to contractors any defective items for either repair, correction, or replacement.

Editorial Corrections. The following editorial corrections are made to accommodate recent changes in DD Forms 1155 and 1155r: 3-605.3(b)(1)(ii), line 4—"Clause 16" is changed to read "Clause 15;" 3-608.2(b)(1)(xii)(C), line 2—"17" is changed to "16;" 3-608.4(b)(ii), line 3—"Clauses 17-20" is changed to read "Clauses 16-19."

Because the Defense Acquisition Regulation concerns agency management, public property, and contracts, it is not necessary to issue proposed rules for public comment. Neither is it necessary to delay the effective date until 30 days after the date of publication of these rules, 5 U.S.C. 533(a) and (d). The amendments became effective on November 26, 1982.

How to Use Replacement Pages

Reproduced at the end of this document are replacement pages from DAC 76-40. The number at the top of each page (for example, 1:27) identifies the page from the Regulation which is being replaced. The number at the bottom of the page is a reference to the last appearing numbered paragraph on that page, or if none shows, on a preceding page. The vertical line in the right margin indicates where the amendment is located.

List of Subjects in 32 CFR Parts 1-39

Adoption of Amendments

Government procurement.

Therefore, the Defense Acquisition Regulation contained in the August 1, 1981 edition of 32 CFR Parts 1-39, Volumes I, II, and III, is amended in the DAR paragraphs indicated by substitution of the replacement pages listed in the table.

DAR paragraph	Replacement pages
Volume I	
1-307.2	1:27.
1-330	1:72.
1-506.3	1:87, 1:88.
1-703	1:119.
1-704.3	1:122-B.
1-706.1	1:140, 1:141.
1-706.5	1:142-D.
1-706.6	1:142-E.
1-706.7	1:144.
1-708	1:149.
1-803	1:154.
1-805.2	1:157.
1-805.3	1:157.
1-803.1	1:160.
1-1002.4	1:167.
1-1005.3	1:176.
1-1201	1:182.
1-1202	1:183.
Section III, Table of Contents	1.
2-101	3:1.

DAR paragraph	Replacement pages	DAR paragraph	Replacement pages	DAR paragraph	Replacement pages
3-203	3:6.	7-104.52	7:110.	14-401	14:14.
3-203.1	3:6.	7-104.58	7:113.	14-402	14:14.
3-203.2	3:7.	7-302.4	7:207, 7:208.	14-403	14:14.
3-203.3	3:7.	7-302.33 (added)	7:231.	14-404	14:16.
3-409	3:50.	7-602.10	7:277.	14-405	14:16.
3-410.2	3:56.	7-602.29	7:288, 7:291.	14-406	14:16, 14:17.
3-508.2	3:74, 3:75.	7-1901.26 (added)	7:446.	14-407	14:17.
3-600	3:77.	7-2101.8	7:530, 7:533.	14-407.1	14:17, 14:18.
3-603.1	3:77, 3:78.	8-701	8:38.	14-407.2	14:18.
3-604.1	3:78-A.	8-705.1	8:42.	14-407.3	14:18.
3-604.2	3:78-A.	8-705.2	8:42.	14-408	14:19.
3-605.2	3:79.	8-707	8:45.	14-409.2	14:20.
3-605.3	3:80.	8-709	8:45.	14-502	14:21.
3-605.4	3:82.	8-103	8:3.	14-503	14:22.
3-606.2	3:83.	8-104	9:4.	14-504	14:22.
3-608.1	3:89, 3:90, 3:90-A, 3:91, 3:92, 3:92-A, 3:92-B, 3:93.	10-405	10:21.	14-603	14:23.
3-608.3	3:94.	11-401.1	11:14.	14-603.1 (deleted)	14:23.
3-608.4	3:95.	11-401.2	11:14.	14-603.2 (deleted)	14:23.
3-608.7	3:96.	Section XIV, Table of Contents	1, 2.	14-604 (added)	14:23, 14:24.
3-805.1	3:117.	14-000	14:1.		
4-105	4:3.	14-001.1	14:1.	Volume III	
4-106.1	4:4.	14-001.8 through 14-001.13 (added)	14:2.	16-102.1	16:3, 16:4.
4-106.2	4:5.	14-101	14:3.	16-402.2	16:23.
4-106.3	4:40.	14-101.2	14:3.	18-302	18:12.
6-804	6:39.	14-101.5	14:4, 14:5.	18-903.3	18:57.
6-1303.2	6:51.	14-103	14:6, 14:7.		
		14-103.1	14:7.		
Volume II		14-201	14:8, 14:9.		
7-103.5	7:4, 7:4-A, 7:4-B, 7:5, 7:5-A, 7:6.	14-202	14:9.		
7-104.5	7:33.	14-203	14:9.		
7-104.9	7:44-A.	14-301	14:10.		
7-104.40	7:91.	14-305	14:11.		
7-104.41	7:91.	14-305.1	14:11.		
		14-305.2	14:11.		
		14-305.3	14:12.		
		14-307	14:13.		
		14-308	14:13.		

M. S. Healy,

OSD Federal Register Liaison Officer,
Washington Headquarters Services,
Department of Defense.

January 10, 1983.

BILLING CODE 3810-01-M

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1-305.5 *Research, Exploratory Development and Advanced Development.* Solicitations shall generally indicate either a desired term of performance or a completion date. In cases where development of a tangible item by a given date is urgent, solicitations shall indicate such urgency. Generally, solicitations to conduct research and exploratory development work will specify a level of effort for a term of performance. However, solicitations calling for a specific item in the category of such exploratory or advanced development will specify a completion date. A contractor may propose an alternate term of performance or completion date without disqualification of his proposal.

1-306 *Approval Signatures.* Approval signatures on contracts or purchase authorizations shall be minimized to the greatest practical extent and, in the event that multiple approval signatures are required, they shall, where possible, be obtained concurrently.

1-307 *Priorities, Allocations, and Allotments.*

1-307.1 *General.* In the interest of keeping current defense programs on schedule and maintaining an administrative means of promptly mobilizing the nation's economic resources in event of war or national emergency, it is a statutory requirement and national policy to require contractors to use industrial priority ratings and allotment authority to support military procurement, to the extent required by the Bureau of Domestic Commerce (BDC), of the Department of Commerce. For additional guidance on Industrial Preparedness Planning for national emergencies, see 1-2200.

(a) *DoD Priorities and Allocations Manual.* Department of Defense implementation of all rules and regulations published by the BDC for which the Department of Defense is delegated administrative responsibility will be published in the Priorities and Allocations Manual promulgated by Department of Defense Instruction 4400.1. Authorized deviations to the priorities and allocations rules and regulations will likewise be published in the Manual.

(b) *Operating Responsibility.* In accordance with 1-403, the Departments shall comply with the priorities and allocations program, including the Defense Priorities System (DPS) and the Defense Materials System (DMS) as set forth in the Priorities and Allocations Manual and in the rules and regulations published by the BDC.

1-307.2 *Required Use of Priorities, Allocations, and Allotments Clause.* The contract clause set forth in 7-104.18 shall be inserted in or attached to all ratable contracts and orders. Ratable contracts are those contracts for supplies which are required to be supported with rating and allotment authority (see Priorities and Allocations Manual, Section 2).

1-307.3 *Inadequate Response to Solicitations.*

(a) In accordance with the policies and procedures of the Priorities and Allocations System, rated contracts and purchase orders or Authorized Controlled Material Orders may be placed on selected suppliers when adequate response to a solicitation is not received. Therefore, when there are no bids or proposals received as a result of a solicitation or if the bids or proposals received do not cover the entire requirement, normal procurement procedures shall be followed in attempting to locate sources, to the extent exigencies of the procurement will

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permit. If such efforts are unsuccessful, and it is determined at this point in time that the procurement must be accomplished, then rated orders in the form of rated contracts, rated purchase orders or an Authorized Controlled Material Order shall be presented, to one or more (as appropriate) selected suppliers or manufacturers qualified to produce the item or material. This will be accomplished by a cover letter signed by the contracting officer, citing the requirements of the Defense Production Act and DPS Regulation 1, and requesting timely acceptance thereof by the contractor. The letter shall also request that any reasons for rejection be promptly furnished in writing, as required by the BDC Regulations. Rated orders will be placed pursuant to appropriate negotiation authority. Contracts and purchase orders shall contain, as a minimum, the following information in addition to normal contractual requirements to be a valid rated order:

- (i) DO or DX rating on contracts or purchase orders as appropriate.
- (ii) DMS allotment number or Authorized Controlled Material Orders.
- (iii) Certification "Certified for National Defense Use Under DMS Reg 1 or DPS Reg 1 (as appropriate)."
- (iv) Delivery schedule.
- (v) Signature.

(b) Rated orders or Authorized Controlled Material Orders which are rejected by suppliers shall be forwarded to BDC, through established Departmental priorities assistance channels, for such action as BDC considers appropriate.

1-308 *Documentation of Procurement Actions; Maintenance and Disposition of Contract Files.*

(a) Each office performing purchasing, contract administration, or contract paying functions shall maintain official records of all actions with respect to solicitations and contracts in accordance with the provisions of this paragraph 1-308, except that the application of these provisions to small purchases and other simplified procurements covered by Section III, Part 6, is optional. The head of each such office shall be responsible for the establishment, currency, completeness, and review of this documentation, and for its final disposition, in accordance with Supplement 2 entitled "Contract File Maintenance, Closeout, and Disposition."

(b) The combination of official contract files listed in S2-101 shall contain documentation of all actions taken with respect to the contract, including final disposition, sufficient to constitute a full history of the transaction and permit ready reconstruction of all stages of the transaction, for the purpose of (i) providing a complete background to assure informed decisions at each step in the procurement, (ii) supporting actions taken by personnel in the procurement cycle, (iii) providing information for reviews and investigations conducted by the Department concerned, the Department of Defense, the General Accounting Office, or others, and (iv) furnishing essential facts in the event of litigation or Congressional inquiries.

1-309 *Solicitations for Informational or Planning Purposes.* It is the general policy of the Department of Defense to solicit bids, proposals or quotations only where there is a definite intention to award a contract or purchase order. However, in some cases solicitation for informational or planning purposes may be justified. Invitations for bids and requests for proposals will not be used for this

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Army:

Deputy Assistant Secretary (Acquisition)
Office of the Assistant Secretary of the Army
(Research, Development, and Acquisition)
Department of the Army
Washington, D. C. 20380

Navy:

Chief of Naval Material (MAT OOD1)
Navy Department
Washington, D. C. 20360

Air Force:

HQ USAF/RDX
The Pentagon
Washington, DC 20330

DLA:

Staff Director, Administration
Headquarters, Defense Logistics Agency
Attention DLA-X
Cameron Station
Alexandria, Virginia 22314

NSA:

Director of Procurement
Fort Meade, MD 20755

DCA:

HQ, Defense Communications Agency
Attention Code 201
Washington, D. C. 20305

DNA:

HQ, Defense Nuclear Agency
Washington, D. C. 20305

DMA:

HQ, Defense Mapping Agency, Attn: DMA-LO,
Washington, D. C. 20390

1-330 Contractor Liability for Damage to Government Property.
(a) Policy. It is the policy of the Department of Defense generally to act as a self-insurer for loss of or damage to property of the Government occurring after acceptance of supplies delivered to the Government or performance of services for the Government when the loss of or damage to property results from any defects or deficiencies in such supplies or services. This policy shall not apply:
(1) to loss of or damage to the contract end item itself (except in the case of major items as provided in (c) below); or

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- (ii) when contractor liability can be preserved without increasing the contract price; or
- (iii) when contractor liability is expressly provided by a clause authorized by this Regulation.

(b) General. Except as provided in (a) above or in (c) below, the basic "Limitation of Liability" clause in 7-104.45(a) shall be inserted in all contracts exceeding \$25,000, and may be inserted in contracts of \$25,000 or less when the contractor specifically requests its inclusion. This clause relieves the contractor from liability for loss of or damage to Government property except for end items delivered under the contract.

(c) (1) Major Items - In the procurement of major items (normally exceeding \$100,000 in unit cost) such as missiles, aircraft, tanks, ships, aircraft engines and navigational or communication systems, it is Department of Defense policy, in addition to (a) above, to relieve the contractor from liability for loss of or damage to such major item(s) occurring after acceptance by the Government: (i) for all fixed price type contracts for major items, the clause in 7-104.45(b) shall be substituted for the clause in 7-104.45(a); (ii) for all cost type contracts for major items, the clause in 7-204.33(a) shall be substituted for the clause in 7-104.45(a). These clauses do not limit the Government's rights otherwise arising under the contract to have any defective items or components thereof, corrected, repaired, or replaced when discovery of the defect occurs prior to the loss of or damage to the major item, or equitable relief when the defect is discovered after loss or damage occurs.

(2) Contracts Providing For Both Major Items And Other Contract End Items. In a contract providing for the purchase of both major items and other contract end items, both a major items clause and the basic clause shall be inserted in accordance with the instructions in 7-104.45(c) for fixed-price type contracts and 7-204.33(b) for cost type contracts.

(3) Service Contracts. The clause in 7-1912 shall be inserted in all contracts requiring the performance of services (see 22-101(a)). For contracts requiring the performance of services and the delivery of supplies as separate line items, the appropriate clause in 7-104.45 shall be used in conjunction with the clause in 7-1912, and the line items to which each applies clearly identified. However, the clause in 7-1912 shall not be inserted in service contracts for the maintenance, repair, rehabilitation or modification of real property (22-101(b)(ii)) or for architect-engineering services (22-101(b)(iii)).

(4) Subcontracts. The "Limitation of Liability" clauses in 7-104.45, 7-204.33 and 7-1912 require the contractor to insert the substance of the clause applicable to its contract in any subcontracts, except that, a contractor under a contract for major items shall not insert the substance of the major items clause in either 7-104.45(b) or 7-204.33(a) in any subcontracts without the advance written approval of the contracting officer. The contracting officer should give this approval only when the circumstances would dictate use of the major items clause under the guidelines of (1) above if the subcontract were a direct prime contract with the Government.

(5) Purchase Orders. The clause in 7-104.45(a) or 7-1912, as applicable, may be used with the DID Form 1155, Order for Supplies or Services/Request for Quotations, when specifically requested for inclusion by the contractor.

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1-505.5 *Fees for Information.* Contingent fees paid for "information" leading to obtaining a Government contract or contracts are included in the prohibition and, accordingly, are in breach of the covenant unless the agent qualifies under the exception as a bona fide employee or a bona fide established commercial or selling agency maintained by the contractor for the purpose of securing business.

1-506 Representation and Agreement Required From Prospective Contractors.

1-506.1 *General.* Except as provided in 1-506.3, each Department shall inquire of and secure a written representation from prospective contractors as to whether they have employed or retained any company or person (other than a full-time employee working solely for the prospective contractor) to solicit or secure the contract, and shall secure a written agreement to furnish information relating thereto as required by the contracting officer. When the SF 33 is not used, the clause in 7-2002.1 shall be included in the solicitation. The Contractor's Statement of Contingent or Other Fees (Standard Form 119) shall be used without deviation when either part of the inquiry provided in 7-2002.1 is answered in the affirmative. The form shall also be used without deviation in any other case when a Department desires to obtain such information. When further information is required, it may be obtained in any appropriate manner. Normally, submission of the form shall be required only of successful bidders and offerors, and contractors. (However, for Foreign Military Sales, see 6-1305.4.)

1-506.2 *Interpretation of the Representation.*

(a) For the purpose of the representation and agreement required from the prospective contractor, as described in 1-506.1, the definition of "bona fide employee" is as specified in 1-505.3.

(b) The fact that the prospective contractor retains a person who does not devote his full time solely to the prospective contractor does not necessarily mean that the relationship involved is in violation of the covenant against contingent fees or that there is any stigma attached to the contractor-agent relationship. It does mean, however, that the prospective contractor must fill out the representation in the affirmative and, as required, furnish information with respect to such employment or retention.

(c) If the representation would otherwise be answered in the affirmative the fact that the person employed or retained by the bidder or offeror or contractor is an attorney, or a public relations consultant, or has any other special or professional title, does not permit answering in the negative.

1-506.3 *Exceptions.* The inquiry and agreement specified in 1-506.1 need not be made and submission of Standard Form 119 need not be requested in connection with the following:

- (i) any contract in which the aggregate amount involved does not exceed \$25,000;
- (ii) any contract for services which are required to be performed by an individual contractor in person under Government supervision and paid for on a time basis;

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(iii) any contract for public utility services furnished by a public utility company where the utility company's rates for the services furnished are subject to regulation by Federal, State, or other regulatory body and the public utility company is the sole source of supply;

(iv) contracts to be made in foreign countries; and

(v) any other contracts, individually or by class, designated by the Secretary. (Reports of any such exceptions shall be filed promptly with the Administrator of General Services.)

1-507 Sales Commissions and Contingent Fees on Foreign Military Sales. See 6-1305.

1-508 Enforcement.

1-508.1 *General.* Each Department shall take the necessary steps to assure that the indicated proposed contractor has furnished a representation (negative or affirmative) and agreement required by 1-506.1.

(a) If the indicated proposed contractor makes such representation in the negative, such representation may be accepted and award made or offer accepted.

(b) If the indicated proposed contractor makes such representation in the affirmative, a completed Standard Form 119, in duplicate, shall be requested from him. In the case of formal advertising, the making of an award in accordance with established procedure of the Department concerned need not be delayed pending receipt of the form. In the case of negotiation, if the proposed contractor makes such representation in the affirmative, he shall be required to file a completed Standard Form 119, or the statement in lieu of the form, prior to acceptance of the offer or execution of the contract, unless the Chief of the Purchasing Office considers that the interest of the Government will be prejudiced by the suspension of negotiations pending receipt and consideration of an executed Standard Form 119.

(c) If the indicated proposed contractor fails to furnish the representation and agreement as required by 1-506.1, such failure shall be considered a minor informality and, prior to award, he shall be afforded a further opportunity to furnish such representation and agreement. A refusal or failure to furnish the representation and agreement after such opportunity has been afforded shall require rejection of the bid or offer.

1-508.2 *Failure or Refusal to Furnish Standard Form 119.* If the successful bidder or offeror or the contractor, upon request, refuses or fails to furnish a completed Standard Form 119, or a statement in lieu thereof, as provided in 1-506.1 the Chief of the Purchasing Office shall take one or more of the following actions, or other action, as may be appropriate:

- (i) if an award has not been made or bid or offer has not been accepted, determine whether the bid or offer should be rejected;
- (ii) if the contract has been awarded or bid or offer accepted, determine what action shall be taken, such as making an independent investigation or considering the eligibility of the contractor as a future contractor.

1-508.3 *Misrepresentation or Violations of the Covenant Against Contingent Fees.* In case of misrepresentation concerning contingent fees, or violation or breach of the covenant against contingent fees, or some other relevant im-

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Such appeals shall be directed to the Chairman, Size Appeals Board, Small Business Administration, Washington, D.C. 20416.

(3) *Action of Size Appeals Board.* The Size Appeals Board will promptly notify the contracting officer of a valid appeal and, if possible, will inform the contracting officer prior to the date set for opening of the solicitation of its ruling on the appeal. The SBA decision, if received prior to the opening date, shall be considered final, and solicitations will be modified to reflect such decision, if necessary. Where appropriate, opening dates may be extended. SBA rulings received after the opening date shall not apply to the current acquisition but shall apply in future acquisitions of the product or service.

1-704 Small and Disadvantaged Business Utilization Officials.

1-704.1 (a) Director of Small and Disadvantaged Business Utilization. The Director of Small and Disadvantaged Business Utilization is responsible for the overall management and direction of the DoD small business, disadvantaged business utilization, and labor surplus area programs and for advising the Secretary of Defense and the Deputy Secretary of Defense in matters relating to these programs. To that end, the Director will provide guidance to the Departments and periodically review the direction and implementation of their activities in promoting contract awards to small business, small disadvantaged business, and labor surplus area concerns.

(b) Director of Small Business and Economic Utilization Policy. The Director of Small Business and Economic Utilization Policy is responsible for the establishment, implementation, and execution of DoD small business and labor surplus area programs. Negotiations with the SBA, the Office of Federal Procurement Policy, the Office of Management and Budget, and other agencies or departments outside the Department of Defense, concerning small business and labor surplus area policy, programs, and DoD goals shall be conducted by the Director of Small Business and Economic Utilization Policy or, with his authorization, by representatives of the Departments. The Director of Small Business and Economic Utilization Policy, on behalf of the Director of Small and Disadvantaged Business Utilization, will provide guidance to the Departments' Directors of Small and Disadvantaged Business Utilization regarding small business and labor surplus area matters.

(c) Director of Disadvantaged Business Utilization Policy. The Director of Disadvantaged Business Utilization Policy is responsible for the establishment, implementation, and execution of the DoD socially and economically disadvantaged business utilization program. Negotiations with the Small Business Administration, the Office of Federal Procurement Policy, the Office of Management and Budget, and other agencies or departments outside the Department of Defense, concerning disadvantaged business

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(iii) If the determination of the Chairman, Size Appeals Board, Small Business Administration, on the appeal is not received by the contracting officer within the 30 working day period, it shall be presumed that the SBA District Director's size determination has been sustained.

(iv) Until receipt of the SBA determination of the size status, or expiration of the ten day period (30 days in case of an appeal to the Chairman, Size Appeals Board), whichever occurs first, contracting action shall be suspended; however, this suspension shall not apply to any urgent acquisition action which the contracting officer determines in writing must be awarded without delay to protect the public interest. The contracting officer's determination shall be placed in the contract file.

(4) *Appeal From Size Determination.* An appeal from a size determination made by an SBA District Director may be taken before the close of business on the fifth working day after the receipt of such decision. Unless written notice of appeal is received by the SBA Size Appeals Board, Washington, D.C., within this time and the contracting officer has been notified of such appeal prior to award, the appellant will be deemed to have waived its rights of appeal insofar as the pending procurement is concerned.

(5) *Award of Set-Aside Acquisitions.* Except as provided in 3-508.1 or when the contracting officer determines in writing that award must be made without delay to protect the public interest, award will not be made prior to (1) five working days after the bid opening date for acquisitions placed through small business restricted advertising, or (2) the deadline date for submitting a protest set forth in the notification to the apparently unsuccessful offeror(s) for small business set-aside acquisitions placed through conventional negotiation.

(c) Product Classification

(1) *Determination by Contracting Officer.* The contracting officer shall determine the appropriate classification of a product or service establishing the small business definition to be used in a specific acquisition. If different products or services are being acquired on the same solicitation, an appropriate small business size standard shall be established for each product or service. Both the classification and the applicable size standard (number of employees, average annual receipts, etc.), pursuant to 1-701, shall be set forth in each solicitation in excess of \$25,000, and in each solicitation of \$25,000 or less which is a small business set-aside. The contracting officer's determination shall be final unless appealed in accordance with (2) below.

(2) *Appeal From Classification.* An appeal from a product or service classification determination by a contracting officer must be taken:

- not less than 10 working days before the bid opening date or the deadline for submitting proposals or quotations where this date or deadline is more than 30 days after the issuance of the invitation for bids or request for proposals or quotations; or
- not less than five working days before the bid opening date or the deadline for submitting proposals or quotations where this date or deadline is 30 or less days after the issuance of the invitation for bids or request for proposals or quotations.

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- (ii) Navy - Head of a contracting activity or the official in charge of an activity having purchase authority of \$10,000 or more, or in charge of a contract administration activity;
- (iii) Air Force - Commander of each central procurement activity; the Wing/Base Commander of each local purchasing activity and the Chief of each contract administration activity. In addition, an Executive for Small and Disadvantaged Business Utilization shall be appointed by the Commander of each Major Air Command in the United States, not mandatorily reporting directly to the Commander but having ready access to such person, who will have primary responsibility for the effective implementation of the Air Force small business, small disadvantaged business utilization and labor surplus area program(s) within the Command;
- (iv) Defense Logistics Agency - Commanders of Defense Supply Centers, Commanders, Defense Contract Administration Services Regions and Commanders of other DIA contracting activities;
- (v) National Security Agency - the Director;
- (vi) Defense Communications Agency - the Director;
- (vii) Defense Nuclear Agency - the Director;
- (viii) Defense Mapping Agency - Directors of subordinate components.

A copy of each appointment and termination of appointment of all such specialists shall be forwarded to the appropriate Department or Agency Office of Small and Disadvantaged Business Utilization (1-704.2). In addition to performing that portion of the specific program outlined in (b) below that is normally performed in the activity to which he is assigned, the small and disadvantaged business utilization specialist shall advise the head of the activity and shall perform such additional functions as are prescribed for him in furtherance of the overall small business, small disadvantaged business utilization and labor surplus area programs. A small and disadvantaged business utilization specialist shall be appointed on a full-time basis in all activities having sufficient business or program responsibility to justify such action. When the volume of contracting does not warrant assignment of a full time small and disadvantaged business utilization specialist, an individual shall be appointed as the specialist on a part-time basis. The responsibilities of this assignment shall take precedence over collateral responsibilities.

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- (b) A small and disadvantaged business utilization specialist (SABU), appointed pursuant to (a) above, shall perform the following duties, as determined to be appropriate to the activity by the appointing officer or by the Departmental or Agency Director or Staff Director of Small and Disadvantaged Business Utilization. The SABU shall:
 - (i) maintain a program designed to locate capable small business, small disadvantaged business and labor surplus area business sources for current and future acquisitions, through SEA or other methods;
 - (ii) coordinate inquiries and requests for advice from small business, small disadvantaged business and labor surplus area business concerns on acquisition matters;
 - (iii) prior to the issuance of solicitations or contract modifications (except those which exercise an option), (A) for additional supplies or services in excess of \$5,000 which have not been set aside under 1-706.1(c), or (B) for a dissolved small business-small purchase set-aside in excess of \$5,000 (1-702(c)), review the contracting officer's justification for either action. In automated contracting systems, such reviews will be accomplished prior to entering the item into the automated system after which no further review of the individual acquisition will be necessary if the automated system is so programmed that any changes in the acquisition of the item satisfy the provisions of 1-702(c), 1-706.1(c) and (f), and 1-706.5(a)(1). Disagreements between the specialist and the contracting officer on proposed set-aside actions for small business (not including small business-small purchase set-asides (1-702(c))) shall be resolved under 1-706.3.
 - (iv) when small business concerns cannot be given an opportunity to compete because adequate specifications or drawings are not available, unless there are sufficient and valid reasons to the contrary, initiate action, in writing, with appropriate technical and contracting personnel to insure that necessary specifications or drawings for the current or future acquisitions, as appropriate, are available;
 - (v) review acquisition programs for possible breakout of items suitable for acquisition from small business concerns;
 - (vi) insure that financial assistance, available under existing regulations, is offered and that requests by small business concerns for proper assistance are not treated as a handicap in the award of contracts. (See Appendix B, Parts 4 and 5.)

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1-706 Set-Asides (Except Small Business-Small Purchase Set-Asides (1-702(c))).

1-706.1 General.

- (a) Small business and labor surplus area (LSA) set-asides should be considered in the following order of precedence:
- (i) Combined small business/LSA set-aside (1-706.7);
 - (ii) Partial set-aside for LSA firms (1-804.2);
 - (iii) Total set-aside for small business firms (1-706.5);
 - (iv) Partial set-aside for small business (1-706.6).
- (b) Subject to the order of precedence established in (a) above, any individual acquisition or class of acquisitions, or any appropriate part thereof, shall be set aside for the exclusive participation of small business concerns when such action is determined to be in the interest of (i) maintaining or mobilizing the Nation's full productive capacity, (ii) war or national defense programs, or (iii) insuring that a fair proportion of Government acquisition is placed with small business concerns.

(c) Proposed acquisitions over \$5,000 that are not subject to simplified small purchase procedures, and all proposed acquisitions over \$10,000, shall be specifically reviewed for set-aside for exclusive participation by small firms in accordance with 1-706.5. In automated contracting systems, all proposed acquisitions which are not small business-small purchase set-asides (1-702(c)) will be considered for small business set-asides in accordance with 1-706.5. If necessary, the screening for set-asides will be accomplished before entering such requirements into the system.

(d) The contracting officer is responsible for either setting aside a requirement or documenting, in accordance with departmental procedures, why a set-aside is inappropriate. The Small and Disadvantaged Business Utilization Specialist is responsible for reviewing those acquisitions not set aside and for taking action in accordance with 1-706.3 as appropriate.

(e) The determination to make a set-aside may be unilateral or joint. A unilateral determination is one which is made by the contracting officer. A joint determination is one which is recommended by the SBA representative and concurred in by the contracting officer. Insofar as practicable, unilateral determinations rather than joint determinations shall be

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- (b) If the total proposed 8(a) contract price exceeds the estimated current fair market price (i.e., it includes a business development expense), such expense shall not be funded by DoD. SBA has stated that it does not generally expect to assume business development expenses for construction. If SBA elects to pay such expense, as an exception to its general rule, it will issue an SBA reimbursable order for the agreed amount to the DoD PCO in advance of contract award. If SBA requests audit assistance in determining the reasonableness of the proposed 8(a) price, such assistance will be furnished by the DoD to the extent available. In the event SBA elects not to fund the business development expense, award will not be made to SBA unless the proposed contract price is reduced by the amount of such expense.

1-705.6 Small Business and Disadvantaged Business Goals.

(a) The Director of Small and Disadvantaged Business Utilization is responsible for the development of overall DoD small business and disadvantaged business goals and for consulting with SBA regarding the establishment of such goals.

(b) Departmental Directors of Small and Disadvantaged Business Utilization are responsible for the development of small business and disadvantaged business utilization goals for subordinate elements within their department. These goals will be further assigned by these subordinate elements as appropriate, such as engineer district offices or individual contracting divisions within a central contracting activity or major commodity command.

(c) Heads of contracting activities are responsible for the attainment of assigned small business and disadvantaged business utilization goals.

(d) Within 60 days after the conclusion of each fiscal year, the Secretaries of the Military Departments and the Directors of Defense agencies shall report to the Secretary of Defense on the extent of participation by small business concerns and disadvantaged business concerns in contracts awarded by their Department. Such reports shall contain appropriate justifications for failure to meet goals established by the Office of the Secretary of Defense, as well as actions planned to increase the rate of participation by such firms in future contract awards. The Office of the Secretary of Defense will submit information to SBA concerning any failure to meet established goals and actions to be taken to improve future performance.

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used as the basis for set-asides. SBA recommendations for set-asides will be limited to those proposed acquisitions over \$5,000 and not reserved for small business under the procedures of 1-702(c) which, after review by the small business specialist or the contracting officer, have been determined by either party not to meet the criteria for total or partial restriction to small business concerns.

(f) Once a product or service has been acquired successfully by a contracting office on the basis of a small business set-aside, all future requirements of that office for that particular product or service not subject to simplified small purchase procedures shall be acquired on the basis of a repetitive set-aside. This procedure will be followed unless the contracting officer determines that there is not a reasonable expectation that (i) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (ii) awards will be made at reasonable prices. Withdrawal of a repetitive set-aside will be in accordance with 1-706.3.

(g) If a proposed small business set-aside is estimated to exceed \$1,000,000 in value and a bond is required, the contracting officer shall, to the extent practicable, place contracts so as to allow more than one concern to perform the work.

(h) To provide for SBA consideration of individual set-asides at the request of its representative, the contracting office shall make available to him for review at the office (to the extent that he has been granted security clearance) all proposed classified and unclassified acquisitions expected to exceed \$5,000 on which unilateral set-asides have not been made by the contracting officer or otherwise reserved for small business under the procedures of 1-702(c).

(i) In addition to individual acquisition set-asides, classes of current and future acquisitions, or portions thereof, of selected items or services may be set aside for exclusive small business participation. The determination to make a class set-aside may be either unilateral or joint. Unilateral set-asides regardless of value will normally be initiated by the contracting officer, but may also be initiated by recommendation of the small business specialist. Class set-asides may be recommended by the SBA representative for only those items or services on which unilateral class set-asides have not previously been made by the contracting officer. The determination to make a class set-aside shall not depend on the existence of a current acquisition if future acquisitions can be clearly

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foreseen. Class set-asides shall apply only to the contracting office making or participating in the agreement. A class set-aside agreement should specifically identify the items or services subject thereto. Copies of each class set-aside agreement shall be retained at the contracting office. Any class of acquisitions proposed to be totally set aside shall satisfy the requirements of 1-706.5. The set-aside determination for any class of acquisitions proposed to be partially set aside shall specify that it does not apply to any individual acquisition not severable into two or more economic production runs or reasonable lots.

(j) None of the following is, in itself, sufficient cause for not making a set-aside:

- (i) a large percentage of previous acquisitions of the item has been placed with small business concerns;
- (ii) the item is on an established planning list under the Industrial Preparedness Program, except that a total set-aside shall not be authorized when one or more large business Planned Emergency Producers of the item desires to participate in the acquisition (but see 1-706.6 as to partial set-asides);
- (iii) the item is on a Qualified Products List, except that a total set-aside shall not be authorized when the products of one or more large businesses are on the Qualified Products List unless it has been confirmed that none of such large businesses desires to participate in the acquisition (but see 1-706.6 as to partial set-asides);
- (iv) a period of less than 30 days from date of issuance of solicitations is prescribed for the submission of offers;
- (v) the acquisition is classified;
- (vi) small business concerns are considered to be receiving a fair proportion of total contracts for supplies or services;

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(f) Any contracting action which has been appealed by the SBA representative shall be suspended pending the decision of the Chief of the Contracting Office. If the decision sustains the contracting officer, and if the SBA representative requests further suspension in accordance with (e) above, the suspension shall continue until (1) the SBA appeal is deemed to have been withdrawn (as provided in (e) above), or (11) the matter is determined by the Secretary of the Department concerned. However, this procedure shall not apply to any particular contracting action that the contracting officer determines must be initiated without delay in order to protect the public interest, and as to which he inserts in the contract file a signed statement of justification approved at a level above the contracting officer. The contracting officer shall promptly give written notice to the SBA representative of any such contracting action initiated.

(g) The Secretary of the Department concerned will have 30 working days to either sustain or deny the appeal for set-aside action. Should it be determined that a decision cannot be made within this time, a later date will be established in writing by the Secretary of the Department concerned to the Administrator, SBA, citing the reasons why additional time is required. A copy of such correspondence will be provided to the Director of Small and Disadvantaged Business Utilization, Office of the Deputy Secretary of Defense.

(h) In those cases where an SBA representative is not assigned or available, and the contracting officer disagrees with the recommendation of the small business specialist regarding a small business set-aside for an individual acquisition or class of acquisitions or a portion thereof and so notifies the small business specialist in writing, or if the small business specialist disagrees with the contracting officer regarding a withdrawal or modification of a set-aside determination, the small business specialist may appeal in writing to the appointing authority (see 1-704.3(a)) for decision. A memorandum of the decision by the appointing authority shall be placed in the contract file. After receipt of a decision from the appointing authority, which shall be final, and if the decision approves the action of the contracting officer, the small business specialist shall forward for information and management purposes complete documentation of the case to the appropriate Departmental Director for Small and Disadvantaged Business Utilization or his designee as identified in 1-704.2.

(i) A signed memorandum of nonconcurrence in a recommended set-aside action or of any withdrawal or modification shall be made and retained in the contract file.

1-706.4 Reporting for Department of Commerce Procurement Synopsis. See 1-1003.8.

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1-706.5 Total Set-Aside.

(a)(1) Subject to the order of precedence established in 1-706.1(a), the entire amount of an individual acquisition or class of acquisitions, including contracts for architectural and engineering services, research, development, test and evaluation, maintenance repair, and construction, except small business-small purchase set-asides (1-702(c)), shall be set aside for exclusive small business participation (1-701.1) if the contracting officer determines that there is a reasonable expectation that (i) offers will be obtained from at least two responsible small business concerns offering the products of different small business concerns and (ii) awards will be made at reasonable prices (1-706.3(a)). Total set-asides shall not be made unless such a reasonable expectation exists (but see 1-706.6 as to partial set-asides). Although past acquisition history of the item or similar items is always important, it is not the only factor to be considered in determining whether a reasonable expectation exists. In making R&D small business set-asides, there must also be a reasonable expectation of obtaining from small business the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performances, and schedules.

(2) Every proposed acquisition for construction, including maintenance and repairs, in excess of \$5,000 and under \$2 million (except dredging under \$1 million), shall be considered individually, as though the Small and Disadvantaged Business Utilization Specialist had initiated a set-aside request, and the procedures of 1-706.3 shall apply.

(3) Every proposed acquisition of \$2 million or more for construction, or \$1 million or more for dredging, shall be considered on an individual acquisition basis under (1) above.

(b) Contracts (including small purchases not otherwise reserved under 1-702(c)) for total small business set-asides may be entered into by conventional negotiation or by a special method of contracting known as "Small Business Restricted Advertising." The latter method shall be used wherever possible (see also 3-201.3). Where multiyear contracting procedures are appropriate (see 1-322), total set-asides may be made in connection therewith. Solicitations shall be restricted to small business concerns. Small Business Restricted Advertising, including awards thereunder, shall be conducted in the same way as prescribed for formal advertising in Section II, except that bids and awards shall be restricted to small business concerns. Bids received from firms that do not qualify as small business concerns shall be considered as nonresponsive and shall be rejected.

(c) In acquisitions involving total set-asides for small business, each solicitation shall contain the clause in 7-2003.2. The applicable size standards shall be set forth in Section C of the solicitation.

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be conducted only with those offerors who have submitted responsive offers on the non-set-aside portion. Negotiations shall be conducted with small business concerns in the order of priority as indicated in the foregoing clause, provided that, when equal low bids are received on the non-set-aside portion from concerns which are equally eligible for the set-aside portion, the concern which is awarded the non-set-aside portion (under equal low bid procedure of 2-407.6) shall have first priority with respect to negotiations for the set-aside portion. The set-aside portion shall be awarded as provided in the clause. An offeror entitled to receive the award for quantities of an item under the non-set-aside portion and who accepts the award of additional quantities under the set-aside portion shall not be requested to accept a lower price because of the increased quantities of the award, nor shall negotiation be conducted with a view to obtaining such a lower price based solely upon receipt of award of both portions of the acquisition. This does not prevent acceptance by the contracting officer of voluntary reductions in the price from the low eligible offeror prior to award, acceptance of voluntary refunds (see 1-312), or the change of prices after award by negotiation of a contract modification.

(2) Offers obtained under the provisions of the set-aside clause from firms eligible for the set-aside portion of the requirement shall be in writing and shall include (i) agreement as to the established set-aside price for the available set-aside quantity, (ii) agreement as to the required delivery, (iii) agreement that all other terms and conditions of the solicitation will apply to the set-aside award, and (iv) agreement to inclusion of the clauses "Examination of Records by the Comptroller General" in 7-104.15 and "Audit by Department of Defense" in 7-104.41(a).

(3) When the award of the non-set-aside portion has been made to a small business concern and the same concern is entitled to receive the set-aside portion of the solicitation, the set-aside portion may be added to the basic contract by supplemental agreement utilizing Standard Form 30. The supplemental agreement shall (i) include a reference to the contractor's letter offering on the set-aside quantity, (ii) state the price and delivery schedule applicable to the set-aside quantity, and (iii) include the clauses "Examination of Records by Comptroller General" in 7-104.15 and "Audit by Department of Defense" in 7-104.41(a), applicable to the set-aside portion only. Copies of all pertinent documents, including the signed offer, shall be attached. The supplemental agreement shall be signed by the contracting officer but need not be signed by the contractor since his signature on the attached offer will be deemed sufficient.

(4) When the award for the non-set-aside portion has been made to a firm other than the concern entitled to receive the set-aside portion of the solicitation, award of the set-aside portion will be made utilizing Standard Form 26. The offers obtained and the award utilized shall reference and include the same data indicated in paragraphs (2) and (3) above. Also, the award shall reference in Block 26 of Standard Form 26, the applicable solicitation and the contractor's written

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1-706.6 Partial Set-Asides.

(a) Subject to the order of precedence established in 1-706.1(a), a portion of an acquisition, not including construction, shall be set aside for exclusive small business participation when:

- (1) the acquisition exceeds \$25,000; and
- (11) the acquisition is severable into two or more economic production runs or reasonable lots (see 1-804.1(a)(2)(4)-(v)); and
- (111) one or more small business concerns are expected to have the capability to furnish a severable portion of the acquisition at a reasonable price, except that a partial set-aside shall not be made if there is a reasonable expectation that only two concerns (one large and one small) with capability will respond with offers unless authorized by the Head of the Contracting Activity on a case-by-case basis. Before reaching this conclusion the contracting officer shall consult with the Small and Disadvantaged Business Utilization Specialist and may make advanced inquiries to determine the number of interested concerns. Similarly, a class of acquisitions, not including construction, may be partially set aside in accordance with 1-706.1(d). Under certain specified conditions, partial set-asides may be used in conjunction with multiyear contracting procedures (see 1-322.1(d)).

(b) When a portion of an acquisition is to be set aside for small business pursuant to (a) above, the acquisition shall be divided into a set-aside portion and a non-set-aside portion, each of which shall be not less than an economic production run or reasonable lot. Insofar as practical, the set-aside portion will be such as to make the maximum use of small business capacity. Delivery and other terms applicable to the set-aside portion of an item and those applicable to the non-set-aside portion of that item shall be comparable.

(c) (1) In acquisitions involving partial set-asides for small business, each solicitation shall contain the clause in 7-2003.3(a) (except see (c)(2) below). The applicable size standards shall be set forth in Section C of the solicitation. (2) When experience indicates that token bidding, block bidding, tie-in bidding, or similar devices may occur, the alternate clause in 7-2003.3(b) may be used.

(d) (1) After the award price for the non-set-aside portion has been determined, negotiations may be conducted for the set-aside portion. Acquisition on the set-aside portion shall in all instances be effected by negotiation. Negotiations shall

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offer, and copies of the solicitation and offer shall be attached. The Standard Form 26 shall be signed by the contracting officer but need not be signed by the contractor. The contractor's signature on the attached offer will be deemed sufficient.

For purposes of 21-102 and 21-201, the non-set-aside and set-aside portions shall be reported separately.

1-706.7 Combined Small Business—Labor Surplus Area Set-aside.

(a) In the acquisition of certain items, the objectives of both the Small Business Act and Defense Manpower Policy (DMP) No. 4A may be attained in a single acquisition. Under this procedure, the total required quantity of an item would be set aside for exclusive participation by small business firms and a portion of that total quantity would be further set-aside for award to small business concerns which are also LSA firms.

(b) For acquisitions exceeding \$25,000, the use of this combined small business-LSA set-aside procedure shall be considered. This procedure shall be used in preference to all others when the proposed acquisition meets the criteria for:

- (i) total small business set-aside (1-706.5(a)(1)); and
- (ii) a partial LSA set-aside (1-804.1(a)(1)).

(c) Contracts utilizing this procedure may be entered into by "Small Business Restricted Advertising," the preferred method, (see 3-201.3), or by conventional negotiation. This set-aside procedure may be used in multi-year contracting (see 1-322). Solicitations shall provide that offers may be submitted by small business firms only and that a part of the total requirement is further set-aside for LSA firms which are also small business concerns. Offers received from firms which do not qualify as small business concerns shall be considered nonresponsive and shall be rejected.

(d) (1) In combined small business-LSA set-asides each solicitation shall contain the clause in 7-2003.4(a) (except see (d)(2) below).

(2) When experience indicates that token bidding, block bidding, tie-in bidding, or similar devices may occur, the alternate clause in 7-2003.4(b) may be used.

(e)(1) After the award price for the non LSA set-aside portion has been determined, negotiations may be conducted for the LSA set-aside portion. Acquisition of the LSA set-aside portion shall in all instances be effected by negotiation. Negotiations shall be conducted only with those offerors who have submitted responsive offers on the non LSA set-aside portion. Negotiations shall be conducted in the order of priority as indicated in the foregoing clause; provided that, when equal low offers are received on the non LSA set-aside portion from concerns which are equally eligible for the LSA set-aside portion, the concern which is awarded the non LSA set-aside portion (under the equal low bid procedure of 2-407.6) shall have first priority with respect to negotiations for the LSA set-aside portion. The LSA set-aside portion shall be awarded as provided

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(e.g., administrative reclassification by the SBA during performance or uneconomic and unnecessary subcontract decisions to take inappropriate advantage of the incentive).

(f) The small disadvantaged business concern representation in 7-2003.74 shall be included in all solicitations and all contracts which are awarded without reference to a solicitation, other than those involving small purchase. Failure to execute the representation will be deemed a minor informality and the bidder or offeror shall be permitted to satisfy the requirement prior to award.

1-707.4 Reserved.

1-707.5 Reserved.

1-707.6 Reserved.

1-707.7 Reserved.

1-708 Women-Owned Business Concerns.

(a) Executive Order 12138 created a National Women's Business Enterprise Policy and prescribed arrangements for developing, coordinating, and implementing a national program for women's business enterprises.

(b) To encourage the use of women-owned businesses in subcontracting, the clause in 7-104.52 shall be included in all contracts expected to exceed \$25,000 except (1) contracts which, including all subcontracts thereunder, are to be performed entirely outside the United States, its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands; and (2) contracts for services which are personal in nature.

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Part 8—Labor Surplus Area Concerns

1-800 Scope of Part. This Part sets forth Department of Defense policy and procedures with respect to aiding labor surplus areas in the United States, its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands. This Part implements Defense Manpower Policy No. 4A, 27 Oct 1977 (32A CFR Part 134), and the Small Business Act as amended (15 USC 631), and U.S. Department of Labor Regs (20 CFR Part 654). Defense Manpower Policy No. 4A states the policy of the Government to encourage the placing of contracts and facilities in labor surplus areas and to assist such areas in making the best use of their available resources.

1-801 Definitions.

1-801.1 Labor Surplus Area Concerns. The term "labor surplus area concern" means a concern that agrees to perform or cause to be performed a substantial proportion of a contract in labor surplus areas. A concern shall be deemed to perform a substantial proportion of a contract in labor surplus areas if the aggregate costs that will be incurred by the concern or its first tier subcontractors, on account of manufacturing or production performed in labor surplus areas amount to more than 50% of the contract price.

Example A. ABC Company, manufacturing in a labor surplus area, bids on a contract at \$1,000. ABC Company will incur the following costs:

Direct labor	\$230
Overhead	275
Purchase of materials from RST Company, which manufactures the materials in a full employment area	425

ABC Company qualifies as a substantial labor surplus area concern since it will incur costs in a labor surplus area amounting to more than 50% of the contract price.

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Example B. DEF Company, manufacturing in a surplus area bids on a contract at \$1,000. DEF Company will incur the following costs:

Direct labor	\$200
Overhead	200

Purchase of materials from UVM Company, which is located in a labor surplus area but which merely distributes the materials from stocks on hand (the materials having been manufactured by UVM's supplier)

DEF Company does not qualify as a labor surplus area concern since its manufacturing and production costs do not exceed 50% of the contract price regardless of whether UVM's supplier manufactures in a labor surplus area.

1-801.2 Labor Surplus Area. The term "labor surplus area" means a geographic area which at the time of award is classified as such by the Department of Labor and listed as such by that Department in its publication "Listing of Eligible Labor Surplus Areas Under DWP No. 4A and Executive Order 10582".

1-801.3 Small Business Concern. See 1-701.1-802 General Policy. Except as provided in 1-806 with respect to depressed industries, it is the policy of the Department of Defense to aid labor surplus areas (LSA) by placing contracts with LSA concerns, to the extent consistent with procurement objectives and when such contracts can be awarded at prices no higher than those obtainable from other concerns and by encouraging prime contractors to place subcontracts with LSA concerns. In carrying out this policy, and to accommodate the small business policies of Section I, Part 7, preference shall be given in the following order of priority to (i) LSA concerns which are also small business concerns, (ii) other LSA concerns, and (iii) small business concerns which are not LSA concerns. In no case will price differentials be paid for the purpose of carrying out this policy. Heads of Procuring Activities and chiefs of purchasing and contract administration offices are responsible for the effective implementation of the Labor Surplus Area Program within their respective offices. Responsibility for administration of the program may be assigned to small business specialists appointed pursuant to 1-704.3.

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1-803 Application of Policy.

(a) Within the policy set forth in 1-802, the following shall be applied to contracts which are estimated to exceed \$25,000:

- (i) negotiated contracts shall, where acquisition objectives permit, be awarded to labor surplus area concerns; provided, that in no case shall price differentials be paid for the purpose of carrying out this policy;
- (ii) when appropriate, acquisitions shall be made from LSA concerns by partial set-aside procedures, in accordance with 1-706.7 or 1-804 (but no total set-aside shall be made for LSA concerns) and such set-asides shall be given preference over any small business set-aside;
- (iii) each Department shall assure that information identifying LSA is disseminated promptly to contracting personnel;
- (iv) when less than a complete bidders list is to be used pursuant to 2-205.4, at least a pro rata number of prospective LSA concerns shall be solicited;
- (v) subcontracting with concerns in LSA shall be encouraged in accordance with 1-805;
- (vi) See 6-1403.1(a)(2) regarding purchases from qualifying country sources (see 6-001) where LSA set-asides are involved.

(b) Records of the total value of all contracts in excess of \$25,000 placed with LSA concerns during each fiscal year, and reports based thereon, are maintained by each Department through the Department of Defense Reporting System described in 1-110 and Section XXI, Part 1. Accordingly, each Department, in soliciting bids and proposals for any contract estimated to exceed \$25,000 shall request from any offeror, or other source, any information needed to determine whether the offeror is a LSA concern. Contract files shall be documented to indicate the extent to which LSA concerns were considered and the action taken with respect thereto.

1-804 Partial Set-Asides for Labor Surplus Area Concerns.

1-804.1 General.

- (a)(1) In accordance with the policy set forth in 1-802 and 1-803 (see also 1-706.7), a portion of each acquisition shall be set aside for LSA concerns if:
 - (i) the acquisition is severable into two or more economic production runs or reasonable lots; and
 - (ii) one or more LSA concerns are expected to qualify as LSA concerns and to have the capability to furnish a severable portion of the acquisition at a reasonable price, except that a partial set-aside shall not be made if there is a reasonable expectation that offers will be received from only two concerns with capability (one concern which will not qualify as a LSA concern and one concern which will qualify as a LSA concern) unless authorized by the Head of the Contracting Activity on a case-by-case basis. Before reaching this con-

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1-804.4 Contract Authority. Contracts for set-aside made under this Part 8 shall cite as authority 10 U.S.C. 2304(a)(1). For reporting purposes, see 3-201.2(b)(i) for contracts awarded to labor surplus area concerns and 3-201.2(b)(ii) for contracts awarded to small business concerns which are not labor surplus area concerns.

1-805 Subcontracting With Labor Surplus Area Concerns.

1-805.1 General Policy.

(a) It is the policy of the Government to promote equitable opportunities for labor surplus area concerns to compete for defense subcontracts and to encourage placement of subcontracts with concerns which will perform such contracts substantially in labor surplus areas in the order of priority described in 1-802 where this can be done, consistent with efficient performance of contracts, at prices no higher than are obtainable elsewhere.

(b) To more effectively carry out the Government's policy objectives stated in (a) above, prime contractors and subcontractors having labor surplus area subcontracts programs must be informed of (1) the Government's evaluation of their efforts in carrying out an effective labor surplus area subcontracting program, (2) any specific noted deficiencies in their Labor Surplus Area Subcontracting Programs, and (3) any areas of outstanding achievement where they may have exceeded contractual requirements. To motivate a contractor to improve his program, he should be advised in general terms as to the type of actions will result in a reward, penalty, or no impact on profit or fee (see 3-808.5(d)). Any evaluation and remarks to the contractor, including areas of suggested improvement and areas where the contractor has exceeded contractual requirements, must be documented to furnish a basis for evaluation in connection with future awards.

1-805.2 Labor Surplus Area Subcontracting Program. The Government's labor surplus area subcontracting program requires Government prime contractors to assume an affirmative obligation with respect to subcontracting with labor surplus area concerns. These obligations are in addition to those required by the minority business enterprise subcontracting program (1-332) and the small business subcontracting program (1-707). In contracts which range from \$25,000 to \$500,000, the contractor undertakes the simple obligation of using his best efforts to place his subcontracts with concerns which will perform such subcontracts substantially in labor surplus areas where this can be done, consistent with the efficient performance of the contract, at prices no higher than are obtainable elsewhere. This undertaking is set forth in the contract clause prescribed in 1-805.3(a). In contracts which may exceed \$500,000, the contractor is required, pursuant to the clause required by 1-805.3(b), to undertake a number of specific responsibilities designed to insure achievement of the objectives referred to above and to impose similar responsibilities on major subcontractors.

1-805.3 Required Clauses.

(a) The Utilization of Labor Surplus Area Concerns clause in 7-104.20(a) shall be inserted in all contracts which may exceed \$25,000, except:

- (1) contracts with foreign contractors which, including all subcontracts thereunder, are to be performed entirely outside the United States, its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands;
- (2) contracts for services which are personal in nature;
- (3) contracts for construction; and

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- (4) contracts with the petroleum and petroleum products industry.
- (b) The Labor Surplus Area Subcontracting Program clause in 7-104.20(b) shall be included in all contracts which may exceed \$500,000, but which contain the clause required by (a) above and which, in the opinion of the purchasing activity, offer substantial subcontracting possibilities. Prime contractors who are to be awarded contracts that do not exceed \$500,000, which in the opinion of the purchasing activity offer substantial subcontracting possibilities, shall be urged to accept the clause.

1-805.4 *Reserved.*

1-806 Depressed Industries.

1-806.1 *General.* When an entire industry is depressed, the Director of the Federal Preparedness Agency of the General Services Administration may, under Defense Manpower Policy No. 4A, establish appropriate measures on an industry-wide, rather than on an area, basis. Designations of such industries are made by the Federal Preparedness Agency and such industries will be given special treatment as specified therein. Paragraph 1-806.2 reflects pertinent requirements with respect to the Petroleum and Petroleum Products Industry.

1-806.2 *Petroleum and Petroleum Products Industry.* (Notification No. 58). There shall be no labor surplus area set-asides in this industry.

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Part 9—Responsible Prospective Contractors

1-900 *Scope of Part.* This Part sets forth (i) general policy with respect to responsibility of prospective contractors, (ii) minimum standards for responsible prospective contractors, (iii) requirements and procedures for determination of responsibility, and (iv) policy with regard to determination of subcontractor responsibility.

1-901 *Applicability.* This Part applies to procurement, advertised or negotiated, from contractors located in the United States, its possessions, or Puerto Rico and shall be applied in other places except where inconsistent with the laws and customs of the place where the prospective contractor is located. It is not applicable to procurement from (i) other governments (but see 1-904.3), including State and local governments; (ii) other United States Government departments and agencies, or their instrumentalities (such as Federal Prison Industries, Inc.); or (iii) National Industries for the Blind.

1-902 *General Policy.* Purchases shall be made from, and contracts shall be awarded to, responsible prospective contractors only. A responsible prospective contractor is one which meets the standards set forth in 1-903.1 and 1-903.2, and such special standards as may be prescribed in accordance with 1-903.3 and by overseas commanders. The award of a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional procurement or administrative costs. While it is important that Government purchases be made at the lowest price, this does not require an award to a supplier solely because he submits the lowest bid or offer. A prospective contractor must demonstrate affirmatively his responsibility, including, when necessary, that of his proposed subcontractors. The contracting officer shall make a determination of nonresponsibility if, after compliance with 1-905 and 1-906, the information thus obtained does not indicate clearly that the prospective contractor is responsible. Recent unsatisfactory performance, in either quality or timeliness of delivery, whether or not default proceedings were instituted, is an example of a problem which the contracting officer must consider and resolve as to its impact on the current procurement prior to making an affirmative determination of responsibility. Doubts as to productive capacity or financial strength which cannot be resolved affirmatively shall require a determination of nonresponsibility.

1-903 Minimum Standards for Responsible Prospective Contractors.

1-903.1 *General Standards.* Except as otherwise provided in this paragraph 1-903, a prospective contractor must:

- (i) have adequate financial resources, or the ability to obtain such resources as required during performance of the contract (see Defense Contract Financing Regulations, Part 2, Appendix E, and any amendments thereto; see also 1-904.2 and 1-905.2; for SBA certificates of competency, see 1-705.4);
- (ii) be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing business commitments, commercial as well as governmental (for SBA certificates of competency, see 1-705.4);

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- (ii) have a satisfactory record of performance including quality. (Contractors who are seriously deficient in current contract performance, when the number of contracts and the extent of deficiency of each are considered, shall, in the absence of evidence to the contrary or circumstances properly beyond the control of the contractor, be presumed to be unable to meet this requirement.) Quality defects of a critical or repetitive nature without adequate and timely corrective action, including repair or replacement of items, shall also be presumptive of inability to meet this requirement. Past unsatisfactory performance, due to failure to apply necessary tenacity or perseverance to do an acceptable job, shall be sufficient to justify a finding of nonresponsibility. DoD components shall assure that contracts are not awarded to contractors with a history of providing supplies or services of an unsatisfactory quality. (In the case of small business concerns, see 1-705.4 and 1-903.2);

- (iv) have a satisfactory record of integrity (in the case of a small business concern, see 1-705.4); and
- (v) be otherwise qualified and eligible to receive an award under applicable laws and regulations, e.g., Section XII, Part 8.

1-903.3 Additional Standards.

(a) *Standards for Production, Maintenance, Construction, and Research and Development Contracts.* In addition to the standards in 1-903.1, in procurement involving production, maintenance, construction (see 18-106), or research and development work (and in other procurement as appropriate), a prospective contractor must:

- (i) have the necessary organization, experience, operational controls and technical skills, or the ability to obtain them (including where appropriate, such elements as production control procedures, property control system and quality assurance measures applicable to materials produced or services performed by the prospective contractor and subcontractors (see 1-903.4)); and
- (ii) have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them. Where a prospective contractor proposes to use the facilities or equipment of another concern, not a subcontractor, or of his affiliate (see 2-201(a)(8)(i) and (b)(vii)), all existing business arrangements, firm or contingent, for the use of such facilities or equipment shall be considered in determining the ability of the prospective contractor to perform the contract; see also 1-904.2.

(b) *Standards for Food.* Procurement of food shall be made only from those sources which, in addition to meeting the standards in 1-903.1, are approved with respect to sanitation in accordance with standards and procedures prescribed in AR 40-657, NAVSUP Instruction 4355.4A, AFR 163-2 and MCO P10110.31B.

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1-903.3 *Special Standards.* When the situation warrants, contracting officers shall develop with the assistance of technical personnel or other specialists, special standards of responsibility to be applicable to a particular procurement or class of procurements. Such special standards may be particularly desirable when a history of unsatisfactory performance has demonstrated the need for insuring the existence of unusual expertise or specialized facilities necessary for adequate contract performance. The resulting standards shall form a part of the solicitation and shall be applicable to all bidders or offerors.

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procurements shall be published in the Synopsis, even though access to classified matter might be necessary in order to submit a proposal or to perform the contract (see 1-1003.9(f)(3)). The intent of the exception for classified procurement in the synopsis requirements of P.L. 87-305 is not to exempt every classified procurement from publishing, but to provide a safeguard against violating security requirements.

(c) The following need not be published in the Synopsis (Exceptions 1 through 9 — item 13 of the DD Form 350):

- (i) see (b) above;
- (ii) procurement of perishable subsistence;
- (iii) procurement of electric power or energy, gas (natural or manufactured), water, or other utility services;
- (iv) procurement (whether advertised or negotiated) which is of such urgency that the Government would be seriously injured by the delay involved in permitting the date set for receipt of bids, proposals, or quotations to be more than 15 calendar days from the date of transmittal of the synopsis or the date of issuance of the solicitation, whichever is earlier;
- (v) procurement to be made by an order placed under an existing contract other than an order placed under a Basic Ordering Agreement;
- (vi) procurement to be made from or through another Government department or agency, including procurements from the SBA using the authority of section 8(a) of the Small Business Act, or a mandatory source of supply such as an agency for the blind under the blind-made products program;
- (vii) procurement of personal and professional services other than architect-engineer services (see 1-1003.4(b)(1));
- (viii) procurement from educational institutions to be negotiated under 3-205;
- (ix) procurement in which only foreign sources are to be solicited.

1-1003.2 *Time of Publishing.* To allow concerns which are not on current bidders lists ample time to prepare bids, proposals, or quotations, purchasing offices should, when feasible, synopsized proposed procurements no later than ten days before the issuance of solicitations, or the placement of orders against basic ordering agreements if such basic ordering agreement has not previously been synopsized in accordance with 3-410.2(c)(4), as specified in 1-1003.9(b), provided that in the case of "Architectural and Engineering Services" and "Research and Development Procurements," every effort shall be made to allow an interval of 14 days. If definite dates for issuance of the solicitation document have not been established, show such dates as being either on or about a given date. If this is not feasible or practicable, purchasing offices shall synopsized proposed procurements not later than the date of issuance of solicitations unless the exceptions cited in 1-1003.1(b) and (c) are applicable.

1-1003.3 *Pre-Invitation / Solicitation Notices.* Where pre-invitation notices (see 2-205.6) or pre-solicitation notices (see 3-106.2) are used, a synopsis of the pre-invitation or pre-solicitation information shall be included in the Commerce Business Daily. This information need not be republished in the synopsis when the invitation for bids is issued. However, if the pre-invitation notice contains a set-

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do not require voluminous specifications or drawings. With regard to classified acquisitions, the foregoing instructions apply to the extent consistent with Departmental security instructions and procedures.

1-1002.2 *Limited Availability of Certain Specifications, Plans, and Drawings.* When the purchasing activity is not in possession of complete sets of specifications, plans, and drawings (as in some procurements of aircrafts, shipbuilding, or major weapons systems), or the drawings and specifications are classified, or are so voluminous that display and distribution in accordance with 1-1002 is impracticable, the solicitation shall contain notice of this fact and of the locations at which the specifications, plans, or drawings may be examined (see 1-1203).

1-1002.3 *Reserved.*

1-1002.4 *Displaying in Public Place.* A copy of each solicitation for an unclassified procurement in excess of \$5,000 which provides at least 10 calendar days for submission of offers shall be displayed at the contracting office and, if appropriate, at some additional public place from the date issued until 7 days after bids or proposals have been opened.

1-1002.5 *Information Relates to Newspapers and Trade Journals.* A brief announcement of the proposed purchase may be made available to newspapers, trade journals, and magazines for publication without cost to the Government.

1-1002.6 *Paid Advertisements in Newspapers and Trade Journals.* See Section IV, Part 8.

1-1003 *Synopses of Proposed Procurements.*1-1003.1 *General.*

(a) Except for procurements described in (b) and (c), every proposed advertised or negotiated procurement, including those basic ordering agreements which:

- (i) involve specific supplies or services;
- (ii) are supported by appropriate determinations and findings limiting future orders thereunder to the basic ordering agreement contractor; and

modifications to existing contracts when new funds are obligated for additional supplies and services made in the United States, its possessions, and Puerto Rico which may result in an award in excess of \$10,000 shall be published promptly in the Commerce Business Daily "Synopsis of U.S. Government Proposed Procurement, Sales and Contract Awards". When an item is assigned or is within a Federal Supply Class assigned for procurement in Section V, Part 12, and is purchased by other than the assigned Department, the synopsis shall cite the applicable purchase exclusion number from 5-1201.1 or 5-1201.2(a). Modifications to an existing contract resulting from price changes, engineering changes, overruns, definitization of letter contracts, orders under a basic ordering agreement which was previously synopsized in accordance with 3-410.2(c)(4), and other similar transactions need not be published in the Commerce Business Daily.

(b) Only those classified procurements, where the information necessary to be included in the Synopsis cannot be worded in such a manner so as to preclude the disclosure of classified information, or where the mere disclosure of the Government's interest in the area of the proposed procurement would violate security requirements, shall not be published in the Synopsis. All other classified

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tion, shall be referred to the Secretary of the Department concerned, and the appropriate legislative liaison office shall be informed. When a proposed reply is to be so referred to a Secretary, an interim reply shall be made to the congressional request indicating the action being taken.

(b) *Inclusion on Bidders Mailing List.* Any member of any Committee or Subcommittee of the Congress which is interested in procurement matters shall, upon request of the Committee or Subcommittee Chairman, be placed on applicable bidders mailing lists to receive automatic distribution of bid and proposal information in the specified area of interest.

1-1005 Publicizing Award Information.

1-1005.1 Synopsis of Contract Awards.

(a) *General.* With the exception of awards to SBA using the authority of section 8(a) of the Small Business Act, and awards for perishable subsistence and brand name items for commissary resale, awards of all unclassified contracts to be performed in whole or in part within the United States, exceeding \$100,000 in amount, shall be published in the *Commerce Business Daily* "Synopsis of U.S. Government Proposed Procurement, Sales and Contract Awards."

(b) *Preparation and Transmittal.*

(1) Purchasing offices shall prepare and forward single copies of synopses of contract awards daily, using the same format as prescribed in 1-1003.9, to the address below, via first class mail.

U.S. Department of Commerce
Commerce Business Daily
P.O. Box 5999
Chicago, Illinois 60680

(2) The synopsis of contract awards shall contain the following information:

- (i) the name and address of purchasing office;
- (ii) the classification code (4-digit) applicable to the procurement action;
- (iii) a clear and concise description of the supplies or services being procured, including a national stock number or a service stock number when assigned, such description to be followed by the contract number and date and, in parentheses, by the applicable number of the invitation for bids or requests for proposals;
- (iv) the quantity of each item;
- (v) the dollar amount of the award;
- (vi) the name, size status (S) for small business and (L) for large business, and the full address of the contractor;
- (vii) for FOB destination procurement when total shipments from a point of origin to a point of destination will exceed 200,000 pounds and destinations are firm—
 - (A) origin point of shipment when different from (vi) above;
 - (B) CONUS destination of shipment (see 1-1003.9(b)(6)); and
 - (C) scheduled delivery period (beginning and ending dates); and

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(iii) when requested by the prime contractor, a statement of the industrial, craft, processes or component items in or for which subcontracts are available and subcontractors are desired, together with the general area, if any, indicated by the prime contractor, such as Southeast States, West Coast, New England.

1-1005.2 Announcement of Awards.

(a) *Public Announcement.* Information on proposed contractual actions over \$3 million shall be submitted in writing in accordance with Departmental/Agency procedures. Report Control Symbol DD-LA(AR) 1279 applies. Departments will submit reports to the Office of the Assistant Secretary of Defense (Public Affairs) by the close of business the day before contract award is proposed, so that this data may be announced to the press at 1600 hours Washington, D.C. time on the day of award. Contracts excluded from this reporting requirement include (i) those placed with the Small Business Administration under Section 8(a) of the Small Business Act, and (ii) those placed with foreign firms when the place of delivery or performance is outside the United States or its possessions. Awards or release of information on proposed contracts shall not be made prior to the public release time of 1600 hours Washington, D.C. time.

(b) *Congressional Notification.* In accordance with Departmental procedures, Departments shall notify the appropriate Members of Congress (Senators and Representatives in whose state and district the proposed contractor is located and, if different, in whose state and district the work is to be performed) of contract awards of over \$3 million concurrent with the public announcement described in (a) above.

1-1005.3 Local Announcements of Awards Over \$25,000. Contract awards may also be the subject of local press release or other public announcements. When such press releases or public announcements are made, for procurements of \$25,000 or more, they shall include the following information:

- (i) for awards after formal advertising, state that the contract was awarded after competition by formal advertising and include the number of bids solicited and the number received, and state in general terms the basis for selection, e.g., the lowest responsible bidder;
- (ii) for awards after procurement by negotiation, include the information contained in the notice prescribed by 3-508.3 and where the award was made after competitive negotiation (either price or design competition), include a statement to this effect and state in general terms the basis for selection.

1-1006 Reserved.

1-1007 Public Release of Long-Range Procurement Estimates.

1-1007.1 *General.* To assist industry in planning its efforts, and to locate additional sources, it may be desirable to announce to the public long-range procurement estimates on certain items, groups or types of items, materials, or research and development projects and tasks procured by the Department of Defense. Procurement estimates with respect to proposed purchases may be provided to industry as far in advance as possible under the conditions contained in 1-1007.3, 1-1007.4 and 1-1007.5.

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waiver of product qualification requirements. Where waivers have been granted, solicitations shall specifically indicate that the qualification requirement is inapplicable. Such information shall also be included in any Synopsis of the procurement.

1-1109 Inadequate Competition.

(a) *Pre-Solicitation.* In connection with procurement of a qualified product as an end item, the contracting officer shall review the applicable Qualified Products List prior to solicitation to ascertain whether the number of sources is adequate for competition. If, in the opinion of the contracting officer, the number of sources is inadequate, action shall be taken as prescribed below unless he already has the necessary information.

(1) The contracting officer shall request the activity that prepared the specification to provide information concerning the status of tests on additional products, including the anticipated dates when such tests will be completed so that opening of bids or submission of proposals may be so scheduled as to allow completion of the tests.

(2) If no tests are being conducted or contemplated, the contracting officer shall further request the preparing activity to advise whether a means of quality assurance other than qualification approval may be substituted in the procurement.

(b) *Post-Solicitation.* The contracting officer shall advise the specification preparing activity of the name and address of any concern which requested copies of the solicitation but was not included on the Qualified Products List. The specification preparing activity may then attempt to interest such concerns in becoming qualified.

1-1110 *Reporting Nonconformance With Specification Requirements.* If a supplier on the qualified products list repeatedly submits products not meeting specification requirements for inspection, resubmits products previously rejected without correcting the defects, or is otherwise unsatisfactory in the performance of contracts, he shall be reported to the activity that prepared the specification for a determination as to whether the supplier's product shall be removed from the list.

1-1111 *Misuse of Qualified Products List Information.* Misuse of qualified products list information, such as for advertising or publicity purposes contrary to that permitted in 1-1104(v), shall be reported promptly to the preparing activity.

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Part 12—Specifications, Plans, and Drawings

1-1201 General.

(a) Plans, drawings, specifications, standards, or purchase descriptions for acquisitions shall state only the actual minimum needs of the Government and describe the supplies and/or services in a manner which will encourage maximum competition and eliminate, insofar as possible, any restrictive features which might unnecessarily limit acceptable offers to one supplier's product, or the products of a relatively few suppliers. Items to be acquired shall be described by citing the applicable specifications and standards or by a description containing the necessary requirements. Specifications and standards shall be selectively applied and tailored in their application. Selective application is the process of reviewing and selecting from available specifications, standards, and related documents those which have application to a particular acquisition. Tailoring is the process by which individual provisions (sections, paragraphs or sentences) of the selected specifications, standards, and related documents are reviewed and modified so that each one selected states only the minimum requirements of the Government. Such tailoring need not be made a part of the basic specification or standard but will vary with each application dependent upon the nature of the acquisition. When specifications are cited, they and all amendments or revisions thereof applicable to the acquisition, shall be identified, including the respective approval dates of the applicable issue, revision, amendment, or notices. When specifications, standards, or other documents are referenced in cited specifications, their effective issue or revision shall be that listed in the Department of Defense Index of Specifications and Standards (DoDISS) and supplements thereto, unless (i) specific issues are set forth therein in the cited Specifications or (ii) different issues than those specified in the cited specifications are set forth in the solicitation. The date of the applicable DoDISS and supplements thereto shall be set forth in the solicitation. Copies of all specifications, standards, and other documents citing issue dates other than those shown for the documents by the specified DoDISS must be furnished with the solicitations as prescribed by 1-1203. The requirement to identify the DoDISS, specifications, standards, and other documents by issue refers to the specific calendar date of approval printed on the document or the latest applicable amendment or revision notice. Revision letters of drawings may be used in lieu of revision dates when the letters provide the same degree of identification as the dates. General identification such as "the issue in effect on the date of the solicitation," or similar language, shall not be used. Drawings and data furnished with solicitations shall be clear and legible.

(b) Many specifications cover several grades or types, and provide for several options in methods of inspection, etc. When such specifications are used, the solicitation shall state specifically the grade, type, or method of inspection, etc., on which bids or offers are to be based.

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1-1202 Mandatory Specifications and Standards.

- (a) Except as provided in (b) below, the following specifications and standards are mandatory for use by the Department of Defense in the acquisition of supplies and services covered by such specifications and standards:
- Federal specifications and standards, unless determined by the Department of Defense to be inapplicable for its use;
 - Military specifications and standards approved by the Department of Defense for its use; and
 - Industry documents adopted by the Department of Defense as listed in the Department of Defense Index of Specifications and Standards.
- (b) Federal and Military specifications and standards need not be used for the following unless required by Departmental instructions:
- purchase of items for authorized resale except military clothing;
 - purchases for construction when nationally-recognized industry and technical source specifications and standards are available (see 18-107);
 - purchase of items in an amount not to exceed \$10,000 (multiple small purchases of less than \$10,000 of the same item shall not be made for the purpose of avoiding the use of Federal or Military specifications); or
 - purchases using small purchase procedures.
- (c) Unless required by Departmental instructions, Federal and Military specifications and standards need not be prepared for use in the below listed contracting actions; however, existing Federal and Military specifications and standards, and adopted industry documents to the extent that they are applicable to the item or service required, shall be used for:

- purchase incident to research and development;
- purchase of items for test or evaluation;
- purchase of laboratory test equipment for use by Government laboratories;
- purchase of one-time procurement items, or
- purchase of items—
 - for which it is impracticable or uneconomical to prepare a specification or standard (repetitive use of a purchase description containing the essential characteristics of a specification, except for acquisition of unique components or replacement parts, will be construed as evidence of improper use of this exception); or
 - when the purchase involves an item which is the product of private development and the provisions of 1-304 are complied with.

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(d) If it is determined, in accordance with the procedures established under the Defense Standardization Program by the Under Secretary of Defense for Research and Engineering, that the specifications and standards listed in (a) above do not meet the particular or essential needs of a bureau, service, or command, then (except as provided in (b) and (c) above) applicable amendments, revisions or new specifications or standards (interim Federal or limited coordination Military) shall be immediately prepared and used.

(e) When it is necessary to make interim changes or corrections to specifications or standards to effect an acquisition, the authorizing activity shall take immediate action to advise the specification or standard preparing activity of the changes or corrections and the reasons giving rise thereto.

1-1203 Availability of Specifications, Standards, Plans and Drawings.

1-1203.1 General. Each solicitation shall be accompanied with the applicable specifications, standards, plans, drawings, descriptions and any other pertinent documents, or shall state where such documents may be obtained or examined, in

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accordance with this paragraph. In the case of specifications and drawings available from the purchasing office, the solicitation should identify as precisely as possible the responsible individual's name and title, address and room number, office symbol, and telephone number, for purposes of facilitating and expediting requirements for documents or for examination of such documents.

1-1203.2 Specifications and Standards Listed in the DODISS and Data Item Description Listed in DoD Directive 5000.19-L, Volume II.

(a) A Department of Defense Single Stock Point (DODSSP) has been established at the Naval Publications and Forms Center in Philadelphia for unclassified Federal, Military and other specifications and standards (including commercial) listed in the Department of Defense Index of Specifications and Standards (DODISS) and data item descriptions listed in the Department of Defense Acquisition Management Systems and Data Requirements Control List (AMSDDL) DODD 5000.19-L, Volume II. Except as provided in (b) below, such specifications, standards, and descriptions normally will not be furnished with the solicitation, but the solicitation shall contain the provision in 7-2003.8.

(b) Specifications and Standards listed in the DODISS (excluding commercial) and Data Items listed in the AMSDDL may be furnished with the solicitation when:

- (i) the nature and complexity of the item are such that furnishing with the solicitation is necessary to enable prospective contractors to make a competent initial evaluation of the solicitation;
- (ii) in the judgment of the contracting officer, it would be impracticable for prospective contractors to obtain the specifications, standards and descriptions from the DODSSP in time to respond to the solicitation; e.g., urgency of the procurement, isolated geographical area, or other cogent reason; or
- (iii) a prospective contractor who has not previously bid on the item requests a copy of the solicitation.

(c) Purchasing activities may obtain copies of the DODISS and the AMSDDL, as well as all unclassified specifications and standards (including commercial) listed in the DODISS, and data item descriptions listed in the AMSDDL by sending DD Form 1425 to the DODSSP.

1-1203.3 Specifications and Standards Not Listed in DODISS, Data Item Descriptions Not Listed in DoD Directive 5000.19-L, Volume II, and Plans, Drawings, and Other Pertinent Documents. Specifications and standards not listed in the DODISS, and plans, drawings, and other pertinent documents (including new or revised Federal or Military specifications and standards not yet listed in DODISS) and data item descriptions not listed in DoD Directive 5000.19-L, Volume II, normally shall be furnished with the solicitation. When this is not feasible because of the bulk of the documents, the limited number of copies available, or for some other good reason, the solicitation shall include a provision substantially similar to that contained in 7-2003.9(a) or (b) as appropriate.

1-1204 Packaging and Marking Policies.

(a) All Department of Defense supplies, materials, and equipment shall be afforded the degree of packaging (preservation and packing) required to prevent deterioration and damages due to the hazards of shipment, handling and storage.

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SECTION III

PROCUREMENT BY NEGOTIATION

Part 1—Use of Negotiation

3-100 Scope of Part. This Part deals with the nature and use of negotiation as distinguished from formal advertising, and with limitations upon that use.

3-101 General.

(a) Pursuant to the authority of 10 U.S.C. 2304(a), procurement may be effected by negotiation under any one of the exceptions (1) through (17) set forth in Part 2 of this Section. However, procurement shall be made by formal advertising when such method is feasible and practicable, even though existing conditions and circumstances would otherwise satisfy the requirements of Part 2 of this Section.

(b) When supplies or services are to be procured by negotiation, offers shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured.

(c) No contract shall be entered into as a result of negotiation unless a business clearance or approval as is prescribed by applicable Departmental procedures has been obtained.

(d) Negotiated procurements shall be on a competitive basis to the maximum practical extent. When a proposed procurement appears to be necessarily noncompetitive, the contracting officer is responsible not only for assuring that competitive procurement is not feasible, but also for acting whenever possible to avoid the need for subsequent noncompetitive procurements. This action should include both examination of the reasons for the procurement being noncompetitive and steps to foster competitive conditions for subsequent procurements, particularly as to the availability of complete and accurate data, reasonableness of delivery requirements (1-305.2(a)), and possible breakout of components for competitive procurement. Except for procurement of electric power or energy, gas (natural or manufactured), water, or other utility services, and procurement of educational services from nonprofit institutions, contracts in excess of \$25,000 shall not be negotiated on a noncompetitive basis without prior review at a level higher than the contracting officer to assure compliance with this subparagraph.

3-102 Reserved.

3-103 Records and Reports of Negotiated Contracts. In addition to the records and reports described in 1-308, 3-211.4, and 3-216.4, each Department is required to maintain a record of the total value of all contracts negotiated by it during each fiscal year under each of the circumstances permitting negotiation enumerated in Section III, Part 2. These records, and reports based thereon, are maintained through the Department of Defense Procurement reporting system described in 1-110 and Section XXI, Part 1.

3-104 Aid to Small Business and Minority Concerns in Negotiated Procurements. When negotiation is conducted, consideration shall be given to the size

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and minority status of the business concerns, and when subcontracting is consistent with the best interests of the Government, the extensive use of subcontractors shall be a favorable factor. See Section 1, Part 7, and 1-322.

3-105 *Add to Labor Surplus Area Concerns in Negotiated Procurements.* When negotiation is conducted, consideration shall be given as to whether the prospective supplier is a labor surplus area concern. See Section 1, Part 8.

3-106 *Presolicitation Notices and Conferences.*

3-106.1 *General.* This Part describes a procedure which may be used as a preliminary step to negotiated procurements where the cost of preparing a formal solicitation and response would be substantial for both the Government and industry. This procedure is designed to develop sources for procurement; permit the Government to solicit for preliminary information based on a general description of the supplies or services involved; permit prospective offerors to submit proposals without undue expenditure of effort, time, and money; and to explain complicated specifications and requirements to interested firms. The presolicitation conference shall not be used as a method for prequalification of offerors, and may be used only when approved at a level higher than the contracting officer.

3-106.2 *Presolicitation Procedure.*

(a) When a presolicitation notice is used it shall be prepared by the contracting officer and forwarded to all known potential offerors. It shall at least request an expression of interest in the contemplated procurement and shall designate a time for submission of responses. In cases of complex procurement, it may also request information pertaining to management, engineering, and production capabilities. Each notice shall define as explicitly as possible the information to be furnished by the offeror and shall indicate whether it is contemplated that the presolicitation notice will be followed by a conference and a formal solicitation. Detailed drawings, specifications, or plans shall not normally be included in a presolicitation notice. The presolicitation notice shall be synopsis in accordance with 1-1003. See 1-309 for solicitations for informational or planning purposes; 2-205.6 for pre-invitation notices in formally advertised procurements; and 2-207 and 3-504 for pre-bid and pre-proposal conferences, respectively.

(b) All of those responding to the presolicitation notice shall be advised of the details of any pending presolicitation conference. The presolicitation conference shall be conducted by procurement personnel, and attended by technical and legal personnel as appropriate. All prospective offerors attending the conference shall be furnished copies of the solicitation, unless they decline to participate in the procurement. If it is determined to proceed with the procurement without a conference, those responding to the presolicitation notice shall be furnished a formal solicitation, except those who decline to participate. In addition, a copy of the solicitation shall be furnished to any prospective offeror who requests one (but see 1-603 and 1-609.7).

(c) All prospective contractors shall be furnished identical information in connection with the proposed procurement. Care shall be taken to safeguard any information received in confidence. (See 1-1004.)

3-107 *Offeror Response Time.* The guidance in 2-202.1 shall be applied to negotiated procurements.

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Part 2—Circumstances Permitting Negotiation

3-200 *General.* Subject to the limitations set forth in Part 1 of this Section III and pursuant to the authority of 10 U.S.C. 2304(a), procurement may be effected by negotiation under any one of the exceptions ((1) through (17) of 10 U.S.C. 2304(a)) set forth in this Part 2, subject, in the case of construction contracts, to the further restrictions of 10 U.S.C. 2304(c) as set forth in 18-301. Each negotiated contract shall contain a reference to the authority under which it was negotiated.

3-201 National Emergency.

3-201.1 *Authority.* Pursuant to 10 U.S.C. 2304(a)(1), purchases and contracts may be negotiated if—

"it is determined that such action is necessary in the public interest during a national emergency declared by Congress or the President."

3-201.2 Application.

(a) The authority of this paragraph 3-201 shall be used only to the extent determined by the Assistant Secretary of Defense (Installations and Logistics) to be necessary in the public interest, and then only in accordance with Departmental procedures consistent with this paragraph 3-201.

(b) For the duration of the national emergency declared pursuant to Presidential Proclamation 2914, dated December 16, 1950, the Assistant Secretary of Defense (Installations and Logistics) has determined that only the following procurements may be made pursuant to the authority of 10 U.S.C. 2304(a)(1):

- (i) procurements made in keeping with (A) labor surplus set-aside programs (including, when no other negotiating authority is appropriate and the use of formal advertising is not feasible and practicable under the existing conditions and circumstances, the placement of contracts for the total or any part of the requirements set-aside which are not filled by awards made in accordance with the provisions of the Notice of Labor Surplus Area Set-Aside (see 1-804); or
- (ii) procurements made in keeping with the small business programs

(A) after unilateral determinations for set-asides, or

(B) to place the total or any part of the requirements set aside (unilateral or joint) which are not filled by awards to small business concerns, when no other negotiating authority is appropriate and the use of formal advertising is not feasible and practicable (see 1-706.7).

3-201.3 *Limitation.* The authority of this paragraph 3-201 shall not be used when negotiation is authorized by the provisions of 3-206 except that, in the event of a labor surplus or small business set-aside, this authority shall be used in preference to any other authority in this Part 2 (see 1-706.2 and 1-804.4). The authority of this paragraph shall not be to negotiate a reasonable price with a low responsible small business bidder whose bid has been determined by the contracting officer to be an unreasonable bid under Small Business Restricted Advertising procedures. When such an unreasonable bid is received, the set-aside shall be dis-

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solved and the requirement procured on an unrestricted basis by the use of formal advertising or where appropriate by other negotiation authority in accordance with existing regulations.

3-202 Public Exigency.

3-202.1 Authority. Pursuant to the authority of 10 U.S.C. 2304(a)(2) purchases and contracts may be negotiated if—

"the public exigency will not permit the delay incident to advertising."

3-202.2 Application. In order for the authority of this paragraph 3-202 to be used, the need must be compelling and of unusual urgency, as when the Government would be seriously injured, financially or otherwise, if the supplies or services were not furnished by a certain date, and when they could not be procured by that date by means of formal advertising. When negotiating under this authority, competition to the maximum extent practicable, within the time allowed, shall be obtained. The following are illustrative of circumstances with respect to which this authority may be used:

- (i) supplies, services, or construction needed at once because of fire, flood, explosion, or other disaster;
- (ii) essential equipment for, or repair to, a ship when such equipment repair is needed at once for compliance with the orders of the ship;
- (iii) essential equipment for, or repair to, aircraft grounded or about to be grounded, when such equipment or repair is needed at once for the performance of the operational mission of such aircraft;
- (iv) construction needed at once to preserve a structure or its contents from damage;
- (v) essential equipment for, or repair to, missiles or missile support equipment, when such equipment or repair is needed at once to preclude impairment of launch capabilities or mission performance;
- (vi) purchase requests citing an issue priority designator under the Uniform Material Movement and Issue Priority System (UMMIPS), which may justify negotiation under this or other negotiation authority, but in such cases the specific circumstances must be set forth in the determination and findings; or
- (vii) purchase requests citing "Electronic Warfare QRC Priority" as the priority designator.

3-202.3 Limitation. Every contract negotiated under the authority of this paragraph 3-202 shall be accompanied with a determination and findings justifying its use, signed by the contracting officer and prepared in accordance with the requirements of Part 3 of this Section III. The authority of this paragraph 3-202 shall not be used when negotiation is authorized by the provisions of 3-203 or 3-206.

3-203 Purchases Not More Than \$25,000.

3-203.1 Authority. Pursuant to 10 U.S.C. 2304(a)(3), purchases and contracts may be negotiated if—

"the aggregate amount involved is not more than \$25,000."

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3-203.2 Application. Purchases or contracts aggregating not more than \$25,000 shall be made in accordance with Part 6 of this Section, and 18-302 in the case of certain construction contracts.

3-203.3 Limitation. The authority of this paragraph 3-203 shall not be used when negotiation is authorized by the provisions of 3-206. However, where small business set asides are made, the appropriate paragraph 3-201.2 (for unilateral set-asides) or 3-217 (for joint class set-asides) shall be cited. When negotiations have been initiated under another provision of this Section, that provision shall be cited as the negotiation authority for any resulting contract, even though one or more contracts of not more than \$25,000 in amount may result.

3-204 Personal or Professional Services.

3-204.1 Authority. Pursuant to 10 U.S.C. 2304(a)(4), purchases and contracts may be negotiated if—

"for personal or professional services."

3-204.2 Application. The authority of this paragraph 3-204 shall be used only when all of the following conditions have been satisfied:

- (i) if personal services, they are required to be performed by an individual contractor in person (not by a firm), or if professional services, they may be performed either by an individual contractor in person or a firm or organization;
- (ii) the services (A) are of a professional nature, or (B) are to be performed under Government supervision and paid for on a time basis; and
- (iii) procurement of the services is authorized by law, and is effected in accordance with the requirements of any such law and in accordance with Departmental procedures.

3-204.3 Limitation. The authority of this paragraph 3-204, and the above conditions imposed upon its use, shall not apply to the procurement by negotiation of any type of service authorized under any other provision of this Section III.

3-205 Services of Educational Institutions.

3-205.1 Authority. Pursuant to the authority of 10 U.S.C. 2304(a)(5), purchases and contracts may be negotiated if—

"for any service by a university, college, or other educational institution."

3-205.2 Application. The following are illustrative of circumstances with respect to which the authority of this paragraph 3-205 may be used:

- (i) educational or vocational training services to be rendered by any university, college, or other educational institution in connection with the training and education of personnel, and for necessary material, services, and supplies furnished by any such institution in connection therewith;
- (ii) experimental, developmental, or research work (including services, tests, and reports necessary or incidental thereto) to be conducted by any university, college, or other educational institution, and reports furnished in connection therewith; or
- (iii) analyses, studies, or reports (statistical or otherwise) to be conducted by any university, college, or other educational institution.

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balanced by a penalty in the form of decreased profit or fee for failure to achieve such targets. Performance incentives are particularly appropriate for inclusion in contracts for major weapons and equipment, both in development when desired performance objectives are known and the fabrication of prototypes for test and evaluation is required, and in production where there is potential for improved performance that would be highly desirable to the Government. Effort always should be made in these procurement situations to include a performance incentive in the contract. Performance incentives present complex problems in contract administration and should be negotiated and administered by contracting officers with the full cooperation of Government engineering and pricing specialists.

(c) Limitations.

(1) Performance incentives, when related to the performance of the product, may result in increased costs and shall always, except under firm fixed-price contracts, be coupled with a balancing of range of fee or profit on the cost and performance aspects, negotiated so as to give appropriate weight to basic procurement objectives. Where incentives relating to the performance of the product are included in a contract, and earliest possible delivery is of considerable importance to the Government, the contract normally should include a performance incentive relating to time of performance or for expedited delivery schedules.

(2) In the case of cost-plus-incentive-fee or cost-plus-award-fee type contracts, the maximum fee shall not exceed the limitation stated in 3-405.6(e)(2).

3-408 Letter Contract.

(a) Definition. A letter contract is a written preliminary contractual instrument which authorizes immediate commencement of manufacture of supplies, or performance of services, including, but not limited to, preproduction planning and the procurement of necessary materials.

(b) Application. A letter contract may be entered into when (i) the interests of national defense demand that the contractor be given a binding commitment so that work can be commenced immediately, and (ii) negotiation of a definitive contract in sufficient time to meet the procurement need is not possible, as, for example, when the nature of the work involved prevents the preparation of definitive requirements, specifications, or cost data.

(c) Limitations.

(1) A letter contract shall be used only after a written determination that no other type of contract is suitable.

(2) A letter contract shall not be entered into without competition when competition is practicable. Where a letter contract award is based on price competition, an overall price ceiling shall be included in the letter contract.

(3) A letter contract shall include an agreement between the Government and the contractor as to the date by which finalization is expected to be completed and a finalization schedule, as required by 7-802.5. This date shall be prior to:

- (i) the expiration of 180 days from the date of the letter contract; or
- (ii) forty percent (40%) of the production of the supplies, or the performance of the work, called for under the contract, whichever occurs first.

In extreme cases, an additional period may be authorized.

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3-205.3 Limitation. Except as authorized in 22-902(b), the authority of this paragraph 3-205 shall not be used when negotiation is authorized by the provisions of 3-203 or 3-206.

3-206 Purchases Outside the United States.

3-206.1 Authority. Pursuant to 10 U.S.C. 2304(a)(6), purchases and contracts may be negotiated if—

"for property or services to be procured and used outside the United States, and its Territories, possessions and Puerto Rico."

3-206.2 Application. The authority of this paragraph 3-206 shall be used only for the procurement of supplies to be shipped from, delivered, and used, or services to be performed, outside of the United States, its possessions and Puerto Rico, irrespective of the place of negotiation or execution of the contract. When the authority of this paragraph is available for the negotiation of a contract, no other negotiating authority shall be used, nor shall formal advertising be used.

3-207 Medicines or Medical Supplies.

3-207.1 Authority. Pursuant to 10 U.S.C. 2304(a)(7), purchases and contracts may be negotiated if—

"for medicine or medical supplies"

3-207.2 Application. The authority of this paragraph 3-207 shall be used only when the following two requirements have been satisfied:

- (i) such supplies are peculiar to the field of medicine, including technical equipment such as surgical instruments, surgical and orthopedic appliances, X-ray supplies and equipment, and the like, but not including prosthetic equipment; and
- (ii) whenever it is determined to be practicable, such advance publicity as is considered suitable with regard to the supplies involved and other relevant considerations shall be given for a period of at least 15 days before making a purchase of or contract for supplies or services, under this authority of this paragraph 3-207, for more than \$10,000.

3-207.3 Limitation. Every contract negotiated under the authority of this paragraph 3-207 shall be accompanied with the determination and findings justifying its use, signed by the contracting officer and prepared in accordance with the requirements of Part 3 of this Section III. The authority of this paragraph 3-207 shall not be used when negotiation is authorized by the provisions of 3-203 or 3-206.

3-208 Supplies Purchased for Authorized Resale.

3-208.1 Authority. Pursuant to 10 U.S.C. 2304(a)(8), purchases and contracts may be negotiated if—

"for property for authorized resale"

3-208.2 Application.

(a) The authority of this paragraph 3-208 shall be used only for purchases for resale, where appropriated funds are involved, and ordinarily only for purchases of articles with brand names or of a proprietary nature which a selling activity believes or finds to be desired or preferred by its patrons.

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(4) The maximum liability of the Government stated in the letter contract will be the amount estimated to be necessary to cover the contractor's requirements for funds prior to definitization, but this amount shall not exceed fifty percent (50%) of the total estimated cost of the procurement unless advance approval is obtained from the official authorizing the letter contract.

(5) The total estimated cost shall not exceed the funds available for obligation and commitment in the appropriate allotment account. Therefore, the letter contract shall not describe, refer to, or otherwise commit the Government to a definitive contract in excess of the funds available for obligation and commitment at the time the letter contract is executed.

(6) Amendments to letter contracts to accomplish new procurement may be used only if the new procurement is inseparable from the procurement covered by the existing letter contract. Such amendments are subject to the same limitations as new letter contracts.

(d) *Definitization.* A letter contract shall be superseded by a definitive contract at the earliest practicable date and not later than the target date established in the Definitization clause or any extension thereof by the contracting officer. To cover unusual cases in which the Government and the contractor, after exhausting all reasonable efforts, cannot negotiate a definitive contract because of failure to reach agreement as to price or fee, the clause in 7-802.5 requires the contractor to proceed with the work and gives the contracting officer the right, with approval of the Head of the Procuring Activity, to determine a reasonable price or fee in accordance with Section III, Part 8, and Section XV, subject to the Disputes clause.

(e) *Content.* Letter contracts shall be specifically negotiated and, as a minimum, shall include the clauses required by Section VII, Part 8. Whether executed on Standard Form 26 or Standard Form 30, a definitized contract will be numbered as a modification of the letter contract as provided in 20-204.3(a).

3-409 Indefinite Delivery Type Contracts.

(a) One of the following indefinite delivery type contracts may be used for procurement where the exact time of delivery is not known at time of contracting.

(b) For items with a shelf-life of less than six months, consideration will be given to use of indefinite delivery type contracts with orders to be placed either (i) directly by the users, or (ii) by central purchasing offices with deliveries direct to users. See 1-1204.

(c) Depending on the situation, indefinite delivery type contracts may provide for (i) firm fixed prices, (ii) economic price adjustment, (iii) price redetermination, or (iv) prices established in accordance with (d) below.

(d) When indefinite delivery type contracts, whether competitively awarded or not, are priced on the basis of catalog or market prices, the price to be paid may be determined by establishing an adjustment factor for application to the price in industry-wide pricing guides or manufacturer's price catalogs. Normally, the adjustment factor will be a fixed percentage discount for application to the price in effect on the date of each order.

(e) When it is desired to authorize the use of the fast pay procedure for orders not in excess of \$25,000, the special data required by 3-606.3(b) shall be included in the contract. The clause in 3-606.3(b)(iv) shall be modified for this

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This Agreement, including Parts A and B hereof, may be amended only by mutual agreement of the parties, and the Agreement may be terminated in its entirety by either party upon thirty (30) days written notice to the other party, except that this Agreement may be terminated by the Government at any time if the parties fail to agree upon any deletion, amendment or addition to this Agreement which is required by statute, Executive Order, or the Armed Services Procurement Regulation. No deletion, modification, addition to, or termination of, this Agreement shall affect any contracts theretofore entered into between the parties in which this Agreement or a portion thereof has been incorporated by reference.

This Agreement shall be reviewed, as a minimum, annually before the anniversary of its effective date, and revised to conform with all requirements of statutes, Executive Orders, or the Armed Services Procurement Regulation. This revision shall be evidenced by an agreement modifying this Basic Agreement or by the issuance of a superseding Basic Agreement.

This Agreement shall not be referred to by the Contractor in bids submitted in response to invitations for bids nor become a part of any contract placed through the process of formal advertising.

In WITNESS WHEREOF, the parties hereto have executed this Agreement as of the day and year first above written:

UNITED STATES OF AMERICA

By _____
(Contracting Officer)

By _____
(Name of Company)

(Title)

(d) Limitations.

(1) Basic agreements shall neither cite appropriations to be charged nor to be used alone for the purpose of obligating funds.

(2) Basic agreements shall not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the contractor involved, nor shall they be used in any manner to restrict competition.

(3) Basic agreements generally shall be utilized only in connection with negotiated contracts.

3-410.2 Basic Ordering Agreement.

(a) Description.

(1) A basic ordering agreement is not a contract (but see 12-302, 12-602.1 and 12-1001). It is an agreement which is similar to a basic agreement (see 3-410.1) except that it also includes a description, as specific as practicable, of the supplies to be furnished or services to be performed when ordered and a description of the method for determination of the prices to be paid to the contractor for the supplies or services. Such method shall be consistent with the contract types authorized by this Part. Either the specific terms and conditions of delivery or a description of the method for their determination shall be set forth in the basic ordering agreement. The basic ordering agreement shall list one or more activities which are authorized to issue orders under the agreement. Any activity so named may issue orders specifying the supplies or services required. Orders shall be issued on DD Form 1155 or Standard Form 26 and shall incorporate by reference the provisions of the basic ordering agreement. When it is desired to

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use the fast pay procedure for orders not in excess of \$25,000, the special data required by 3-606.3(b) shall be included in the basic ordering agreement. The clause in 7-104.84(a) shall be modified for this purpose to refer to orders and to the appropriate clause of the basic ordering agreement for the preparation of invoices.

(2) The basic ordering agreement shall specify the point at which each order becomes a binding contract. For example, the agreement may provide either (i) that issuance of an order gives rise to a contract immediately, (ii) that a contract arises upon the contractor's failure to reject the order within a specified number of days, or (iii) that a contract arises when the contractor accepts the order in a specified manner, such as by postcard, telegram, letter, signing and returning a copy of Standard Form 26 or DD Form 1155.

(b) *Applicability.* The basic ordering agreement may be used as a means of expediting procurement where specific items, quantities, and prices are not known at the time of execution of the agreement but where past experience or future plans indicate that a substantial number of requirements for items or services of the type covered by the basic ordering agreement will result in procurements from the contractor during the term of the agreement. Under proper circumstances, use of the procedures under the agreement is advantageous and economical in ordering parts for equipment support since such procedures substantially shorten the administrative time required for placing such articles in a production status, thereby not only decreasing the amount of support inventory required to be carried but also decreasing the possibility that parts procured will become obsolete as a result of design changes in the equipment.

(c) *Limitations.*

(1) Basic ordering agreements shall not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the contractor involved, nor shall they be used in any manner to restrict competition.

(2) Supplies or services may be ordered under a basic ordering agreement only under the following circumstances:

- (i) If it is determined at the time the order is placed that it is impracticable to obtain competition by either formal advertising or negotiation for such supplies or services; or
- (ii) If after a competitive solicitation of quotations or proposals from the maximum number of qualified sources (see 3-101), other than a solicitation accomplished by use of Standard Form 33, it is determined that the successful responsive offeror holds a basic ordering agreement, the terms of which are either identical to those of the solicitation or different in a way that could have no impact on price, quality or delivery, and if it is determined further that issuance of an order against the basic ordering agreement rather than preparation of a separate contract would not be prejudicial to the other offerors.

In situations covered by (ii), the choice of firms to be solicited shall be made in accordance with normal procedures, without regard to which firms hold basic ordering agreements; firms not holding a basic ordering agreement shall not be precluded by the solicitation from proposing or quoting; and the existence of a basic ordering agreement shall not be a consideration in source selection.

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in 2-303.2, appropriately modified to relate to proposals and, if necessary, to telegraphic proposals.

(d) The normal revisions of proposals by offerors selected for discussion during the usual conduct of negotiations with such offerors are not to be considered as late proposals or late modifications to proposals.

(e) Late proposals and modifications of proposals which are not considered shall be held unopened, unless opened for identification, until after award and then retained with other unsuccessful proposals.

(f) The following shall, if available, be included in the purchase office files with respect to each late proposal or modification of proposal:

- (i) the date of mailing, filing, or delivery, as the case may be;
- (ii) the date and hour of receipt;
- (iii) whether or not considered for award; and
- (iv) the wrapper or other evidence if considered for award.

3-507 Treatment of Procurement Information.

3-507.1 *Restrictions on Disclosure and Use of Data in Proposals and Quotations.*

(a) A proposal, whether solicited or unsolicited, may include data, such as a technical design or concept or financial and management plan, which the offeror does not want disclosed to the public for any purpose or used by the Government for any purpose other than evaluation of the proposal. If an offeror wishes so to restrict his proposal, he shall mark the title page with the following legend:

This data, furnished in connection with Request for Proposal No. _____, shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than to evaluate the proposal; provided, that if a contract is awarded to the offeror as a result of or in connection with the submission of this data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the contract. This restriction does not limit the Government's right to use information contained in the data if it is obtained from another source without restriction. The data subject to this restriction is contained in Sheets _____ (1946 DEC)

*If proposal is unsolicited (see 4-101(c)(1)), delete "Furnished in connection with Request for Proposal No. _____"

The offeror shall mark each sheet of data which he wishes to restrict with the following legend:

Use or disclosure of proposal data is subject to the restriction on the Title page of this Proposal. (1946 DEC)

Contracting officers and other Government personnel shall not refuse to consider any proposal merely because it or the data submitted with it is so marked. Those portions of the proposal and data which are so marked (except for information which is also obtained from another source without restriction) shall be used only to evaluate the proposal and shall not be disclosed outside the Government without the written permission of the offeror. If it is desired to duplicate, use, or

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disclose the data of the offeror to whom the contract is to be awarded, for purposes other than to evaluate the proposal, the contract should so provide. (See 9-201 for a description of "data" and Section IX, Part 2, in general, for the policy, instructions, and contract clauses with respect to the acquisition and use of data.)

(b) Proposals or quotations of subcontractors which are included as part of a proposal submitted by a prime-offeror may be marked as provided in (a) above.

(c) Records or data, other than the types of items listed in 1-329.1(b), bearing such a legend may be otherwise subject to release under the terms of the Freedom of Information Act, 5 U.S.C. 552, as amended (see 1-329). It is to be noted, however, that absent a request for such records or data pursuant to the statutory provisions, and the subsequent determination of releasability, the legend shall be honored in accordance with (a) above.

(d) Proposals, solicited and unsolicited, shall be maintained and disposed of pursuant to 1-308 and related S2-102.1(x) and S2-501.

(e) See Part 9 of Section IV for further provisions with respect to unsolicited proposals.

3-507.2 Disclosure of Information During the Pre-Award or Pre-Acceptance Period.

(a) General. After receipt of proposals or quotations, no information contained in any proposal or quotation or information regarding the number or identity of the offerors shall be made available to the public, or to anyone within the Government not having a legitimate interest therein, as expressly provided by this Regulation. However, the negotiated price of the potentially selected offer shall be made available to the public in accordance with 4-1203.4(b)(3) when the procedures therein are used.

(b) Equal Consideration and Information to All Prospective Contractors. Discussions with prospective contractors regarding a potential procurement and the transmission of technical or other information shall be conducted only by the contracting officer, his superior having contractual authority or others specifically authorized. Such personnel shall not furnish any information to a potential supplier which alone or together with other information may afford him an advantage over others. However, general information which would not be prejudicial to others may be furnished upon request e.g., explanation of a particular contract clause or a particular condition of the schedule. When necessary to clarify ambiguities, or correct mistakes or omissions, an appropriate amendment to the solicitation shall be furnished in a timely manner to all to whom the solicitation has been furnished. See 3-505.

3-508 Information to Offerors.

3-508.1 General. Notice shall be provided to offerors in accordance with 3-508.2 and 3-508.3 below. Such notice need not be given where disclosure may in some way prejudice the Government's interest or where the contract is:

- (i) for substance;
- (ii) negotiated pursuant to 10 U.S.C. 2304(A)(4), (5), or (6) (see 3-204, 3-205, or 3-206);
- (iii) negotiated with a foreign supplier when only foreign sources of supplies or services have been solicited.

3-508.2 Pre-Award Notice of Unacceptable Offers.

(a) In any procurement in excess of \$25,000 in which it appears that the period of evaluation of proposals is likely to exceed 30 days or in which a limited

number of suppliers have been selected for additional discussion (see 3-805), the contracting officer, upon determination that a proposal is unacceptable, shall provide prompt notice of that fact to the source submitting the proposal. Such notice need not be given where the proposed contract is to be awarded within a few days and notice pursuant to 3-508.3 below would suffice. In addition to stating that the proposal has been determined unacceptable, notice to the offeror shall indicate, in general terms, the basis for such determination and shall advise that, since further negotiation with him concerning this procurement is not contemplated, a revision of his proposal will not be considered.

(b) In any procurement involving a small business set-aside (excluding those processed in accordance with 3-600), upon final completion of negotiations and determinations of responsibility but prior to award, the contracting officer shall inform each unsuccessful offeror by written notice of the name and location of the apparently successful offeror(s). Each apparently unsuccessful offeror should be advised that any subsequent revisions of his proposal will not be considered, since no further negotiations are contemplated, and no further contact with the contracting officer need be made regarding the instant procurement unless the unsuccessful offeror has grounds to challenge the small business size status of the apparently successful offeror(s). This notification procedure shall not apply to procurements exempt by 3-508.1 above or to any urgent procurement action which the contracting officer determines in writing must be awarded without delay to protect the public interest. The contracting officer's determination shall be placed in the contract file.

3-508.3 Post-Award Notice to Offerors.

(a) Promptly after making all awards in any procurement in excess of \$25,000, the contracting officer shall give written notice to the unsuccessful offerors that their proposals were not accepted, except that such notice need not be given where notice has been provided pursuant to 3-508.2(a). Such notice shall include:

- (i) the number of prospective contractors solicited;
 - (ii) the number of proposals received;
 - (iii) the name and address of each offeror receiving an award;
 - (iv) the items, quantities, and unit prices of each award, provided that, where the number of items or other factors makes the listing of unit prices impracticable, only the total contract price need be furnished; and
 - (v) in general terms, the reasons why the offeror's proposal was not accepted, except where the price information in (iv) above readily reveals such reason, but in no event will an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.
- (b) In procurements of \$25,000 or less and subject to the exceptions in 3-508.1 above, the information described in (a) above shall be furnished to unsuccessful offerors upon request.
- (c) Such information as is authorized to be released to unsuccessful offerors pursuant to (a)(i) through (iv) above may, upon his request, be provided to the successful offeror.

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3-508.4 Debriefing of Unsuccessful Offerors.

(a) Offerors under negotiated procurements generally expend substantial time and effort in preparing their proposals. Therefore, those offerors not selected for contract award have a significant interest in learning why they were unsuccessful. Debriefing is the process by which purchasing offices provide unsuccessful offerors with the Government's evaluation of the significant factors contained in their proposals, citing determinative deficiencies and weaknesses. An adequate debriefing can provide the basis upon which offerors may improve future proposals and, in addition, give assurance that the selection has been handled fairly, in accordance with applicable regulations and the provisions of the solicitation.

(b) When a contract is awarded on some basis other than price, unsuccessful offerors shall be debriefed upon their written request, and furnished the basis for the selection decision and contract award. Debriefings shall be provided at the earliest feasible time after contract award. They shall be conducted by purchasing office officials familiar with the rationale for the selection decision and contract award.

(c) It is essential that debriefings be conducted in a scrupulously fair, objective and impartial manner. Debriefing information given offerors shall be factual and consistent with the evaluation. While offerors should be informed of the areas in which their technical or management proposals were weak or deficient, point-by-point comparisons with the technical or management proposals of the other offerors shall not be made. Furthermore, debriefings shall not reveal: (i) trade secrets; (ii) privileged or confidential manufacturing processes and techniques; (iii) commercial and financial information which is privileged or confidential, including cost breakdowns, profit, overhead rates, and similar information; or (iv) the relative merits or technical standing of competitors or the evaluation scoring.

(d) A summary of the debriefing shall be made a part of the contract file.

3-508.5 Classified Information. Classified information shall be furnished only in accordance with regulations governing classified information.

3-499 Protests Against Award. Protests against awards of negotiated procurements shall be treated substantially in accordance with 2-407.8.

3-510 Reserved.

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Part 6—Small Purchase and Other Simplified Purchase Procedures

3-600 Scope of Part. This Part sets forth simplified procedures for the procurement of supplies, nonpersonal services, and construction, the aggregate amount of which does not exceed \$25,000, which are referred to in this Part as "small purchases." It also applies to certain other supplies and services. This Part does not preclude the use of bilateral purchase orders (see 3-608.4). Standard Form 19 for construction contracts (see 16-402.2 and 18-302); or a negotiated two-party formal contract for procurements not in excess of \$25,000, for example where the procurement is classified or requires specific contract provision relating to technical inspection or test, specification changes, Government-furnished property, insurance, patents, price adjustments, or the like. When the total cost of services to repair Government equipment does not exceed \$25,000, such services may be obtained by purchase orders or other appropriate small purchase method, regardless of the value of the Government equipment being repaired (see 3-608.2(b)(1)(viii)), except as provided in 3-608.2(b)(2). Procurements of supplies and services or construction initially estimated to exceed \$25,000 shall not be made by the small purchase method, even though resulting awards do not exceed such amounts.

3-601 Purpose. The objective of the simplified purchase methods prescribed herein is to reduce administrative costs.

3-602 Definitions. As used in this Part, the following terms have the meanings set forth below.

(a) *Bulk funding concept* means a system whereby a contracting officer receives authorization from a fiscal and accounting officer to obligate funds on purchase documents against a specified lump sum of funds reserved for the purpose for a specified period of time rather than obtaining individual obligational authority on each purchase document.

(b) *Mail indicia* means the official printed markings substituted for stamps, i.e., "Postage and Fees Paid" and appropriate department. This includes such markings on envelopes, cards, labels, wrappers, or tags.

(c) *Local delivery* means the movement of supplies or commodities wholly within a recognized metropolitan area in which both the point of pickup and the point of delivery are located.

3-603 Policy.

3-603.1 General.

(a) All purchases covered by this Part shall be accomplished by negotiation and shall cite the appropriate subparagraph of 10 U.S.C. 2304(a) in accordance with Part 2 of this Section. Such purchases shall be made only when requirements cannot be satisfied by procurement in accordance with Section V. The contracting officer shall use the purchase method covered by this Part which he determines to be most suitable to the immediate requirement and most efficient and economical. Simplified procedures may be used in procurements from Government established sources, if authorized by the basic contract or concurred in by the source.

(b) Requirements aggregating more than \$25,000 shall not be broken down into several purchases which are less than \$25,000 merely for the purpose of per-

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mining negotiation under the small purchase procedures authorized by this Part. Related items (such as small hardware items or spare parts for vehicles) may be included in one solicitation, and the award made on "all or none" basis. In such cases, suppliers shall be advised of this award procedure when quotations are requested.

(c) The "bulk funding" concept shall be used to the maximum extent practicable to reduce processing delays, double handling, and documentation. Bulk funding is particularly appropriate when numerous purchases using the same type of funds are to be made during a given period.

(d) Installation or activity transportation facilities may be used for delivery from local suppliers to the purchasing installation only after consideration of the following methods:

- (i) supplier delivery;
- (ii) common carrier;
- (iii) parcel post; and
- (iv) mail indicia.

(e) Inspection procedures for small purchases shall be in accordance with 14-308.

(f) The use of United States-owned foreign currency in making payments for small purchases shall be in accordance with Section VI, Part II.

(g) Each acquisition of supplies and services which has an anticipated value not in excess of \$10,000 and which is subject to the small purchase procedures set forth in this part is a small business-small purchase set-aside (1-702(c)) unless the contracting officer (i) determines there is no reasonable expectation of obtaining two or more quotations for purchases in excess of \$1,000 or at least one quotation for purchases not in excess of \$1,000; or (ii) is unable to obtain quotation(s) that are, in either case, competitive with market prices in the industry and competitive in terms of quality and delivery as outlined in 3-604. In the event that the small business-small purchase set-aside is dissolved in accordance with (g)(ii), new quotes shall be solicited on an unrestricted basis. In automated contracting systems, all proposed acquisitions pursuant to small purchase procedures will be screened for reservation in accordance with the criteria in this paragraph. When source lists are maintained for acquisitions not exceeding \$10,000, these source lists shall include all known small business concerns. The names of such concerns shall be obtained from the activity Small and Disadvantaged Business Utilization Specialist who, in turn, may request support from the SBA Procurement Center Representative or other Federal and private sources which maintain lists of small business concerns. Foreign concerns shall not be solicited nor awarded acquisitions reserved for small business concerns.

(h) In other acquisitions using small purchase procedures, solicitation of foreign firms located in qualifying countries (see 6-001 and 6-1043.1(a)) is not required unless determined to be in the best interests of the Government.

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(1) When the acquisition is not reserved, quotations based on supplying foreign end products shall be evaluated in accordance with the procedures in 6-104.4.

3-604 Competition and Price Reasonableness

3-604.1 Purchases Not in Excess of \$1,000. Small purchases not exceeding \$1,000 may be accomplished without securing competitive quotations if the prices are considered to be reasonable. Such purchases shall be distributed equitably among qualified suppliers. When practical, a quotation will be solicited from other than the previous supplier prior to placing a repeat order. The administrative cost of verifying the reasonableness of the price of purchases not in excess of \$1,000 may more than offset potential savings in detecting instances of overpricing; therefore, action to verify the reasonableness of the price need be taken only when the buyer or contracting officer suspects or has information (e.g., comparison to previous price paid, personal knowledge of the item involved) to indicate that the price may not be reasonable. In some cases, e.g., first buy of new items, action to verify may also be required to determine whether or not the price is reasonable.

3-604.2 Purchases in Excess of \$1,000

(a) Solicitation of quotations from a reasonable number of qualified sources of supply shall be made to assure that the procurement is to the advantage of the Government, price and other factors considered, including the administrative cost of the purchase. Generally, solicitation shall be limited to three suppliers and, to the maximum extent possible, shall be restricted to the local trade area of either

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the purchasing or the receiving activity. If practicable, two sources not included in the previous solicitation should be requested to furnish quotations. Quotations should generally be solicited orally except for construction contracts in excess of \$2,000. Written solicitations should be used when (i) the suppliers are located outside the local area, (ii) special specifications are involved, (iii) a large number of line items are included in a single proposed procurement, or (iv) obtaining oral quotations is not considered economical or possible.

(b) Reasonableness of a proposed price should be based on competitive quotations. If only one response is received, or the price variance between multiple responses reflects lack of adequate competition, a statement shall be included in the contract file setting forth the basis of the determination of fair and reasonable price. This determination may be based on a comparison of the proposed price with prices found reasonable on previous purchases, current price lists, catalogs, advertisements, similar items in a related industry, value analysis, the contracting officer's personal knowledge of the item being procured, or any other means. Written records of solicitation may be limited to notes or abstracts to show vendor or vendors contacted, prices, delivery, and any other informal historical data. If a separate form is used for documentation of price reasonableness, DD Form 1784, Small Purchase Pricing Memorandum, shall be used (see 16-813). If this form is not used, the price reasonableness statement shall be based on one or more of the criteria set forth on the form. In any case, the contracting officer should gain as much knowledge as practicable of the physical and material characteristics and intended use of the item to be purchased. When only one source is solicited, an additional notation must be made to explain the absence of competition, except for procurement of utility services available only from one source or of educational services from nonprofit institutions. Notification to unsuccessful suppliers shall be given only if requested.

(c) Occasionally an item can be obtained only from a supplier who quotes a minimum order price or quantity, which either unreasonably exceeds stated quantity requirements, or results in an unreasonable price for the quantities required. If practicable before placing the order the requiring activity should be informed in such cases of all facts regarding the quotation and requested to confirm or alter its requirement for the item or items under consideration. The file shall be documented to support the final action taken.

3-605.1 Blanket Purchase Agreement (BPA).

3-605.1 General. A blanket purchase agreement is a simplified method of filling anticipated repetitive needs for small quantities of supplies or services by establishing "charge accounts" with qualified sources of supply (see 12-302, 12-602.1 and 12-1001). Blanket purchase agreements are designed to reduce administrative costs in accomplishing small purchases by eliminating the need for issuing individual purchase documents.

3-605.2 Limitation on Use. A blanket purchase agreement may not be used when a call exceeds \$10,000, except that EPA calls up to \$25,000 may be placed by Inventory Control Points and calls for subsistence are unlimited as to dollar value.

3-605.3 Establishment of Blanket Purchase Agreements.

(a) Alternate Sources. To the extent practicable, blanket purchase agreements for items of the same type should be placed concurrently with more than one supplier. All competitive sources should be given an equal opportunity to furnish supplies or services under such agreements.

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(b) Form.

(1) Except as provided in (2) below, blanket purchase agreements shall be prepared and issued on DD Form 1155 (Order for Supplies or Services/Request for Quotations). Either the "General Provisions," DD Form 1155, or the "Reverse of Order for Supplies or Services/Request for Quotations—Foreign," DD Form 1155r-1, as applicable, shall be used. Other applicable provisions of the blanket purchase agreement shall be set forth on the Standard Form 36 (Continuation Sheet) or on a blank sheet of paper. Clauses authorized in 3-608.2(b) which are mandatory for use in purchases over \$10,000 shall be included in blanket purchase agreements that permit the placement of individual calls valued at more than \$10,000. Additionally, the following provisions may be applicable:

- (i) The Contract Work Hours and Safety Standards Act—Overtime Compensation clause in 7-103.16(a) shall be added unless it is reasonably anticipated that the aggregate of the total dollar amounts of orders to be placed thereunder will be \$2,500 or less;
 - (ii) where the agreement is for the intended purchase of services covered by the Service Contract Act of 1965, as amended, the clause in 7-1903.41(a) or (b) shall be substituted for Clause 15 of the General Provisions and the procedures in 12-1005 complied with, unless it is reasonably anticipated that the aggregate of the total dollar amounts of orders to be placed thereunder will be \$2,500 or less;
 - (iii) where the agreement is for the intended purchase of supplies, the Walsh-Healey Public Contracts Act clause in 7-103.17 shall be added, unless the agreement limits the aggregate total of orders to be placed thereunder to \$10,000; and
 - (iv) where the agreement is for the intended purchase of supplies, the applicable equal opportunity clause in 7-103.18 shall be added.
- (2) Blanket purchase agreements issued by the Defense Personnel Support Center may be prepared on its form "Order for Subsistence."
- (c) Numbering. Enter the Procurement Instrument Identification (PII) number as prescribed in Section XX, Part 2.
 - (d) Accounting Data. Blanket purchase agreements need not cite any accounting data so that purchases utilizing different appropriation data may be made under the same agreement.
 - (e) Negotiation Authority. The Schedule of each agreement shall be annotated as follows:

The issuance of individual calls under this blanket purchase agreement will be made under the authority of 10 U.S.C. 2304(a)(1), 10 U.S.C. 2304(a)(3), 10 U.S.C. 2304(a)(6), or 10 U.S.C. 2304(a)(17).

If for the purchase of subsistence:

The issuance of individual calls under this blanket purchase agreement will be made under the authority of 10 U.S.C. 2304(a)(1), 10 U.S.C. 2304(a)(3), 10 U.S.C. 2304(a)(6), or 10 U.S.C. 2304(a)(17).

This annotation shall not be duplicated on forms used to document individual calls, although the specific authority for the call may be cited therein.

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occurs, for all deliveries made during a billing period and for which payment has not been received. Such invoices need not be supported by copies of delivery tickets, or

(C) When billing procedures provide for an individual invoice for each delivery, these invoices shall be accumulated provided that: (i) a consolidated payment will be made for each specified period; and

(ii) the period of any discounts will commence on final date of billing period or on the date of receipt of invoices for all deliveries accepted during the billing period, whichever is later.

The provision in (C) above should not be used if the accumulation of the individual invoices by the Government materially increases the administrative costs of this purchase method.

(D) An invoice for subscriptions or other charges for newspapers, magazines, or other periodicals shall show the starting and ending dates and shall state either that orders have been placed in effect or will be placed in effect upon receipt of payment.

(viii) The special data required by 3-606.3(b) when it is desired to use the fast payment procedure. Also see Block 16 of DD Form 1155.

3-605.4 *Competition Under Blanket Purchase Agreement.* Calls against blanket purchase agreements shall be placed only after compliance with 3-604. When concurrent agreements for similar items are in effect, calls not in excess of \$1,000 shall be equitably distributed. In those instances where there are an insufficient number of BPAs for any given class of supplies or services to assure adequate competition, the individual placing the order shall solicit quotations from other sources.

3-605.5 *Calls Against Blanket Purchase Agreements.* Calls against blanket purchase agreements generally will be made orally, except that informal correspondence may be used when ordering against agreements outside the local trade area. Written calls may be executed on DD Form 1155. Documentation of calls shall be limited to essential information. Forms may be developed for this purpose locally.

3-605.6 *Receipt and Acceptance of Supplies or Services.* Acceptance of supplies or services shall be indicated by signature and date on the appropriate form by the authorized government representative after verification and notation of any exceptions. Use of the DD Form 250 Series, Material Inspection and Receiving Report (MIRR), shall be required by purchasing offices to document receipt and acceptance of supplies or services when the purchase is to be assigned to another activity for administration. A sales slip, delivery ticket, DD Form 1155 or DD Form 250 Series may be used for receipt and acceptance when purchases are retained for administration.

3-605.7 *Review Procedures.* The contracting officer or his designated representative shall review the blanket purchase agreement files at least semi-annually to assure that authorized procedures are being followed. When an activity ordering against a blanket purchase agreement does not come under the jurisdiction of the command of the contracting officer issuing the agreement, the com-

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(f) *Terms and Conditions.* Blanket purchase agreements shall contain the following provisions:

(i) *Description of agreement.*—a statement that the supplier shall furnish supplies or services, described therein in general terms, if and when requested by the contracting officer or his authorized representative during a specified period and within a stipulated aggregate amount, if any. Blanket purchase agreements may be limited to specific items or commodity groups or the scope of the agreement may encompass all items that the supplier is in a position to furnish.

(ii) *Extent of obligation.*—a statement that the Government is obligated only to the extent of authorized calls actually placed against the blanket purchase agreement.

(iii) *Pricing.*—a statement that the prices to the Government shall be as low as, or lower than those charged the supplier's most favored customer, in addition to any discounts for prompt payment.

(iv) *Call limitation.*—a statement that no individual call under the agreement shall exceed \$10,000 or such higher limitation set forth in 3-605.2.

(v) *Notice of individuals authorized to place calls and dollar limitations.*—a provision that a list of names of individuals authorized to place calls under the agreement, identified by organizational component, and the dollar limitation per call for each individual shall be furnished the supplier by the contracting officer.

(vi) *Delivery tickets.*—a requirement that all shipments under the agreement, except subscriptions and other charges for newspapers, magazines, or other periodicals shall be accompanied by delivery tickets or sales slips which shall contain the following minimum information—

- (A) name of supplier;
- (B) blanket purchase agreement number;
- (C) date of call;
- (D) call number;
- (E) itemized list of supplies or services furnished;
- (F) quantity, unit price, and extension of each item less applicable discounts (unit prices and extensions need not be shown when incompatible with the use of automated systems, provided that the invoice is itemized to show this information); and
- (G) date of delivery or shipment.

(vii) *Invoices.*—one of the following statements:

- (A) A summary invoice shall be submitted at least monthly or upon expiration of the blanket purchase agreement, whichever occurs first, for all deliveries made during a billing period, identifying the delivery tickets covered therein, stating their total dollar value, and supported by receipted copies of the delivery tickets; or

- (B) An itemized invoice shall be submitted at least monthly or upon expiration of the blanket purchase agreement, whichever first

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mand utilizing the blanket purchase agreement shall conduct the necessary review. In addition, the contracting office which entered into the blanket purchase agreement shall also review and update, as required, each blanket purchase agreement at least annually.

3-606 Fast Payment Procedure.

3-606.1 General. The fast payment procedure is designed to reduce lead time to consignees and to improve supplier relations by expediting payment for small purchases. The procedure provides for payment for supplies based on the contractor's submission of an invoice which constitutes a representation that the supplies have been delivered to a post office, common carrier or point of first receipt by the Government, and that the contractor agrees to replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to purchase agreements. Consignees shall notify the contracting office as soon as possible of supplies not received, damaged in transit, or not conforming to specifications of the purchase order.

3-606.2 Conditions for Use. When the conditions set forth below are present, the fast payment procedure should be used to the maximum extent possible, provided such use is consistent with the other conditions of the purchase. Use of the fast payment procedure would not be indicated, for example, in small purchases by posts, camps, and stations when material being purchased is destined for use at such activities and contract administration will be performed by the contracting office of such activities.

- (i) Individual orders do not exceed \$25,000, except that for purchases of (a) brand name commissary resale subsistence and (b) commercial type medical supplies for direct shipment overseas, the procedure may be used without limitation (see 7-104.84).
- (ii) Title to the supplies will vest in the Government (A) upon delivery to a post office or common carrier for mailing or shipment to destination, or (B) upon receipt by the Government when the shipment is by means other than the post office or common carrier.
- (iii) Supplier agrees to replace, repair, or correct supplies not received at destination, damaged in transit, or not conforming to purchase requirements.

3-606.3 Preparation and Execution of Orders.

(a) Orders shall be issued on Order for Supplies or Services/Request for Quotations (DD Form 1155), except that calls against blanket purchase agreements shall be issued in accordance with 3-605.5. Orders may be either priced or unpriced.

(b) Purchase orders or blanket purchase agreements using fast payment procedures shall include:

- (i) a requirement for the supplies to be shipped transportation or postage prepaid;
- (ii) a requirement that invoices be submitted direct to the finance or other office designated in the order, or in the case of unpriced purchase orders, to the contracting officer (see 3-608.3(c));
- (iii) the following statement on consignee's copy: *Consignee's Notification to Contracting Activity of Nonreceipt, Damage, or Nonconformance.* The consignee shall notify the contracting office promptly after specified date of delivery in the purchase order, of supplies not

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received, damaged in transit, or not conforming to specifications of the purchase order. Unless extenuating circumstances exist, such notification should be made not later than 60 days after specified date of delivery.

- (iv) when DD Form 1155 is not used, the clause in 7-104.84(a);
- (v) a requirement that outer shipping containers shall be marked "FAST PAY."

3-606.4 Responsibility for Collection of Debts. The contracting officer shall be primarily responsible for collecting debts resulting from failure of contractors to properly replace, repair, or correct supplies lost, damaged, or not conforming to purchase requirements (see E-602 and E-603).

3-607 Imprest Fund Method.

3-607.1 General. An imprest fund is a cash fund of a fixed amount established through an advance of funds, without appropriation charge, to an authorized imprest fund cashier to effect immediate cash payments of relatively small amounts for authorized purchases of supplies and nonpersonal services.

3-607.2 Establishment of Imprest Funds.

(a) Authority. Commanders of installations and of activities with purchasing authority are authorized to approve the establishment of imprest funds. The number of imprest funds at an installation shall be kept to a minimum and one imprest fund should be sufficient in most instances. Exceptions to this general rule may be justified for isolated activities when the location of the established fund is not readily accessible.

(b) Amount of Imprest Funds. The amount of each fund shall be established on the basis of the estimated monthly payments therefrom and the need for replenishment without undue administrative burden, but shall not exceed \$5,000. A review shall be made at least quarterly to insure that the fund is not in excess of actual needs, and necessary adjustments shall be made.

(c) Imprest Fund Cashiers.

(1) Imprest fund cashiers must be appointed by the head of an installation or activity to make authorized cash payments for materials and nonpersonal services, maintain custody of funds, and file periodic vouchers to account for and replenish the imprest fund. An imprest fund cashier should be established at a convenient location on the installation or activity for the purpose of making payments to vendors or carriers, e.g., in "Central Receiving." Disbursing officers and individuals responsible for originating, approving, and processing requirements are not eligible for appointment as imprest fund cashiers. Exceptions to this rule may be granted by the major headquarters exercising control over the installation or activity. In no event shall an imprest fund cashier have access to or control of more than one imprest fund.

(2) Each appointment and termination of appointment shall be approved by the head of the installation or activity. After approval, administrative orders signed by the appropriate authority shall be issued. Appointment orders shall contain the following:

- (i) name of individual and duty station;
- (ii) identification of disbursing station for which the cashier will act, including the accounting number assigned thereto;
- (iii) specific duties to be performed;

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of paid reimbursement vouchers ordinarily will suffice for the records of the imprest fund cashier.

(j) *Review.* The imprest fund cashier shall be required to account for the established fund at any time, by cash on hand, paid suppliers' receipts, unpaid reimbursement vouchers, and interim receipts for cash. Unannounced inspections, including cash counts are required to be made of each imprest fund at least quarterly by qualified individuals who are under the jurisdiction of the Comptroller or Chief Accounting Officer of the installation, where such positions exist, but in any case by individuals, excluding the disbursing officer advancing the funds and subordinates of the imprest fund cashier.

3-608 Purchase Orders.

3-608.1 General.

(a) Negotiated purchases of supplies, nonpersonal services and construction not in excess of \$25,000 may be effected by using DD Form 1155 (*Order for Supplies or Services/Request for Quotations*) and its ancillary forms (for construction see also 16-402.2); Standard Form 44 (*Purchase Order - Invoice Voucher*) may also be used for material and nonpersonal services not in excess of \$2,500.

(b) The DD Form 1155 provides for the arrangement of information in fixed locations, including sequential numbering of all blocks, and within certain of these blocks a code box for inserting alpha-numeric codes. The uniform arrangement of data and the provision for codes will facilitate manual and automated processing of contractual documents and interchange of information between purchasing offices and contract administration activities.

3-608.2 *Order for Supplies or Services Request for Quotations (DD Forms 1155, 1155r, 1155r-1; Standard Form 36; DD Form 1155c-1 and Standard Form 30).*

(a) *Forms.* The following forms may be used to issue purchase orders:

- (i) DD Form 1155 (*Order for Supplies or Services/Request for Quotations*) which when used with DD Form 1155r in accordance with 3-608.2(b)(1) or with DD Form 1155r-1 in accordance with 3-608.2(b)(2) as appropriate, provides in one document—
 - (A) a purchase order, a blanket purchase agreement, a delivery order under a contract, or delivery order on Government agencies outside the Department of Defense (see Section V);
 - (B) a receiving and inspection report;
 - (C) a property voucher;
 - (D) a public voucher; and
 - (E) a document for acceptance by the supplier.

(ii) Standard Form 36 (*Continuation Sheet*) provides additional space or a blank sheet of paper may be used.

(iii) DD Form 1155c-1 (*Commissary Continuation Sheet*) (for use on optional basis), provides columns suited for commissary procurement; and

(iv) Standard Form 30 (*Amendment of Solicitation/Modification of Contract*) shall be used in all modifications to DD Form 1155 (see 3-608.4).

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The foregoing forms may be used as snap-out manifold forms, as cut sheets, or as reproducible masters. In addition, DD Form 1155r or DD Form 1155r-1 may be printed on the reverse of DD Form 1155.

(b) *Conditions for Use.*

(1) *Use as a Purchase Order of Not More Than \$25,000 in the United States, its Possessions, and Puerto Rico.* The United States, when used in a geographical sense, means the States and the District of Columbia. Possessions, in a geographical sense, include the Virgin Islands, the Swan Islands, Guantanamo Bay, Johnston Island, American Samoa, Guam, Wake Island, Midway Island, and the Guano Islands, but do not include Puerto Rico, leased bases, or trust territories. Definitions of the United States, in a contractual sense, vary according to individual laws, orders or regulations. Applicability is specified in the various DAG sections. DD Form 1155 is authorized for negotiated purchases of not more than \$25,000 within the United States, its possessions, and Puerto Rico, provided:

(i) The procurement is unclassified, except that DD Form 1155 may be used for classified procurements if:

(A) the Military Security Requirements clause in 7-104.12 is inserted in the Schedule;

(B) DD Form 254 (*Contract Security Classification Specification*) (see 16-811) is incorporated in the purchase order; and

(C) the contractor's acceptance of the purchase order is obtained by use of DD Form 1155r at the time of issuance of the order.

(ii) No clause covering the subject matter of any clause set forth in this Regulation, other than clauses on DD Form 1155r (see also 16-303) and clauses referred to in this paragraph (3-608.2(b)(1)) and in 3-608.3 (*Unpriced Purchase Order*), 3-608.4 (*Obtaining Contractor Acceptance and Modifying the Purchase Order*), 14-302 (*Standard Inspection Clauses*), 14-303 (*Inspection System Requirements*), 14-304 (*Quality Program Requirements*), and 14-306(c) (*Acceptance of Supplies or Services*) is to be used.

(iii) When the order specifies the delivery of data, one of the clauses in 7-104.9, *Rights in Data and Computer Software*, shall be added as appropriate in accordance with the instructions contained in Section IX, Part 2.

(iv) When required by Section VI, Part 4, the clause, *Certain Communist Areas*, in 7-103.15 shall be used.

(v) When required by 1-325, the clause in 7-103.4(b), *Extent of Quantity Variation*, shall be added.

(vi) Reserved.

(vii) When the order is assigned to other than the purchasing office for administration, or if otherwise desired by the purchasing office, the clause, *Material Inspection and Receiving Report*, in 7-104.62 shall be used.

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(vii) When Government property having an acquisition cost in excess of \$50,000 is to be furnished (for use in performance of an order or for repair), the appropriate Government Property clause or clauses in 7-104.24 shall be inserted in the Schedule. When Government property having an acquisition cost not in excess of \$50,000 is to be furnished for use in performance of the order or for repair, the Government-Furnished Property (Short Form) clause in 7-104.24(f) shall be inserted in the Schedule; provided that use of the clause shall be optional when the acquisition cost of property furnished for repair is not in excess of \$10,000. When a Government Property clause is inserted in the Schedule, the contractor's signature shall be obtained on the DD Form 1155r.

(vi) When the order is for Military Assistance Program items, the United States Products Certificate (Military Assistance Program) at 7-2003.50 and the clause, United States Products (Military Assistance Program), in 7-2003.51, shall be inserted in the Schedule, and Clause 6 (Foreign Supplies) of the General Provisions shall be deleted. In addition, the contractor's signature shall be obtained on DD Form 1155r.

(xi) Reserved.

(xii) The clauses, *New Material*, 7-104.48, and *Government Surplus*, 7-104.49, may be used in accordance with the provisions of 1-1208.

(xiii) When the order is for mortuary services—

(A) the following clauses shall be inserted in the Schedule:

(i) the Specifications clause in 7-1201.4;

(ii) the Delivery and Performance clause in 7-1201.7;

(iii) the Subcontracting clause in 7-1201.8;

(iv) the Inspection of Services clause in 7-1902.4;

(v) the Professional Requirements clause in 7-1201.11;

(vi) the Facility Requirements clause in 7-1201.12; and

(vii) the Preparation History clause in 7-1201.13;

(B) the Additional Default Provision clause in 7-1201.9 shall be inserted in the Schedule, with the following substitution for paragraph (a) and the first sentence of paragraph (b) of that clause:

(a) This clause supplements the "Termination for Default" clause of this contract.

(b) This contract may be terminated for default by written notice if during the performance of this contract:

(C) The Changes clause in 7-1902.2 shall be substituted for paragraph 16 of the Additional General Provisions on DD Form 1155r.

(xiii) Reserved.

(xiv) When required by Section VI, Part 3, the clauses, *Preference for Certain Domestic Commodities*, in 7-104.13; *Preference for Domestic Specialty Metals (Major Programs)*, in 7-104.93(a); and *Preference for Domestic Specialty Metals*, in 7-104.93(b), shall be added.

(xv) When required by Section XII, Part 10, the clause, *Services Contract Act of 1965, as Amended*, at 7-1903.41(a) for service contracts in excess of \$2,500, or 7-1903.41(b) for service contracts not in excess of \$2,500, shall be added.

(xvi) When required by 19-213.2, the clause, *Shipments to Ports—Clearance and Documentation Requirements*, at 7-104.74 shall be added.

(xvii) In accordance with 1-130, the clause in 7-104.45(a), *Limitation of Liability*, or 7-1912, *Limitation of Liability—Services Contract*, may be inserted.

(xviii) When the order requires the use of a Government bill of lading or mailing indicia, the clause, *F.O.B.—Government Bills of Lading and Prepaid Postage*, at 7-104.85 shall be added.

(xix) Reserved.

(xx) Reserved.

(xxi) At the contracting officer's discretion, the clause, *Duty-Free Entry—Qualifying Country End Products and Supplies*, at 7-104.32 may be used. (See 6-104.5 and 6-803.3(c).)

(xxii) When required by 12-302, the *Contract Work Hours and Safety Standards Act—Overtime Compensation* clause in 7-103.16(a) shall be added.

(xxiii) Reserved.

(xxiv) Reserved.

(xxv) When required by 1-706.5, the *Notice of Total Small Business Set-Aside* clause in 7-2003.2 shall be added.

(xxvi) The changes authorized by 16-402.2 shall be incorporated when construction procurements are negotiated in accordance with 18-302.

(xxvii) When required by 19-208.3(a), the clause, *FOB Destination*, in 7-104.71, and the clause, *FOB Destination—Evidence of Shipment*, in 7-104.76 shall be added.

(xxviii) When required by 1-2207.3(c)(1)(iii), the clause, *Required Sources for Miniature and Instrument Ball Bearings*, in 7-104.38 shall be added.

(xxix) When required by 1-2207.4(c)(1)(iii), the clause, *Required Sources for Precision Components for Mechanical Time Devices*, in 7-104.46 shall be added.

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- (xxx) In accordance with 6-1312, all orders for the purchase of goods or services for Military Assistance Programs (MAP), International Military Educational Training (INET) and Foreign Military Sales (FMS) shall include the clause, *Exclusionary Policies and Practices of Foreign Governments*, in 7-104.97.
- (xxxi) As required by 12-1302(a), insert the clause, *Affirmative Action for Handicapped Workers*, in 7-103.28.
- (xxxii) If the order is to involve materials of a hazardous nature, include the clause, *Hazardous Material Identification and Material Safety Data*, in 7-104.98, as prescribed by 1-323.2.
- (xxxiii) When the order involves the purchase of gas in contractor-furnished returnable cylinders and the contractor retains title to the cylinders, the clause in 7-104.60, *Returnable Gas Cylinders*, shall be added. A similar clause may also be used in orders for other supplies involving reels, spools, drums, carboys, liquid petroleum gas containers, or other reusable containers, when the contractor is to retain title to the containers.
- (xxxiv) In orders, except those exempted by 12-808(b) - (f), insert the applicable *Equal Opportunity* clause in 7-103.18(a) or (b).
- (xxxv) When the purchase order includes FMS requirements, clearly indicate "FMS Requirement" on its face and specify within the order each FMS case identifier code by line/subline item number, e.g., FMS Case Identifier GY-D-BCA.
- (xxxvi) The clause, *Delivery of Excess Quantities of \$100 or Less*, in 7-104.103, may be used in accordance with instructions therein.
- (xxxvii) For orders requiring payment in Canadian currency, the contract price shall be quoted in terms of Canadian dollars and shall be identified by the initials CN: e.g., \$1,647.23CN. The contract shall clearly indicate on its face the US/Canadian conversion rate in effect at the time of award and the US dollar equivalent of the Canadian dollar contract amount.
- (xxxviii) The *Whick-Realey Public Contracts Act* clause in 7-103.17 shall be used in each order for supplies that exceeds \$10,000 and is otherwise subject to the act, in accordance with 12-602.
- (xxxix) Unless exempted under 12-402, the clause in 7-103.27, *Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era*, shall be in all orders of \$10,000 or more.

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- (xli) The clause, *Utilization of Small Business and Small Disadvantaged Business Concerns*, in 7-104.14(a), shall be in all orders exceeding \$10,000 except those which will be performed entirely outside the United States, the District of Columbia, or the Commonwealth of Puerto Rico, or for orders which are for services personal in nature.
- (xlii) Reserved.
- (xliii) The clause, *Affirmative Action Compliance Requirements for Construction*, in 7-603.60 shall be inserted in orders exceeding \$10,000 in accordance with 12-807.1, unless exempted under 12-808.
- (xliv) The *Equal Opportunity* clause in 7-607.13 shall be included in architect-engineer contracts and is applicable to contractors who have been or are awarded Federal contracts and/or subcontracts which have an aggregate value in excess of \$10,000. The clause is also applicable unless exempted under the rules, regulations and relevant orders of the Secretary of Labor (41 CFR, ch. 60).
- (xlv) Unless exempted by 12-805, the clause, *Certification of Nonsegregated Facilities*, in 7-2003.14(b)(1)(A) shall be inserted in orders exceeding \$10,000 and is applicable to orders, subcontracts and agreements with applicants who are themselves performing Federally assisted construction contracts exceeding \$10,000 which are not exempt from the provisions of the *Equal Opportunity* clause.
- (xlv) The clause, *Previous Contracts and Compliance Reports*, in 7-2003.14(b)(1)(B) shall be inserted in all contracts that exceed \$10,000.
- (xlvii) Except for construction orders, the clause, *Affirmative Action Compliance*, in 7-2003.14(b)(2) shall be inserted in all contracts that include the *Equal Opportunity* clause.
- (xlviii) Unless exempted by 12-808, the clause, *Notification of Visa Denial*, at 7-2003.14(c) shall be included in all orders to be performed in or on behalf of a foreign country.
- (xlviii) In accordance with 12-807.1, insert the clause, *Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity*, in 7-2003.14(d), in applicable solicitations involving construction in excess of \$10,000. Follow the provision's parenthetical instructions for inserting the applicable construction trade(s), percentage goals, and geographical description of the covered area.
- (xlix) In accordance with 1-702(c), insert the clause, *Notice of Small Business-Set-Aside*, in 7-2003.32 in all requests for quotations and purchase orders of \$10,000 or less, which are subject to small purchase procedures, unless exempted under 3-603.1(g).

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(2) Use as a Purchase Order of Not More than \$25,000 Outside the United States, its Possessions, and Puerto Rico. DD Form 1155 and 1155r-1, with executed contractor's acceptance when required, are authorized for negotiated purchases of not more than \$25,000 when such purchases are for supplies and services procured and used outside the United States, its possessions, and Puerto Rico, provided:

- (i) the procurement is unclassified;
- (ii) no clauses covering the subject matter of any clause set forth in this Regulation, other than clauses set forth in DD Form 1155r-1, are to be used, except that—
 - (A) either the standard foreign Disputes clauses in 7-103.12(b) or that clause as modified in accordance with 7-103.12(c) shall be inserted in the Schedule;
 - (B) When the order is translated into another language, the Schedule shall contain the provision in 7-2003.44;
 - (C) When Government property having acquisition cost in excess of \$50,000 is to be furnished (for use in performance of an order or for repair), the Government Property clause in 7-104.24(a) shall be inserted in the Schedule in accordance with instructions in 7-104.24(b). When Government property having an acquisition cost not in excess of \$50,000 is to be furnished for use in performance of the order or for repair, the Government-Furnished Property (Short Form) clause in 7-104.24(f) shall be inserted in the Schedule in accordance with instructions in that paragraph; provided that use of the clause shall be optional when the acquisition cost of property furnished for repair is not in excess of \$10,000. When a Government Property clause is inserted in the Schedule, the contractor's signature shall be obtained on DD Form 1155r-1.

(D) A commercial warranty clause may be used in accordance with 1-324.4.

(E) When required by Section VI, Part 3, one of the clauses in 7-104.13, *Preference for Certain Domestic Commodities*; or 7-104.93(a), *Preference for Domestic Specialty Metals (Major Programs)*; or 7-104.93(b), *Preference for Domestic Specialty Metals*, shall be added. In purchases in excess of \$2,500, the clause, *Certain Communist Areas*, in 7-103.15, shall be inserted in the Schedule when acceptance of supplies, services, or construction is to take place outside the United States, its possessions, or Puerto Rico. DAR 6-402 provides that supplies from the Communist areas of North Korea, Vietnam, or Cuba may be acquired only in unusual situations; for example, in an emergency or when supplies are not available from any other source and a substitute supply is not acceptable. In such situations, the contracting officer shall determine for small purchases that there is need for an exception in accordance with Departmental procedures.

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(F) The clause, *Delivery of Excess Quantities of \$100 or Less*, in 7-104.103, may be used in accordance with instructions therein.

(G) Unless exempted by 12-808, the clause, *Notification of Visa Denial*, at 7-2003.14(c), shall be included in all orders to be performed in or on behalf of a foreign country.

(H) In accordance with 6-804, the statement in 7-104.58(c), to provide reporting of the balance of payments consequences of defense procurement, will be placed on the face of applicable purchase orders.

The contracting officer may delete the Taxes clause from the DD Form 1155r-1 in purchases under \$1,000 if he determines that the administrative burden of securing relief from such taxes would be out of proportion to the relief obtained, provided, that such clause shall be included in all orders in support of NATO infrastructure programs involving the expenditures of funds under Section 503(b) of the Foreign Military Sales Act of 1968. (See 11-403.1(a) on use of foreign taxes clauses.)

(c) Solicitation and Evaluation of Quotations.

(1) General. In using the purchase order method, competition shall be solicited in accordance with 3-604, and every effort shall be made to obtain prompt payment discounts. Written quotations may be solicited by Standard Form 18 (Request for Quotation), DD Form 1155 (Order for Supplies or Services/Request for Quotation), approved automated format, or teletype. When using the DD Form 1155 as a request for quotation, see 3-608.8 for guidance on specific entries required in certain blocks. When using a teletype as a request for quotation, general provisions applicable to the solicitation shall be incorporated by reference.

(2) Evaluation of Quotations. Quotations shall be evaluated inclusive of transportation charges from the shipping point of the supplier to the delivery destination. For orders exceeding \$1,000, oral quotations shall be recorded directly on the purchase request, on an abstract sheet, or other appropriate work sheet. Except as provided under the unpriced purchase order method, quotations that are indefinite as to price or based on economic price adjustment or redetermination shall not be considered for award by the purchase order method.

(d) Preparation and Issuance of Priced Purchase Orders. All applicable blocks and spaces shall be completed with the required data pursuant to 3-608.8, including the following policy guidance:

(i) Supplies to be purchased will be identified in accordance with Section I, Part 12.

(ii) The quantity of supplies or services shall be specified. For bulk quantity items and those subject to shrinkage, evaporation, miscount, weight or footage variance, etc., a maximum allowable variation (normally not in excess of 10%) shall be specified in the order so that shipments in excess of the order quantity may be accepted if the reason for such excess comes within the Variation in Quantity clause of the order and the aggregate amount of the order does not exceed authorized limitations. The clause set forth in 1-325 will be used to express the permissible variation in quantity.

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- (iii) Purchase orders shall be issued on a fixed-price basis, except as otherwise provided under 3-608.3 and shall include any trade discounts and offered prompt payment discounts.
- (iv) Inspection of small purchase shall be in accordance with 14-308. Orders generally will provide that inspection and acceptance will be at destination and source inspection should be specified only when required by 14-308.2(c). When inspection and acceptance are to be performed at destination, advance copies of the purchase order shall be furnished to consignee(s) for material receipt purposes. Receiving reports shall be accomplished immediately upon receipt and acceptance of material to assure expeditious payment of orders and to obtain prompt payment discounts, except where the fast payment procedure is authorized.
- (v) F.O.B. destination shall be specified for supplies to be delivered within the United States, except Alaska and Hawaii, unless there are valid reasons to the contrary.
- (vi) The block "Deliver to F.O.B. Point BY" shall contain a definite calendar date by which delivery of supplies or performance of services is required.
- (vii) The contracting officer's signature on purchase orders shall be in accordance with 20-101. Facsimile signatures may be used in the production of purchase orders by automated methods.
- (viii) Distribution of copies of purchase orders and related forms shall be limited to those copies required for essential administration and transmission of contractual information.
- (ix) Purchase orders for subscriptions or other charges for newspapers, magazines or other periodicals, or for other publications, for which advance payment is authorized shall contain the provision in 7-2003.45.

3-608.3 Unpriced Purchase Order.

- (a) An unpriced purchase order is an order for supplies or services the price of which is not established at the time of issuance of the order. Contracting officers shall assure that suppliers receiving unpriced purchase orders are carefully selected.
- (b) An unpriced purchase order may be used only when all of the following conditions are present:
 - (i) the transaction will not exceed \$25,000;
 - (ii) it is impractical to obtain pricing in advance of issuance of the purchase order; and
 - (iii) the procurement is for:
 - (A) repairs to equipment requiring disassembly to determine the nature and extent of such repairs;
 - (B) sole source material for which cost cannot be readily established; or
 - (C) supplies or services where prices are known to be competitive but exact prices are not known.
- (c) Unpriced purchase orders may be issued by using DD Form 1155 or written telecommunications media (see 3-608.10). A realistic monetary limitation, either for each line item or for the total order, shall be placed on the unpriced purchase order which shall be an obligation subject to adjustment when the firm

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price is established. Each unpriced purchase order shall contain the provision in 7-2003.46. The contracting officer or his designated representative shall review the invoice price and, if reasonable (see 3-604.2(b)), process it for payment. Controls of outstanding unpriced purchase orders shall be maintained to assure regular followup with suppliers until the order is priced.

3-608.4 *Obtaining Contractor Acceptance and Modifying the Purchase Order.*
(a) When it is desired to consummate a binding contract between the parties before the contractor undertakes performance, the contracting officer shall mark in Block 16 on the DD Form 1155 the box requiring acceptance by the contractor.

(b) Standard Form 30 shall be used to modify the purchase order for administrative or other changes.

(i) Modifications making administrative changes such as the correction of typographical errors, changes in paying office and changes in accounting and appropriation data do not require contractor acceptance. In addition, the issuance of no cost Amended Shipping Instructions (ASIs) which modify unilateral purchase orders and which have been concurred in by the contractor by telephone or letter do not require contractor acceptance by signature on the Standard Form 30.

(ii) To otherwise modify the purchase order, and if not previously included in the purchase order, the Additional General Provisions (Clauses 16-19 of DD Form 1155r) shall be incorporated by reference in the Standard Form 30 (Amendment of Solicitation/Modification of Contract), and the contractor acceptance obtained by his signature on the Standard Form 30. Subsequent changes pursuant to the Changes clause shall not require contractor acceptance. However, other modifications outside the scope of the Changes clause, such as the addition of the Government Property Clause, shall require contractor acceptance by signature on the Standard Form 30.

(c) No additional clauses are authorized except as provided in 3-608.2(b) above. A superseding DD Form 1155 shall not be used to issue a change to an outstanding purchase order.

3-608.5 *Termination of Purchase Order.* A purchase order which has not been accepted in writing by the contractor may be withdrawn or canceled by the contracting officer any time prior to the supplier's initiation of performance. Notice of withdrawal or cancellation should be in writing and should request the contractor's acknowledgment thereof. If the contractor has begun performance on such purchase order, however, or if the contractor has accepted the purchase order in writing other than by signature on the DD Form 1155r or on a subsequently issued Standard Form 30, and it later becomes necessary to terminate the purchase order, the contractor should be asked to agree to cancellation of the order without cost or liability to either party. If he agrees, the cancellation shall be effected by use of Standard Form 30, incorporating the Additional General Provisions (DD Form 1155r), signed by the contracting officer and the contractor. If the contractor does not agree to a no-cost settlement, the case will be

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referred to the legal office serving the installation and action will be withheld pending receipt of advice from that office. Termination of a purchase order which the contractor has accepted in writing by means of the Contractor Acceptance on DD Form 1155r, or a subsequently issued Standard Form 30 will be processed in accordance with the guidance set forth in Section VIII of this Regulation.

3-608.6 Use of DD Form 1155 as a Delivery Order.

(a) Except as to specialized procurements for which other instructions are given by this Regulation (as for example, where utility purchases are procured under General Services Administration area contracts, as provided in Section V, Part 8), DD Form 1155 shall be used without monetary limitation as a delivery order for ordering supplies and services:

- (i) under indefinite delivery type contracts (see 3-409) including such contracts made by Government agencies outside the Department of Defense; provided, (A) the order is issued in accordance with, and subject to the terms and conditions of such contract, and (B) the order refers to the particular contract involved;
- (ii) from Government agencies outside the Department of Defense; and
- (iii) from designated Agencies for the Blind and Other Severely Handicapped in accordance with 5-504.1(c).

(b) All delivery orders shall contain the typewritten name of the contracting officer or ordering officer and the original thereof shall be manually signed; when reproducible masters are used, only the masters need be manually signed; when interreared carbon forms are used, manual signature on the original shall suffice. Facsimile signatures may be used in the production of delivery orders by automated methods.

(c) Duplication of the DD Form 1155r or DD Form 1155r-1 is not required when DD Form 1155 is used as a delivery order.

(d) Within the monetary limitations of 3-605.2, the DD Form 1155 may be used to order against a blanket purchase agreement.

(e) If the delivery order includes FMS requirements, clearly indicate "FMS Requirement" on its face and specify within the order each FMS case identifier code by line/subline item number. e.g., FMS Case Identifier GT-D-CA.

3-608.7 Use of DD Form 1155 as a Public Voucher. DD Form 1155 is authorized for use as a public voucher:

- (i) not exceeding \$25,000 when the form is used as a purchase order under 3-608.2(b)(1) above.
- (ii) without monetary limitation when the form is used as a delivery order, and
- (iii) without monetary limitation as the basis for payment of an invoice against blanket purchase agreements, or basic ordering agreements when a firm price has been established.

3-608.8 Instructions for Entries on DD Form 1155 and Standard Form 36.

(a) The instructions herein are mandatory for the preparation of orders if administration is assigned: (i) to DCAS, or (ii) to a non-DCAS office listed in the DoD Directory of Contract Administration Services components and the contractor is located in the continental United States or Canada.

(b) The organizational entity codes (address codes) referenced throughout 3-608.8 are as follows:

(i) Codes published in DoD Activity Address Directory (DODAAD), DoD 4000.25D. These codes will be used for Government entities in Blocks 6, 7, 9, 14,

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3-802.2 Selection of Prospective Sources. Selection of qualified sources for solicitation of proposals is basic to sound pricing. Proposals should be solicited from a sufficient number of competent potential sources to insure adequate competition. (See 1-302, 1-702, 1-902, 3-101, 3-104, 3-105, 4-106.1 and 12-102.) The bidder mailing lists prescribed by 3-503 should be used when appropriate.

3-803 Type of Contract.

(a) The selection of an appropriate contract type and the negotiation of prices are related and should be considered together. Some of the factors for this joint consideration are listed in 3-401 and 3-402. The objective is to negotiate a contract type and price that includes reasonable contractor risk and provides the contractor with the greatest incentive for efficient and economical performance. When negotiations indicate the need for using other than a firm fixed-price contract, there should be compatibility between the type of contract selected and the contractor's accounting system.

(b) In the course of a procurement program, a series of contracts, or a single contract running for a lengthy term, the circumstances which make for selection of a given type of contract at the outset will frequently change so as to make a different type more appropriate during later periods. In particular, the repetitive or unduly protracted use of a cost-reimbursement type or time and materials contract is to be avoided where experience has provided a basis for firm pricing which will promote efficient performance and will place a more reasonable degree of risk on the contractor. Thus, in the case of a time and materials contract, continuing consideration should be given to converting to another type of contract as early in the performance period as practicable.

(c) In selecting the contractor for a cost-reimbursement type contract, estimated costs of contract performance and proposed fees should not be considered as controlling, since in this type of contract advance estimates of cost may not provide valid indicators of final actual costs. There is no requirement that cost-reimbursement type contracts be awarded on the basis of either (i) the lowest proposed cost, (ii) the lowest proposed fee, or (iii) the lowest total estimated cost plus proposed fee. The award of cost-reimbursement type contracts primarily on the basis of estimated costs may encourage the submission of unrealistically low estimates and increase the likelihood of cost overruns. The cost estimate is important to determine the prospective contractor's understanding of the project and ability to organize and perform the contract. The agreed fee must be within the limits prescribed by law and appropriate to the work to be performed (see 3-808). Beyond this, however, the primary consideration in determining to whom the award shall be made is which offeror can perform the contract in a manner most advantageous to the Government.

3-804 Reserved.

3-805 Written and Oral Discussions.

3-805.1 General. Written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, except that this requirement need not be applied to procurements:

- (i) of \$25,000 or less;
- (ii) in which prices or rates are fixed by law or regulation;
- (iii) in which date of delivery will not permit discussion;

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- (iv) of the set-aside portion of partial set-aside or by small business restricted advertising; or
- (v) in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price, provided however that the solicitation notified all offerors of the possibility that award might be made without discussion, and provided that such award is in fact made without any written or oral discussion with any offeror.

3-805.2 Competitive Range.

(a) The determination as to which proposals are in a competitive range shall be made by the contracting officer. The competitive range shall be determined on the basis of price or cost, technical and other salient factors and shall include all proposals which have a reasonable chance of being selected for award. When there is doubt as to whether a proposal is within the competitive range, that doubt shall be resolved by including it. The initial number of proposals considered as being within the competitive range may be reduced when, as a result of the written or oral discussions, any such proposal has been determined to no longer have a reasonable chance of being selected for award.

(b) No proposal from a responsible source offering an acceptable technical proposal shall be rejected for failure to fall within a competitive range unless such proposal includes a price proposal (except for procurement of architect-engineer services, see Section XVIII, Part 4). When unpriced technical proposals are solicited they shall be evaluated to determine those which are acceptable to the Government or which, after discussion, can be made acceptable. After necessary discussion of such technical proposals is completed, prices shall be solicited for all acceptable proposals.

3-805.3 Discussions With Offerors.

(a) All offerors selected to participate in discussions shall be advised of deficiencies in their proposals and shall be offered a reasonable opportunity to correct or resolve the deficiencies and to submit such price or cost, technical or other revisions to their proposals that may result from the discussions. A deficiency is defined as that part of an offeror's proposal which would not satisfy the Government's requirements.

(b) Discussions shall not disclose the strengths or weaknesses of competing offerors, or disclose any information from an offeror's proposal which would enable another offeror to improve his proposal as a result thereof.

(c) Auction techniques are strictly prohibited; an example would be indicating to an offeror a price which must be met to obtain further consideration, or informing him that his price is not low in relation to another offeror. On the other hand, it is permissible to inform an offeror that his price is considered by the Government to be too high.

(d) At the conclusion of discussions, a final, common cut-off date which allows a reasonable opportunity for submission of written "best and final" offers shall be established and all remaining participants so notified. If oral notification is given, it shall be confirmed in writing. The notification shall include informa-

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technical personnel, small business specialists, and contracting officers to obtain information and recommendations with respect to potential sources and to consider the desirability of seeking other sources by publication of proposed procurements, in addition to the synopsis requirement.

(b) In addition to (a) above, and where the procurement mission warrants it, Research and Development Bidders Mailing Lists will be established by purchasing activities in accordance with ASPR Supplement No. 4, "Procedures for Submission of Applications To Be Placed on Research and Development Bidders Mailing Lists."

4-104 Method of Contracting. In research and development procurements it is generally not possible to formulate precise specifications necessary for formal advertising and, therefore, negotiation is necessary. The inherent difficulties in obtaining research and development by formal advertising are recognized by the exception in 3-211. However, two-step formal advertising as stated in Section II, Part 5, may be useful, for example, in the case of an advanced developmental project. While the use of negotiation is the general rule for research and development contracts, this does not diminish the obligation to obtain competition to the maximum practicable extent. (See Section III, Parts 1 and 2.)

4-105 Statement of Work.

(a) The preparation and use of a clear and complete statement of work is essential to sound contracting for research and development. In research, exploratory development and advanced development, statements of work must be individually tailored by technical and contracting personnel to attain the desired degree of flexibility for contractor creativity, both in submitting proposals and in contract performance. Careful distinction must be drawn between level-of-effort work statements, which essentially require the furnishing of technical effort and a report on the results thereof, and task completion type work statements which often require development of tangible end items designed to meet specific performance characteristics.

(b) In preparing statements of work, the following elements shall be considered:

- (i) a general description of the required objectives and desired results;
- (ii) background information helpful to a clear understanding of the requirements and how they evolved;
- (iii) technical considerations, such as any known specific phenomena or techniques;
- (iv) a detailed description of the technical requirements and subordinate tasks; the emphasis shall be on achievement of performance, operational and support requirements, rather than specifying detailed procedures or methods of accomplishment;
- (v) a description of reporting requirements and any other deliverable items, such as data, experimental hardware, mock-ups, prototypes, etc.;
- (vi) design to cost requirements; and
- (vii) other special considerations.

4-106 Selection of Research and Development Contractors.

4-106.1 Selection of Sources.

(a) General. Through its research and development programs, the Department of Defense must seek the most advanced scientific knowledge attainable and the best possible equipment, weapons, and weapon systems that can be

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deviated and produced. This means two things. First, it means seeking the best scientific and technological sources consistent with the demands of the proposed procurement for the best mix of cost, performance and schedules. Second, it means unremitting efforts to increase the number of qualified sources, and to encourage participation by small business concerns, as well as others, in Defense research and development. Alternate proposals provide a means to accomplish the two actions above. See also 1-903.

(b) *Small Business Sources:*

(1) Contracting officers, technical personnel, and small business specialists shall cooperatively seek and develop information on the technical competence of small business concerns for research and development contracts. Small business specialists shall regularly bring to the attention of contracting officers and technical personnel descriptive data, brochures, and other information as to small business concerns that are apparently competent to perform research or development work in fields in which the purchasing activity is interested.

(2) In order to cooperate with the Small Business Administration in carrying out its responsibility of assisting small business concerns to obtain contracts for research and development, contracting officers, technical personnel and small business specialists shall, upon request, provide to authorized SBA representatives information necessary to understand the Government's needs concerning research and development programs under consideration for specific future procurement actions. Normally, this information shall be provided to SBA representatives assigned to a purchasing activity, as early as practicable, and shall cover the Government's requirements for each proposed research and development procurement exceeding \$25,000. To the maximum extent feasible, SBA shall be afforded a minimum of 15 working days to provide pertinent information concerning qualified potential small business sources developed through its investigation of the capabilities of specific firms in the particular field of research and development covered by such procurements. Full evaluation shall be given to any such information in selecting qualified sources. Sources recommended by SBA for a specific procurement shall be solicited. Exception to the policy of providing SBA a minimum 15 working day interval to recommend additional qualified small research and development sources for a proposed procurement will be permitted only in those cases where the head of the purchasing activity or his designated representative advises the SBA representative that such action would result in unjustifiable delay.

(c) *Recommendations by Technical Personnel:* Recommendations as to which potential sources are technically qualified shall be made by cognizant technical personnel after review of the information obtained as a result of advance publicity (see 4-103), and, as appropriate, on the basis of discussion with potential sources (either singly or in a group), correspondence or suitable surveys.

(d) *Research and Development Pools:* See 1-302.3.

4-106.2 *Solicitation.*

(a) To reduce the number of technical proposals, the preparation of which can be both costly and wasteful of scientific or engineering manpower, contracting officers should request proposals only from sources which have been technically evaluated and found qualified to perform research or development in the specific field of science or technology involved. Where several sources are found

fully qualified technically, proposals generally shall be solicited from each such source. Sources which become known as a result of synopses or other means of publicizing requirements shall be sent requests for proposals if such sources have been technically evaluated and determined reasonably qualified to perform, and possess the necessary security clearance. When a source not initially solicited requests a copy of a solicitation and such source has been technically evaluated within the past six months and determined not qualified, he may be so advised and his request denied. In the event such source has not been technically evaluated within the past six months a copy of the request for proposal shall be furnished but only after advice has been given to the source making the request as to the reasons for the limited solicitation and, as appropriate, the unlikelihood of any other source being able to qualify for a contract award under the circumstances. The formal solicitation process described above is not the only method of entering into contracts for research and development. The ongoing research and development work pursued in industrial laboratories is producing ideas and products of interest to the Government; this is especially true in the exploratory and advanced development segment of the research and development spectrum. In the R&D areas where there has been unique and significant industrial accomplishment by a specific concern, the establishment of specifications for solicitation of others may defeat the purpose of taking advantage of this industrial initiative. When a contractor has a new idea or product in the fields of exploratory development or advanced development there should be no hesitancy to discuss it with him, encourage him to submit a proposal, and to negotiate directly with him. Subject to 3-211, this can be done without a formal solicitation. Where there is no substantial question as to the choice of the source, as illustrated in (d) below solicitations may be limited to a single source.

(b) In soliciting proposals for the conduct of research and exploratory development, it may be desirable for the Government to furnish prospective contractors with certain information to elaborate on the proposed statement of work, permit optimum response by offerors, and allow more timely and comparable evaluation of proposals by the Government. This information normally should consist of the Government's estimate of the scientific and technical man-effort, or other reasonable indicators, it envisions when it is not possible to describe the magnitude of the proposed work to a sufficiently definitive degree. For example, the estimated effort may be expressed in terms of numbers of man-months or years in particular occupational categories. This technique may be appropriate in cases of contracts for research studies, investigations, or laboratory scale evaluations of feasibility where the Government desires to limit the scope of effort or depth of research. Where the degree of effort type of information is furnished, it should be made clear that such information is advisory only and is not cause for restricting what the contractor believes to be a meritorious technical proposal.

(c) In addition to (a) above, exploratory requests may be used to determine the existence of ideas or prior work in specific fields of research. However, the request for such information shall clearly state that it does not impose any obligation on the Government or signify a firm intention of the Government to enter into a contract.

(d) The following examples are illustrative of circumstances where there may be no substantial question as to choice of source:

- (i) As a result of thorough technical evaluation, only one source is found fully qualified to perform the proposed work.

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- (ii) The purpose of the contract is to explore an unsolicited proposal which offers significant scientific or technological promise, represents the product of original thinking, and was submitted in confidence by one source.
- (iii) Where the purpose of the contract is to take advantage of unique and significant industrial accomplishment by a specific concern, or to insure that a new product or idea of a specific concern is given financial support.
- (e) In all procurements of research or development in which no small business source was solicited for a proposal, a statement shall be included in the solicitation file setting forth the reasons for not soliciting small business.
- (f) Solicitations shall require offerors to identify technical uncertainties and to make specific proposals for their resolution.
- (g) Solicitation and evaluation of proposals should be planned to minimize offerors' and Government expense.
- (h) Solicitations shall provide offerors the opportunity to indicate the appropriate specifications and standards and to specify the way they will be applied and tailored to achieve the objectives, desired results and comply with the requirements stated in the solicitation.

4-106.3 Conduct of Discussions. See 3-805 and 4-107.

The contracting officer should make certain that each prospective contractor fully understands the details of the various phases of the Government's requirement, especially the statement of work. This may be best accomplished by conferences between a prospective contractor, the contracting officer, and appropriate technical personnel, particularly where there is doubt that a work statement is understood or will be interpreted correctly by prospective contractors.

4-106.4 Evaluation for Award

(a) Generally, research and development contracts should be awarded to those organizations, including educational organizations, which have the highest competence in the specific field of science or technology involved. However, awards should not be made for research or development capabilities that exceed those needed for the successful performance of the work.

(b) Before determining the technical competence of prospective contractors, and recommending to the contracting officer the concern or concerns that they consider most technically competent, cognizant technical personnel shall consider the following:

- (i) the contractor's understanding of the scope of the work as shown by the scientific or technical approach proposed;
- (ii) availability and competence of experienced engineering, scientific, or other technical personnel;
- (iii) availability, from any source, of necessary research, test, and production facilities;
- (iv) experience or pertinent novel ideas in the specific branch of science or technology involved; and
- (v) the contractor's willingness to devote his resources to the proposed work with appropriate diligence.

(c) In determining to whom the contract shall be awarded, the Contracting Officer shall consider not only technical competence, but also all other pertinent factors including management capabilities, cost controls, and past performance in

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Part 8—Paid Advertisements

4-800 Scope of Part. This Part sets forth procedures to be followed in placing paid advertising in media for (i) military and civilian personnel purposes, and (ii) proposed procurements.

4-801 Definitions. As used in this Part, the following terms have the meanings set forth below:

- (i) "media" means any vehicle used to convey an advertising message; it includes newspapers, magazines, trade and professional journals, special printed media, radio and television;
- (ii) "space" means the space purchased for advertising messages in printed media, and the time purchased for advertising messages on radio or television broadcasts;
- (iii) "advertisement" means any single message prepared for insertion in media, regardless of the number of insertions;
- (iv) "publication" means (A) the insertion of an advertisement in a newspaper, magazine, trade or professional journal, or any other printed media; or (B) the broadcasting of an advertisement over radio or television; and
- (v) "newspaper" means a publication printed and distributed at stated intervals to convey news and includes trade journals which carry news in addition to technical matter.

4-802 Authority and Delegation To Place Advertisements.

4-802.1 Authority and Delegation. Authority to approve the publication of paid advertisements in newspapers is vested by statute (44 U.S.C. 3702) in the Secretary of each Department. This authority may be delegated by the Secretary in writing, by position designation, to subordinates within his Department. The delegation shall specify the limitations, if any, of the authority granted. Administrative duties involved in accomplishing the advertising may be delegated in writing, personally signed by the delegate, setting forth the extent of the administrative duties involved. A copy of the instrument delegating authority to advertise and a copy of the instrument assigning administrative duties thereunder will either be attached to the first voucher submitted for payment or shall be forwarded immediately upon issuance to the General Accounting Office address to which records of the Department are submitted for audit purposes. When authority to advertise has been delegated by the Secretary of the Department concerned, a reference to the authorizing directive on the advertisement order is acceptable in lieu of attaching a copy of the authority to the payment voucher. Copies of such instruments also shall be attached to the duplicate voucher submitted to the paying office pursuant to 4-803.5.

4-802.2 Request for Authority To Place Advertisements.

(a) Special or general authority to place advertisements in newspapers must be secured in advance by the use of DD Form 1535, Request/Approval for Authority To Advertise (see 16-504). Special authority permits the publication of a given advertisement a specified number of times in designated newspapers. General authority permits the publication of such advertisements during a designated fiscal year as may be required.

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(b) Requests for authority to place advertisements in newspapers shall be submitted through channels to the Secretary or his designee.

(c) Unless the Secretary of the Department concerned determines otherwise, DD Form 1535 is not required as authority to place advertisements in media other than newspapers.

4-803 Procedures.

4-803.1 *General.* Orders for paid advertisements may be placed either directly with the media or through an advertising agency (see 4-803.6).

4-803.2 *Rates.* Advertisements may be paid for at rates not to exceed the commercial rates charged to private individuals, with the usual discounts.

4-803.3 *Forms.* Orders placed directly with the media shall be issued on DD Form 1155, Order for Supplies or Services/Request for Quotations, if not in excess of \$25,000; and on Standard Form 26, Award/Contract, if over that amount. Orders placed through an advertising agency under a basic ordering agreement shall be issued on DD Form 1155 regardless of amount. If for advertisements in newspapers, the date and number of the instrument of delegation or of assignment shall be put in Block 19 of DD Form 1155 or Block 16 of Standard Form 26; such information may be included for advertisements in other media.

4-803.4 *Proof of Publication.* Every invoice for official advertising shall be accompanied with a copy of the publication or advertisement (known as a "tear sheet") or an affidavit of publication made and furnished by the printer or publisher, by the radio or television station broadcasting the advertisement, or by the advertising agency concerned. Tear sheets or affidavits submitted as proof of publication shall be retained in the paying officer's files until settlement of his account by the General Accounting Office, after which they may be disposed of.

4-803.5 *Payment.* Upon receipt of the invoice, supported by a tear sheet or an affidavit of publication from the media or the advertising agency concerned, the officer placing the advertisement shall attach appropriate supporting documents, sign the certificate in Block 36 of DD Form 1155; or for orders over \$25,000 (other than under a basic ordering agreement), make a similar certification on the second copy of the invoice; and submit the invoice in quadruplicate to the proper paying office for payment.

4-803.6 Placing Advertising Through Advertising Agencies.

(a) *General.* Basic ordering agreements may be entered into with advertising agencies to provide professional advertising services. The use of an advertising agency to assist in producing and placing effective advertisements may be advisable when a significant number of advertisements is to be placed in several publications and in national media.

(b) *Placing of Advertisements in Commissionable Media.* The services of advertising agencies in connection with the placing of advertisements in media often can be obtained at no additional cost to the Government over and above the space cost. This is because many media give advertising agencies a commission or discount (generally 15%) of the space cost, based on the standard card or other published rate. This commission or discount is not given to the Government. These services of the advertising agencies include but are not limited to

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Defense Agencies--

Director, Advance Research Projects Agency;
Director, Defense Nuclear Agency;
Director, Defense Communications Agency;
Director, Defense Intelligence Agency.

(2) For acquisitions estimated to exceed \$2 million in foreign cost--Secretary of the Department concerned, or the Under Secretary of Defense for Research and Engineering in the case of agencies set forth in (d)(1).

(e) Complete documentation justifying acquisitions under (a) and (c) above shall be prepared except for acquisitions made pursuant to (a)(ii) and (a)(vi). Such documentation shall be prepared by requiring activities, furnished in requests for determination submitted to the individuals listed in (b) and (d) above, and included in the contract file.

6-804 Identification of Expenditures in the United States. DoD balance of payment reporting instructions require the reporting of the amount of acquisitions of U.S. end products and services accomplished under these regulations. The following provisions are designed to facilitate such reporting by cognizant accounting and disbursing officers. It is essential in implementing these provisions that there be appropriate liaison between acquisition and accounting and disbursing personnel at each contracting activity.

(a) Except as provided in (b) below, the clause 7-104.58(a) shall be included in each contract of \$25,000 that--

(i) requires the contractor to furnish U.S. end products except that the clause in 7-104.58(a) is not required if the contractor is a domestic concern and the Government will take title to the supplies to be furnished within the United States; or

(ii) in the case of a contract for construction, repair, or maintenance of real property, or for services, to be performed outside the United States, either--

(A) requires the contractor to acquire specified materials, equipment, or services from U.S. sources (whether or not the contractor is a domestic concern), or

(B) is with a contractor who is a domestic concern (whether or not specified items must be acquired from U.S. sources).

(b) In lieu of the clause specified in 7-104.58(a), the statement in 7-104.58(b) may be placed prominently on the face of each contract, purchase, or delivery order involving acquisitions of U.S. end products or services where the contracting officer considers that greater accuracy will be achieved or that inclusion of the contract clause is impracticable.

(c) To provide appropriate reporting of the balance of payments consequences of Defense acquisition for contracts of less than \$25,000, the statement in 7-104.58(c) will be placed prominently on the face of each contract.

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Part 9--International Agreements and Coordination

6-901 Scope of Part. This Part concerns the applicability of international agreements other than those in Parts 13 through 15 and coordination with overseas commands and activities in purchasing from foreign sources.

6-902 International Agreements.

(a) Various treaties and international agreements in effect between the United States and foreign governments, especially those with governments receiving military and economic aid under the Foreign Assistance Act of 1961, affect acquisition in foreign countries. Particular attention should be given to the provisions in these agreements which pertain to purchase procedures, contract forms and clauses, taxes, patents, technical information, facilities, and other matters relating to acquisition.

(b) Copies of international agreements are filed with the United States European Command (APO 128, New York) covering existing agreements in the United Kingdom of Great Britain and Northern Ireland, Western European countries, North Africa, and in the Middle East. Agreements with countries in the Pacific and Far East are filed with the United States Pacific Command (CINCPAC). Many of the agreements are compiled in the "United States Treaties and Other International Agreements" series (TIAS), which is published by the Department of State. Copies of this publication are normally available in overseas legal offices and U.S. diplomatic missions. In addition, Military Assistance Advisory Groups, Naval Missions, and Joint United States Military Aid Groups normally have copies of the agreements applicable to the countries concerned.

(c) In placing contracts with contractors outside the United States for performance outside the United States, contracting officers, including those in the United States, shall ascertain the existence and applicability of any international agreements and, subject to the provisions of 1-109.4, shall comply with such agreements.

6-903 Coordination With Overseas Commands and Activities. When it has been determined that an acquisition will be made from a foreign contractor, overseas contracting offices shall be utilized to the maximum practical extent. Contracting offices not within the command jurisdiction of a unified or specified command, anticipating placement of contracts with foreign contractors, shall maintain liaison with the appropriate component commander during preaward negotiations and postaward administration. Where an acquisition may result in a requirement for logistical support of contractor employees or additional Government employees in an overseas location, the contracting officer shall insure that the contract file includes documentation reflecting specific advance approval for such commitment from the appropriate component commander.

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be issued under this Act for the export of any major defense equipment sold under a contract in the amount of \$35,000,000 or more to any foreign country which is not a member of the North Atlantic Treaty Organization, Australia, Japan or New Zealand unless such major defense equipment was sold under this Act. DoD policies and procedures with respect to commercial availability are contained in the Military Assistance and Sales Manual (DoD Manual 5105.38-H), Part III, Chapter H, entitled Commercial Availability, published by the Defense Security Assistance Agency. (See DoD Manual 5105.38-H.)

6-1302 Applicability. The Defense Acquisition Regulation shall apply to all purchases and contracts made by the Department of Defense in support of Foreign Military Sales (see 1-102).

6-1303 Preparation of DoD Offer and Acceptance, DD Form 1513.

6-1303.1 DD Form 1513 lists the items and/or services, estimated costs, the terms and conditions of sale, and provides for the foreign government's signature to indicate acceptance. (See Appendix P-200.1513.)

6-1303.2 Procedures.

(a) In connection with each Foreign Military Sale expected to involve a contract in excess of \$25,000 which cannot be placed on the basis of price competition (as, for example, when the foreign customer has designated only one source as acceptable), before the Department of Defense furnishes prices for information purposes to potential foreign customers, prices, delivery and other relevant information shall be requested from the prospective source and such request shall state that it is for information for the purpose of a potential Foreign Military Sale and shall identify the customer.

(b) As a general rule on FMS programs requiring new acquisitions, the Contracting Officer should participate in the preparation of Price and Availability Data to support the tendering of the DoD Offer and Acceptance (DD Form 1513) by the U.S. Government to foreign countries and international organizations. In addition to the identification and review of sales commissions and fees (see 6-1305), the contracting officer shall request contractors to identify in advance of the DoD Offer and Acceptance any unusual provisions or deviations, particularly those proposed for the contract which could affect the prices quoted. Such unusual contractual requirements shall also be identified in the submittal of the price and availability data to the Departmental activity responsible for providing the DoD Offer and Acceptance to the foreign country. If the Departmental activity expands, modifies or does not accept such requirements, the contractor shall be advised prior to the submission of the offer to the foreign country.

6-1304 Pricing Acquisitions for Foreign Military Sales.

6-1304.1 General. When the Department of Defense undertakes purchasing for sale to a foreign country which has committed itself to bear the cost of the acquisition, the Department of Defense assumes responsibility to see to it that no more than a fair price is paid for the acquisition. Accordingly, FMS contracts shall be priced on the same principles and with the same care as are used in pricing normal defense contracts. This does not mean that prices of normal defense contracts for an item are automatically applicable to FMS contracts for the same

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CONTRACT CLAUSES AND SOLICITATION PROVISIONS

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Officer, if he decides that the facts justify such action, may receive and act upon any such claim asserted at any time prior to final payment under that contract. Where the cost of property made

the foregoing clause, the period of "30 days" within which any claim for adjustment must be asserted may be varied in accordance with Departmental procedures. In accordance with 10 U.S.C. 2308(f), prior to the pricing of any order that is expected to exceed \$100,000, contract when the price is

age under that is expected to exceed \$100,000, except where the price of the material is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation, the contracting officer shall require the contractor to furnish

contract includes or is modified to include a defective pricing data clause (see Certificate of Current Cost or Pricing Data (see 3-807.6) and shall assure that

EXTRAS (1949 JUL)
Except as otherwise provided in this contract, no payment for extras shall be made unless such extras and the price therefor have been authorized in writing by the Contracting Officer.
(End of clause)

7-103.4 Variation in Quantity.
(a) Insert the following clause.

VARIAION IN QUANTITY (1969 JUL)

(Total of classes)

(b) In accordance with I-325, insert the following clause:

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Decrease (Insert: % or Note)
This increase or decrease shall apply to: _____
(End of clause)

* Insert in the blank the designation(s) to which the percentage apply, such as: (1) the total contract quantity; (2) item 1 only; (3) each quantity specified in the delivery schedule of the "Time of Delivery" clause; (4) the total item quantity for each destination; (5) the total quantity of each item without regard to destination.

7-103.5 Inspection.

(a) The following clause shall be inserted in all fixed-price supply contracts, except as provided in (b) and (c) below.

INSPECTION (1982 NOV)

(a) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the supplies hereunder and shall tender to the Government, for acceptance, only supplies that have been inspected in accordance with said inspection system and have been found by the Contractor to be in conformity with contract requirements. As part of such system, the Contractor shall prepare records evidencing all inspections made pursuant thereto and the outcome thereof. Such records shall be kept complete and available to the Government during the performance of this contract and for such longer period as may be specified elsewhere in this contract. The Government may perform such reviews and evaluations as are reasonably necessary to ascertain compliance with this paragraph. These reviews and evaluations shall be conducted in a manner that will not unduly delay the contract work. The right of review, whether exercised or not, does not relieve the Contractor of the obligations under the contract.

(b) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, and in any event prior to acceptance. However, the Government assumes no contract obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract.

(c) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or, if permitted or required by the Contracting Officer, corrected in place by and at the expense of the Contractor promptly after notice, and shall not thereafter be tendered for acceptance unless the former inspection or requirements of correction is disclosed. If the Contractor fails promptly to remove such supplies or lots of supplies which are required to be removed or promptly to replace or correct such supplies or lots of supplies, the Government either (i) may by contract or otherwise replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby; or (ii) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor corrects or replaces such supplies within the delivery schedule, the Contracting Officer may require the delivery of such supplies at a reduction in price which is equitable under the circumstances. Failure to agree to such reduction of price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(d) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor without additional charge shall provide all reasonable facilities and assistance for the safety and convenience of the Government inspectors in the performance of their duties. If Government inspection or test is made at a point other than the premises of the Contractor or a subcontractor, it shall be at the expense of the Government except as otherwise provided in this contract; provided, that in case of rejection the Government shall not be liable for any reduction in value of supplies used in connection with such inspection or test. All inspections and tests by the Government shall be performed in such a manner as not to unduly delay the work. The Government reserves the right to charge to the Contractor any additional cost of Government inspection and test when supplies are not ready at the time such inspection and test is requested by the Contractor or when reinspection or retest is necessitated by prior rejection. Acceptance or rejection of the supplies shall be made as promptly as practicable after delivery, except as otherwise provided in this contract; but failure to inspect and accept or reject supplies shall not relieve the Contractor from responsibility for such supplies as are not in accordance with the contract requirements nor impose liability on the Government therefor.

(e) The inspection and test by the Government of any supplies or lots of supplies does not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to acceptance. Unless otherwise provided in this contract, acceptance shall be conclusive except as regards (1) latent defects, (2) fraud, or (3) such gross mistakes as amount to fraud.

(f) If acceptance is not conclusive for any of the reasons in paragraph (e) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in contract price, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; *Provided*, That the Contracting Officer may require a reduction in contract price if the Contractor fails to meet such delivery schedule, or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the contract as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation cost from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in (1) or (2) above and does not cure such failure within a period of ten (10) days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby.

(End of clause)

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(b) The clause in (a) above shall be included in all fixed-price incentive contracts except that paragraphs (c) and (f) thereof shall be deleted and the following substituted:

(c) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or, if permitted or required by the Contracting Officer, corrected in place by the Contractor promptly after notice, and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed. Prior to the establishment of the final price, the cost of replacement or correction shall be considered as a cost incurred, or to be incurred, for the purpose of negotiating the total final price. After the establishment of the total final price, all replacements or corrections made by the Contractor shall be accomplished at no increase in the total final price. If the Contractor fails either promptly to remove such supplies or lots of supplies which are required to be removed, or promptly to replace or correct such supplies or lots of supplies, the Government may either (1) may by contract or otherwise replace or correct such supplies, and equitably reduce any target price, or, if it is established, the total final price of this contract, or (2) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor corrects or replaces such supplies within the delivery schedule, the Contracting Officer may require the delivery of such supplies, and equitably reduce any target price or, if it is established, the total final price of this contract. Failure to agree to such equitable reduction shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(f) If acceptance is not conclusive for any of the reasons in paragraph (e) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in the target price or, if it is established, the total final price of this contract, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contractor's delivery schedule, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; Provided, That the Contracting Officer may require a reduction in any target price, or, if it is established, the total final price of this contract, if the Contractor fails to meet such delivery schedule; or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the total final price as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation costs from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in (1) or (2) above and does not cure

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such failure within a period of ten (10) days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and equitably reduce any target price or, if it is established, the total final price of this contract.

(c) The clause set forth in (a) above shall be included in contracts utilizing the clause in 7-109.3 except that paragraphs (e) and (f) shall be deleted and the following substituted:

(e) In case any supplies or lots of supplies are defective in material or workmanship or otherwise not in conformity with the requirements of this contract, the Government shall have the right either to reject them (with or without instructions as to their disposition) or to require their correction. Supplies or lots of supplies which have been rejected or required to be corrected shall be removed or, if permitted or required by the Contracting Officer, corrected in place by the Contractor promptly after notice, and shall not thereafter be tendered for acceptance unless the former rejection or requirement of correction is disclosed. Prior to the establishment of the total final price, the cost of replacement or correction shall be considered as a cost incurred, or to be incurred, for the purpose of negotiating the total final price. After the establishment of the total final price, all replacements or corrections made by the Contractor shall be accomplished at no increase in the total final price. If the Contractor fails either promptly to remove such supplies or lots of supplies which are required to be removed, or promptly to replace or correct such supplies or lots of supplies, the Government may either (1) may by contract or otherwise replace or correct such supplies, and equitably reduce any target price, or, if it is established, the total final price of this contract, or (2) may terminate this contract for default as provided in the clause of this contract entitled "Default." Unless the Contractor corrects or replaces such supplies within the delivery schedule, the Contracting Officer may require the delivery of such supplies, and equitably reduce any target price or, if it is established, the total final price of this contract. Failure to agree to such equitable reduction shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

(f) If acceptance is not conclusive for any of the reasons in paragraph (e) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in the initial contract price, or, if it is established, the redetermined prices of this contract, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contractor's delivery schedule, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; Provided, That the Contracting Officer may require a reduction in the initial contract price, or, if it is established, the redetermined prices of this contract, if the Contractor fails to perform or act as required in (1) or (2) above and does not cure

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fails to meet such delivery schedule; or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the initial contract prices, or, if it is established, the redetermined prices of this contract, as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation costs from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in (1) or (2) above and does not cure such failure within a period of ten (10) days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and equitably reduce the initial contract prices, or, if it is established, the redetermined prices of this contract.

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(d) The following paragraphs (g) and (h) shall be added when the contract provides for the performance of Government Procurement Quality Assurance at source:

(g) When requested by the authorized Government representative, the Contractor shall furnish to the Government:

(1) advance notification prior to starting inspections or tests in accordance with provisions contained in or referenced by this contract; and

(2) advance notification when supplies will be ready for Government inspection.

(h) When the advance notification in (g) above is requested, the authorized Government representative shall specify the period and method of such advance notification; however, such requests shall not require more than two (2) workdays of advance notification if the Government representative is in residence in the Contractor's plant nor more than seven (7) workdays of advance notification in other instances. Notification shall be furnished to the Government representative designated in the request. (1977 SEP)

7-103.6 Title and Risk of Loss.

TITLE AND RISK OF LOSS (1949 JUN)

(a) Unless this contract specifically provides for earlier passage of title, title to supplies covered by this contract shall pass to the Government upon formal acceptance, regardless of when or where the Government takes physical possession.

(b) (1) Unless this contract specifically provides otherwise, risk of loss of or damage to supplies covered by this contract shall remain with the Contractor until, and shall pass to the Government upon:

(i) delivery of the supplies to a carrier, if transportation is f.o.b. origin;

(ii) acceptance by the Government or delivery of possession of the supplies to the Government at the destination specified in this contract, whichever is later, if transportation is f.o.b. destination.

(2) Notwithstanding (1) above, the risk of loss of or damage to supplies which so fail to conform to the contract as to give a right of rejection shall remain with the Contractor until cure or acceptance, at which time (1) above shall apply.

(c) Notwithstanding (b) above, the Contractor shall not be liable for loss of or damage to supplies caused by the negligence of officers, agents, or employees of the Government acting within the scope of their employment.

(End of clause)

7-103.7 Payments.

PAYMENTS (1958 JAN)

The Contractor shall be paid, upon the submission of proper invoices or vouchers, the prices stipulated herein for supplies delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made on partial deliveries accepted by the Government when the amount due on such deliveries so warrants, or, when requested by the Contractor, payment for accepted partial deliveries shall be made whenever such payment would equal or exceed either \$1,000 or fifty percent (50%) of the total amount of this contract.

(End of clause)

In contracts for the furnishing of transportation and accessorial services there will be substituted for the word "proper" above, the words "properly certified."

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7-104.4 Notice to the Government of Labor Disputes. Insert the following clause in all contracts involving the furnishing or production of any item on the Department of Defense Master Urgency List and in any other contract of a class or kind which the Head of the Procuring Activity concerned determines to be appropriate for the use of such a clause.

NOTICE TO THE GOVERNMENT OF LABOR DISPUTES (1958 SEP)

(a) Whenever the Contractor has knowledge that any actual or potential labor dispute is delaying or threatens to delay the timely performance of this contract, the Contractor shall immediately give notice thereof, including all relevant information with respect thereto, to the Contracting Officer.

(b) The Contractor agrees to insert the substance of this clause, including this paragraph (b), in any subcontract hereunder as to which a labor dispute may delay the timely performance of this contract, except that each such subcontract shall provide that in the event its timely performance is delayed or threatened by delay by any actual or potential labor dispute, the subcontractor shall immediately notify his next higher tier subcontractor, or the prime contractor, as the case may be, of all relevant information with respect to such dispute.

(End of clause)

7-104.5 Patent Indemnity. In accordance with 9-103 and 9-103.1, insert the following clause.

PATENT INDEMNITY (1982 NOV)

If the amount of this contract is in excess of \$15,000, the Contractor shall indemnify the Government and its officers, agents, and employees against liability, including costs, for infringement of any United States patent (except letters patent issued upon an application which is now or may hereafter be kept secret or otherwise withheld from issue by order of the Government) arising out of the manufacture or delivery of supplies or out of construction, alteration, modification, or repair of real property (hereinafter referred to as "construction work") under this contract, or out of the use or disposal by or for the account of the Government of such supplies or construction work. The foregoing indemnity shall not apply unless the Contractor shall have been informed as soon as practicable by the Government of the suit or action alleging such infringement, and shall have been given such opportunity as is afforded by applicable laws, rules, or regulations to participate in the defense thereof, and further, such indemnity shall not apply to:

- (i) an infringement resulting from compliance with specific written instructions of the Contracting Officer directing a change in the supplies to be delivered or in the materials or equipment to be used, or directing a manner of performance of the contract not normally used by the Contractor; (ii) an infringement resulting from addition to, or change in, such supplies or components furnished or construction work performed which addition or change was made subsequent to delivery or performance by the Contractor; or (iii) a claimed infringement which is settled without the consent of the Contractor, unless required by final decree of a court of competent jurisdiction.

(End of clause)

(a) In accordance with 9-103.1(b) and 9-103.3, add one of the following sentences:

The foregoing shall not apply to the following:
(Specifically identify the items to be excluded from the Patent Indemnity clause.) (1964 SEP)

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or

The foregoing shall apply only to the following:
(Specifically identify the items to which the Patent Indemnity clause applies.) (1964 SEP)

(b) In accordance with 9-103.4, insert the following clause.

WAIVER OF INDEMNITY (1955 JAN)

Any provision of this contract to the contrary notwithstanding, the Government hereby authorizes and consents to the use and manufacture, solely in the performance of this contract, of any invention covered by the United States patents identified as listed below, and waives indemnification by the Contractor with respect to such patents: (Identify the patents by number or by other means if more appropriate).

(End of clause)

7-104.6 Filing of Patent Applications. In accordance with 9-106, insert the following clause.

FILING OF PATENT APPLICATIONS (1969 DEC)

(a) Before filing or causing to be filed a patent application in the United States disclosing any subject matter of this contract, which subject matter is classified "Secret" or higher, the Contractor shall, citing the thirty (30) day provision below, transmit the proposed application to the Contracting Officer for determination whether, for reasons of national security, such application should be placed under an order of secrecy or sealed in accordance with the provisions of 35 U.S.C. 181-18 or the issuance of a patent should be otherwise delayed under pertinent United States statutes or regulations, and the Contractor shall observe any instructions of the Contracting Officer with respect to the manner of delivery of the patent application to the United States Patent Office for filing, but the Contractor shall not be denied the right to file such patent application. If the Contracting Officer shall not have given any such instructions within thirty (30) days from the date of mailing or other transmittal of the proposed application, the Contractor may file the application.

(b) The Contractor shall furnish to the Contracting Officer, at the time of or prior to the time when the Contractor files or causes to be filed a patent application in the United States disclosing any subject matter of this contract, which subject matter is classified "Confidential," a copy of such application for determination whether for reasons of national security, such application should be placed under an order of secrecy or the issuance of a patent should be otherwise delayed under pertinent United States statutes or regulations.

(c) Where the subject matter of this contract is classified for reasons of security, the Contractor shall not file, or cause to be filed in any country, other than in the United States as provided in (a) and (b) of this clause, an application or registration for a patent containing any of said subject matter without first obtaining written approval of the Contracting Officer.

(d) When filing any patent application coming within the scope of this clause, the Contractor shall observe all applicable security regulations covering the transmission of classified subject matter, and shall also promptly furnish to the Contracting Officer the serial number, filing date, and name of country of any such patent application. When transmitting the application to the United States Patent Office, the Contractor shall by separate letter identify by agency and number the contract or contracts which require security classification markings to be placed on the application.

(e) The substance of this clause shall be included in all subcontracts which cover or are likely to cover classified subject matter.

(End of clause)

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(1) *Identification of Technical Data.* In accordance with 9-503, insert the following clause:

IDENTIFICATION OF TECHNICAL DATA (1975 MAR)

Technical Data (as defined in the "Rights in Technical Data and Computer Software" clause of this contract) delivered under this contract shall be marked with the number of this contract, name of Contractor, and name of any subcontractor who generated the data.

(End of clause)

(m) *Deferred Ordering of Technical Data or Computer Software.* In accordance with 9-502(c), insert the following clause:

DEFERRED ORDERING OF TECHNICAL DATA OR COMPUTER SOFTWARE (1974 NOV)

In addition to technical data or computer software specified elsewhere in this contract to be delivered hereunder, the Government may, at any time during the performance of this contract or within a period of three (3) years after acceptance of all items (other than technical data or computer software) to be delivered under this contract or the termination of this contract, order any technical data or computer software (as defined in the "Rights in Technical Data and Computer Software" clause of this contract) generated in the performance of this contract or any subcontract hereunder. When such technical data or computer software is ordered, the Contractor shall be compensated for converting the data or computer software into the prescribed form, for reproduction and delivery. The obligation to deliver technical data of a subcontractor and pertaining to an item obtained from him shall expire three (3) years after the date the Contractor accepts the last delivery of that item from that subcontractor under this contract. The Government's rights to use said data or computer software shall be pursuant to the "Rights in Technical Data and Computer Software" clause of this contract.

(End of clause)

(6) *Requirements for Data.*

(1) The following clause shall be inserted in all contracts, except as provided in (2) below:

DATA REQUIREMENTS (1972 APR)

(a) Data means recorded information, regardless of form or characteristics.
(b) The Contractor is required to deliver only the data items listed on the DD Form 1423 (Contract Data Requirements List) and data items identified in and deliverable under any contract clause of Section VII of the Armed Services Procurement Regulation (ASPR) made a part of the contract.

(End of clause)

(2) The clause in (1) above need not be included in:

- (i) any contract, of which the aggregate amount involved does not exceed \$25,000 and in any blanket purchase agreement and purchase order utilizing the DD Form 1423; (However, the DD Form 1423 shall be used with orders issued under a basic ordering agreement.);
- (ii) any contract awarded to a contractor outside the United States, except those under 6-501;
- (iii) any research or exploratory development contract when reports are the only deliverable item(s) under the contract;
- (iv) any service type contract, when the Contracting Officer determines that the use of the DD Form 1423 (Contract Data Requirements List) is impractical for use with respect to records prepared by a contractor in performing operation and maintenance under the contract;

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insert with this contract, including demand consequent upon default termination; (ii) the date of transmittal by the Government to the Contractor of a proposed supplemental agreement to complete negotiations fixing the amount; or (iv) if this contract provides for revision of prices, the date of written notice to the Contractor fixing the amount of refund payable in connection with a pricing proposal or in connection with a negotiated pricing agreement not confirmed by contract supplement.

(End of clause)

The interest rates established by the Secretary of the Treasury will be published in the Federal Register every six months. The current rate may also be obtained from the Departmental Contract Finance Office representative.

7-104.40 *Competition in Subcontracting.* The following clause shall be included in all negotiated contracts over \$10,000, except in firm fixed-price contracts where award is on the basis of effective price competition or where prices are established by law or regulation, and except in small purchases made pursuant to 3-600.

COMPETITION IN SUBCONTRACTING (1962 APR)

The Contractor shall select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract.

(End of clause)

7-104.41 *Audit by Department of Defense.*

(a) Insert the following clause in all contracts (except those entered into by formal advertising which are not expected to exceed \$100,000, and except small purchases made pursuant to 3-600).

AUDIT BY DEPARTMENT OF DEFENSE (1978 AUG)

(a) General. The Contracting Officer or his representatives shall have the audit and inspection rights described in the applicable paragraphs (b), (c) and (d) below.

(b) *Examination of Costs.* If this is a cost reimbursement type, incentive, time and materials, labor hour, or price reimbursable contract, or any combination thereof, the Contractor shall maintain, and the Contracting Officer or his representatives shall have the right to examine books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract. Such right of examination shall include inspection at all reasonable times of the Contractor's plans, or such parts thereof, as may be required in the performance of this contract.

(c) *Cost or Pricing Data.* If the Contractor submitted cost or pricing data in connection with the pricing of this contract or any change or modification thereto, unless such pricing was based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation, the Contracting Officer or his representatives who are employees of the United States Government shall have the right to examine all books, records, documents and other data of the Contractor related to the negotiation, pricing or performance of such contract, change or modification, for the purpose of evaluating the accuracy, completeness and currency of the cost or pricing data submitted. Additionally, in the case of pricing any change or modification exceeding \$100,000 to formally advertised contracts, the Contracting Officer of the United States or his representatives who are employees of the United States Government shall have such rights. The right of examination shall extend to all documents necessary to permit adequate evaluation of the cost or pricing data submitted, along with the computations and projections used therein.

(d) *Reports.* If the Contractor is required to furnish Contractor Cost Data Reports (CCDR), Contract Fund Status Reports (CFSR), or Cost Performance Reports (CPR) the Contracting Of-

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abstracted from what would otherwise be considered the quantity canceled for the purpose of computing allowable cancellation charges.

(End of clause)

7-104.48 New Material. In accordance with 1-1208, insert the following clause.

NEW MATERIAL (1965 JAN)

Except as to any supplies and components which the Specification or Schedule specifies by provision not to be new, the Contractor represents that the supplies and components including any former Government property identified pursuant to the "Government Surplus" clause of this contract to be provided under this contract are new (not used or reconditioned, and not of such age or so deteriorated as to impair their usefulness or safety). If at any time during the performance of this contract, the Contractor believes that the furnishing of supplies or components which are not new is necessary or desirable, he shall notify the Contracting Officer immediately, in writing, including the reasons therefor and proposing any consideration which will flow to the Government if authorization to use such supplies is granted.

(End of clause)

7-104.49 Government Surplus. In accordance with 1-1208, insert the following clause.

GOVERNMENT SURPLUS (1965 JAN)

(a) In the event the bid or proposal is based on furnishing items or components which are former Government surplus property or residual inventory resulting from terminated Government contracts, a complete description of the items or components, quantity to be used, name of Government agency from which acquired, and date of acquisition shall be set forth on a separate sheet to be attached to bid or proposal. Notwithstanding any information provided in accordance with this provision, items furnished by the Contractor must comply in all respects with the specifications contained herein.

(b) Except as disclosed by the Contractor in (a) above, no property of the type described herein shall be furnished under this contract unless approved in writing by the Contracting Officer.

(End of clause)

7-104.50 Management Systems. In accordance with 1-331(e), insert the following clause.

MANAGEMENT SYSTEMS REQUIREMENTS (1971 NOV)

The Contractor shall utilize the management systems listed on the DD Form 1660, Management Systems Summary List, attached hereto and made a part hereof. Compliance with this clause shall not relieve the Contractor from complying with any other provision of this contract.

(End of clause)

7-104.51 Production Progress Report. In accordance with 25-202, insert the following clause.

PRODUCTION PROGRESS REPORTS (1971 APR)

(a) The Contractor shall prepare and submit to the Contracting Officer Production Progress Reports in accordance with the instructions set forth elsewhere in this contract.

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ficer or his representatives shall have the right to examine books, records, other documents, and supporting materials, for the purpose of evaluating (i) the effectiveness of the Contractor's policies and procedures to produce data compatible with the objectives of these reports, and (ii) the data reported.

(c) Availability. The materials described in (b), (c) and (d) above shall be made available at the office of the Contractor, at all reasonable times, for inspection, audit, or reproduction, until the expiration of three (3) years from the date of final payment under this contract or such lesser time specified in Appendix M of the Armed Services Procurement Regulation, and for such longer period, if any, as is required by applicable statute, or by other clauses of this contract, or by (1) and (2) below.

(1) If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for a period of three (3) years from the date of any resulting final settlement.

(2) Records which relate to appeals under the "Dispute" clause of this contract, or litigation, or the settlement of claims arising out of the performance of this contract, shall be made available until such appeals, litigation, or claims have been disposed of.

(f) The Contractor shall insert a clause containing all the provisions of this clause, including this paragraph (f), in all subcontracts exceeding \$10,000 hereunder, except altered as necessary for proper identification of the contracting parties and the Contracting Officer under the Government prime contract.

(End of clause)

(b) In the case of consolidated facilities contracts, facilities acquisition contracts and facilities use contracts, paragraph (b) of the clause should be amended to read:

(b) Examination of Costs. The Contractor shall maintain, and the Contracting Officer and his representatives shall have the right to examine, books, records, documents, and other evidence and accounting procedures and practices, sufficient to reflect properly (1) all direct and indirect costs of whatever nature claimed to have been incurred and anticipated to be incurred for the performance of this contract and (2) the use of, and charges for the use of, the facilities. Such right of examination shall include inspection at all reasonable times of the Contractor's plants, or such parts thereof, as may be engaged in the performance of this contract.

7-104.42 Subcontractor Cost or Pricing Data.

(a) The following clause shall be inserted in all negotiated contracts expected to exceed \$100,000, except where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation. The contracting officer may include this clause, with appropriate reduction in the dollar amounts included therein, in other negotiated contracts where a Certificate of Current Cost or Pricing Data is required (see 3-807.3(b)(iii)) in connection with initial pricing of the contract.

SUBCONTRACTOR COST OR PRICING DATA (1978 JAN)

(a) The Contractor shall require subcontractors hereunder to submit, actually or by specific identification in writing, cost or pricing data under the following circumstances: (i) prior to the award of any subcontract the amount of which is expected to exceed \$100,000 when entered into; (ii) prior to the pricing of any subcontract modification which involves aggregate increases and/or decreases in costs plus applicable profit expected to exceed \$100,000; except where the price is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, or prices set by law or regulation.

(b) The Contractor shall require subcontractors to certify, in substantially the same form as that used in the certificate by the Prime Contractor to the Government, that to the best of their

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(b) During any delay in furnishing a Production Progress Report required under this contract, the Contracting Officer may withhold from payment an amount not exceeding \$10,000 or 5% of the amount of this contract, whichever is less.

(End of clause)

7-104.52 Utilization of Women-Owned Business Concerns. In accordance with 1-708(b), insert the following clause.

UTILIZATION OF WOMEN-OWNED BUSINESS CONCERNS (1982 NOV)

(a) It is the policy of the United States Government that women-owned businesses shall have the maximum practicable opportunity to participate in the performance of contracts awarded by any Federal agency.

(b) The Contractor agrees to use its best efforts to carry out this policy in the award of subcontracts to the fullest extent consistent with the efficient performance of this contract. As used in this contract, a "woman-owned business" concern means a business that is at least 51 percent owned by a woman or women who are U.S. citizens and who also control and operate the business and that is a small business as defined pursuant to Section 3 of the Small Business Act and relevant regulations promulgated pursuant thereto. "Control" in this context means exercising the power to make policy decisions. "Operate" in this context means being actively involved in the day-to-day management.

(c) Contractors acting in good faith may rely on written representations by their subcontractors regarding their status as women-owned business concerns.

(End of clause)

7-104.53 Reserved.

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United States. Identifications shall consist of stating the full amount of the payment requested, subdivided into the following categories:

1. United States end products—Expenditures for material and equipment manufactured or produced in the United States, excluding transportation;
2. United States services—Expenditures for services performed in the United States, including charges for overhead, other indirect costs, and profit;
3. Transportation on United States carriers—Expenditures for transportation furnished by United States flag, ocean, surface, and air carriers; and
4. Expenditures not identified under 1, 2, and 3 above.

(b) If this contract is principally for supplies or if the Contractor is not an incorporated concern incorporated in the United States, or an unincorporated concern having its principal place of business in the United States, the amounts identified under (a)(1), (a)(2), and (a)(3) above will be limited to payments made pursuant to the requirements either of the "United States Products and Services" clause, if any, or of any other specific provision of this contract that obligates the Contractor to procure certain materials, equipment, transportation, or services from United States sources.

(c) The identification of expenditures required under (a) above may be expressed either as dollar amounts or as percentages applicable to the total amount of the request for payment.

(d) The identification will be based on reasonable estimates by the Contractor. Nothing in this clause requires the establishment or maintenance of detailed accounting records or gives the United States Government any right to audit the Contractor's books or records.

(End of clause)

(b) In lieu of the clause specified in (a) above, the following statement may be placed prominently on the face of each contract, purchase or delivery order involving procurement of U.S. end products or U.S. services where the contracting officer considers that greater accuracy will be achieved or that inclusion of the contract clause is impracticable:

U.S. Expenditures for:
U.S. end products — % of each invoice
U.S. services — % of each invoice
Transportation on U.S. carriers — % of each invoice.

(c) To provide appropriate reporting of the balance of payments consequences of Defense procurement for contracts of less than \$25,000, the following statement will be placed prominently on the face of each contract, purchase or delivery order or other procurement document:

U.S. Expenditures for:
U.S. end products — % of each invoice
U.S. services — % of each invoice
Transportation on U.S. carriers — % of each invoice.

7-104.59 Reserved.

7-104.60 Contractor-Furnished Returnable Gas Cylinders and Other Containers. Insert the following clause in contracts involving the purchase of gas in contractor-furnished returnable cylinders where the contractor retains title to the cylinders. The clause may be used, with appropriate modification, in contracts for other supplies involving reels, spools, drums, carboys, liquid petroleum gas con-

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tainers, or other reusable containers, where the contractor is to retain title to the containers.

RETURNABLE GAS CYLINDERS (1966 OCT)

(a) Cylinders shall remain the property of the Contractor but will be loaned without charge to the Government for a period of thirty (30) days* after the date of delivery of the cylinders to the Government. Beginning with the first day after the expiration of the thirty (30) day loan period to and including the day the cylinders are delivered to the Contractor where the original delivery was f.o.b. origin, or to and including the date the cylinders are delivered or are made available for delivery to the Contractor's designated carrier in the case where the original delivery was f.o.b. destination, the Government shall pay the Contractor a rental of _____ dollars (\$ _____) per cylinder per day, regardless of type or capacity.

* The time period may be modified to comply with the customary commercial practice for the particular type of container being rented.

(b) This rental charge will be computed separately for cylinders of differing types, sizes, and capacities, and for each point of delivery named in the contract. A credit of thirty (30) cylinder days will accrue to the Government for each cylinder, regardless of type or capacity, delivered by the Contractor. A debit of one (1) cylinder day will accrue to the Government for each cylinder for each day after delivery to the f.o.b. point specified in this contract. At the end of the contract, if the total number of debits exceeds the total number of credits, rental shall be charged for the difference. If the total number of credits equals or exceeds the total number of debits, no rental charges will be made for the cylinders. No rental shall accrue to the Contractor in excess of the replacement value per cylinder specified in (c) below.

(c) For each cylinder lost or damaged beyond repair while in the Government's possession, the Government shall pay to the Contractor the replacement value as follows, less the allocable rental paid therefor:

- (1) oxygen cylinders of 100-110 cubic foot capacity \$ _____;
- (2) oxygen cylinders of 200-220 cubic foot capacity \$ _____;
- (3) acetylene cylinders of 100-150 cubic foot capacity \$ _____; and
- (4) acetylene cylinders of 230-300 cubic foot capacity \$ _____.

(d) Cylinders lost, or damaged beyond repair, and paid for by the Government shall become the property of the Government, subject to the following: If any lost cylinder is located within _____ (insert period of time) after payment by the Government, it may be returned to the Contractor by the Government, and the Contractor shall pay to the Government an amount equal to the replacement value, less rental computed in accordance with (a) above, beginning at the expiration of the thirty (30) day loan period specified in (a) above, and continuing to the date on which the cylinder was delivered to the Contractor.

(End of clause)

7-104.61 *Frequency Authorization.* Any contract which calls for developing, producing, constructing, testing, or operating a device for which a radio frequency authorization is required shall contain the following provision:

FREQUENCY AUTHORIZATION (1966 OCT)

(a) Authorization of radio frequencies required in support of this contract shall be obtained through the Contracting Officer by the Contractor or subcontractor in need thereof. Frequency management procedures prescribed in the Schedule of this contract shall be followed in obtaining radio frequency authorization.

(b) For any experimental, developmental or operational equipment for which the appropriate frequency allocation has not been made, the Contractor or subcontractor shall provide the

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Part 3—Fixed-Price Research and Development Contracts

7-301 *Applicability.* As used throughout this Part, the term "fixed-price research and development contract" means any contract (other than a letter contract, a notice of award, or a modification not affecting new procurement) which (i) is entered into at a fixed price in an amount exceeding \$2,500 (with or without any provision for price redetermination, economic price adjustment, or other form of price revision as covered in 3-404), and (ii) is for experimental, developmental, or research work. See 3-402(b) for use of types of contracts for research and development work.

7-302 *Required Clauses.* The following clauses shall be inserted, as required, in all fixed-price research and development contracts, except as may otherwise be indicated in this Part.

7-302.1 *Definitions.* Insert the contract clause in 7-103.1. Additional definitions may be included in such clause provided they are not inconsistent with such clause or the provisions of this Regulation.

7-302.2 *Payments.*

PAYMENTS (1959 JUN)

The Contractor shall be paid, upon submission of proper invoices or vouchers, the prices stipulated herein for work delivered or rendered and accepted, less deductions, if any, as herein provided. Unless otherwise specified, payment will be made upon acceptance of any portion of the work delivered or rendered for which a price is separately stated in the contract.

(End of clause)

7-302.3 *Standards of Work.*

STANDARDS OF WORK (1959 JUN)

The Contractor agrees that the performance of work and services pursuant to the requirements of this contract shall conform to high professional standards.

(End of clause)

7-302.4 *Inspection.*

(a) The following clause shall be used where the primary contract objective is delivery of end items other than designs, drawings, or reports, except where the contracting officer determines that the use of such clause is impracticable. Where this clause, or this clause as modified in (c) below, is not used, the clause in (b) below shall be used.

INSPECTION (1952 NOV)

(a) All work under this contract shall be subject to inspection and test by the Government, to the extent practicable, at all times (including the period of performance) and in any event prior to acceptance. The Government through any authorized representative may inspect the premises of the Contractor or any subcontractor engaged in the performance of this contract.

(b) The Government may reject any work that is defective or otherwise not in conformity with the requirements of this contract. If the Contractor fails or is unable to correct or to replace such work within the delivery schedule of such later time as the Contracting Officer may authorize, the Contracting Officer may accept such work at a reduction in price which is equitable under the circumstances. Failure to agree on the reduction in price shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes."

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(c) If any inspection or test is made by the Government on the premises of the Contractor or a subcontractor, the Contractor shall provide, without additional charge, all reasonable facilities and assistance for the safety and convenience of the Government inspection in the performance of their duties. If the Government inspection or test is made at a point other than the premises of the Contractor or subcontractor, it shall be at the expense of the Government. All inspections and tests by the Government shall be performed in such a manner as not unduly to delay the work. Final inspection and acceptance or rejection of the work shall be made as promptly as practicable after delivery except as otherwise provided in this contract; but failure to inspect and accept, or reject the work shall neither relieve the Contractor from responsibility for such of the work as is not in accordance with the contract requirements nor impose liability on the Government therefor.

(d) The inspection and test by the Government of any work shall not relieve the Contractor from any responsibility regarding defects or other failures to meet the contract requirements which may be discovered prior to acceptance. Except as otherwise provided in this contract, acceptance shall be conclusive except as regards (1) latent defects, (2) fraud, or (3) such gross mistakes as amount to fraud. If acceptance is not conclusive for any of these three causes, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in contract price, to correct or replace the defective or nonconforming supplies (work) at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; (2) if the Contractor fails to meet such delivery schedule; or (3) if the Contractor fails to correct or replace the defective or nonconforming supplies (work) at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, to repayment of such portion of the contract price as is equitable under the circumstances if it (the Government) elects not to require correction or replacement. When supplies (work) are (is) returned to the Contractor, the Contractor shall bear transportation costs from the original point of delivery to the Contractor's plant and return to the original point of delivery when that point is not the Contractor's plant.

(e) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the work hereunder. Records of all inspection system by the Contractor shall be kept complete and available to the Government during the performance of this contract and for such longer period as may be specified elsewhere in this contract.

(End of clause)

(b) The following clause shall be inserted in all contracts subject to this Part where the clause in (a) above is not used.

INSPECTION (1929 JUN)

The Government, through any authorized representative, has the right, at all reasonable times, to inspect, or otherwise evaluate the work performed or being performed hereunder and the premises in which it is being performed. If any inspection, or evaluation is made by the Government on the premises of the Contractor or a subcontractor, the Contractor shall provide and shall require his subcontractors to provide all reasonable facilities and assistance for the safety and convenience of the Government representatives in the performance of their duties. All inspections and evaluations shall be performed in such a manner as will not unduly delay the work.

(End of clause)

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(c) When it is desired to require contractors to maintain an inspection system in accordance with Military Specification MIL-I-45208 (see 14-303), the clause in (a) above shall be included in the contract, except that the following shall be added as the second sentence of paragraph (c).

The inspection system shall be in accordance with the edition of Military Specifications MIL-I-45208 in effect on the date of this contract. (1967 AUG)

7-302.5 Assignment of Claims. In accordance with 7-103.8, insert the clause therein.

7-302.6 Examination of Records by Comptroller General. In accordance with 7-104.15, insert the clause therein.

7-302.7 Federal, State, and Local Taxes. In accordance with 11-401, insert the appropriate clause in 7-103.10.

7-302.8 Utilization of Small Business and Small Disadvantaged Business Concerns. In accordance with 1-707.3, insert one or more of the clauses in 7-104.14.

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licenses are granted, commercial sale or use in one field of use will not be deemed commercial sale or use as to other fields of use, and a first commercial sale or use with respect to a product of the invention will not be deemed to end the exclusive period to different subsequent products covered by the invention;

(iii) the Contractor shall share any royalties collected on a Subject Invention with the inventor; and

(iv) the balance of any royalties or income earned by the Contractor with respect to Subject Inventions, after payment of expenses (including payments to inventors) incidental to the administration of Subject Inventions, shall be utilized for the support of scientific research or education.

(End of clause)

- 7-302.24 *Reserved.*
- 7-302.25 *Military Security Requirements.* Insert the Military Security Requirements clause in accordance with 7-104.12.
- 7-302.26 *Utilization of Labor Surplus Area Concerns.* In accordance with 1-805.3, insert the clauses in 7-104.20.
- 7-302.27 *Government Delay of Work.* Insert the clause in 7-104.77.
- 7-302.28 *Title and Risk of Loss.* Insert the clause in 7-103.6.
- 7-302.29 *Pricing of Adjustments.* Insert the clause in 7-103.26.
- 7-302.30 *Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era.* Insert the clause in 7-103.27.
- 7-302.31 *Affirmative Action for Handicapped Workers.* Insert the clause in 7-103.28.
- 7-302.32 *Clean Air and Water.* In accordance with 1-2302.2, insert the clause in 7-103.29.
- 7-302.33 *Invoices.* Insert the clause in 7-103.30.
- 7-303 *Clauses To Be Used When Applicable.*
- 7-303.1 *Clauses for Contracts Involving Construction Work.* In accordance with 7-602.23, 12-106, 18-701, and 18-703, insert the Labor Standards Provisions in 7-602.23.
- 7-303.2 *Filing of Patent Applications.* In accordance with 9-106, insert the clause in 7-104.6.
- 7-303.3 *Reporting and Refund of Royalties.* In accordance with 9-110(d) and 9-111, insert the appropriate clause or clauses in 7-104.8.
- 7-303.4 *Reserved.*
- 7-303.5 *Preference for Certain Domestic Commodities.* In accordance with 6-305, insert the clause in 7-104.13.

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7-303.6 *Priorities, Allocations, and Allocations.* In accordance with 1-307.2, insert the clause in 7-104.18.

7-303.7 *Government Property.* When the Government is to furnish, or the contractor is to acquire, Government property, insert the following clause if the contract is with an educational or nonprofit institution, if not, insert the appropriate clauses as provided in 7-104.24. Changes in the clause below, like those in 7-104.24(e), (f) and (g), may be made as therein provided.

GOVERNMENT PROPERTY (FIXED PRICE, NONPROFIT) (1972 SEP)

(a) *Government-furnished Property.* The Government shall deliver to the Contractor, for use in connection with and under the terms of this contract, the property described as Government furnished property in the Schedule or specifications, together with such related data and information as the Contractor may request and as may reasonably be required for the intended use of such property (hereinafter referred to as "Government-furnished property"). The delivery or performance dates for the supplies or services to be furnished by the Contractor under this contract are based upon the expectation that Government-furnished property suitable for use (except for such property furnished "as is") will be delivered to the Contractor at the times stated in the Schedule, or, if not so stated, in sufficient time to enable the Contractor to meet such delivery or performance dates. In the event that Government-furnished property is not delivered to the Contractor by such time or times, the Contracting Officer shall, upon timely written request made by the Contractor, make a determination of the delay, if any, occasioned the Contractor thereby, and shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision affected by any such delay. Except for Government furnished property furnished "as is", in the event that Government-furnished property is received by the Contractor in a condition not suitable for its intended use, the Contractor shall, upon receipt thereof, notify the Contracting Officer of such fact and, as directed by the Contracting Officer, either (i) return such property at the Government's expense or otherwise dispose of such property; or (ii) effect repairs or modifications. Upon completion of (i) or (ii) above, the Contracting Officer upon timely written request of the Contractor shall equitably adjust the delivery or performance dates or the contract price, or both, and any other contractual provision effected by the return, disposition, repair or modification. The foregoing provisions for adjustment are exclusive and the Government shall not be liable to suit for breach of contract by reason of any delay in delivery of Government-furnished property or delivery of such property in a condition not suitable for its intended use.

(b) *Changes in Government-furnished Property.*

(1) By notice in writing, the Contracting Officer may (i) decrease the property furnished or to be furnished by the Government under this contract, or (ii) substitute other Government-owned property for property to be furnished by the Government, or to be acquired by the Contractor for the Government, under this contract. The Contractor shall promptly take such action as the Contracting Officer may direct with respect to the removal, shipping, and disposal of property covered by such notice.

(2) In the event of any decrease in or substitution of property pursuant to paragraph (1) above, or any withdrawal of authority to use property provided under any other contract or lease, which property the Government had agreed in the Schedule to make available for the performance of this contract, the Contracting Officer, upon the written request of the Contractor (or, if the substitution of property causes a decrease in the cost of performance, on his own initiative), shall equitably adjust such contractual provisions as may be affected by the decrease, substitution or withdrawal, in accordance with the procedures provided in the "Changes" clause of this contract.

(c) *Title.*

(1) Title to all property furnished by the Government shall remain in the Government.

(2) Notwithstanding subparagraph (1) above, title to equipment purchased with funds available for research, having an acquisition cost of less than \$1,000, shall vest in the Contractor upon acquisition or as soon thereafter as feasible, provided that the Contractor shall have obtained approval of the Contracting Officer prior to acquisition of such property.

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Act, as amended, be subject to reduction or cutoff. (The preceding sentence applies only if this contract is made in time of war or national emergency as defined in said Act and is with the Department of Defense, the General Services Administration, the Energy Research and Development Administration, the National Aeronautics and Space Administration, the Federal Aviation Administration, or any other department or agency of the United States designated by the President pursuant to Clause 4 of the proviso of section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. 41.)

(b) In no event shall copies of this contract or of any plan, specifications, or other similar documents relating to work under this contract, if marked "Top Secret," "Secret," or "Confidential," be furnished to any person or any claim arising under this contract or to any other person not entitled to receive the same. However, a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such persons upon the prior written authorization of the Contracting Officer.

(End of clause)

The last two sentences of paragraph (a) of the foregoing clause shall be deleted from contracts entered into with foreign contractors.

7-602.9 Material and Workmanship.

MATERIAL AND WORKMANSHIP (1964 JUN)

(a) Unless otherwise specifically provided in the contract, all equipment, material, and articles incorporated in the work covered by this contract are to be new and of the most suitable grade for the purpose intended. Unless otherwise specifically provided in this contract, reference to any equipment, material, article, or patented process, by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition, and the Contractor may, at his option, use any equipment, material, article, or process which, in the judgment of the Contracting Officer, is equal to that named. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer, the model number, and other identifying data and information respecting the performance, reliability, nature, and rating of the machinery and mechanical and other equipment which the Contractor contemplates incorporating in the work. When required by the Contracting Officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the material or articles which he contemplates incorporating in the work. When so directed, samples shall be submitted for approval in the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles installed or used without required approval shall be at the risk of subsequent rejection.

(b) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may, in writing, require the Contractor to remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

(End of clause)

7-602.10 Contractor Inspection System.

(a) Except as provided in (b) below, insert the following clause in all contracts in excess of \$25,000.

CONTRACTOR INSPECTION SYSTEM (1964 NOV)

The Contractor shall (1) maintain an adequate inspection system and perform such inspections as will insure that the work performed under the contract conforms to contract requirements, and (2) maintain and make available to the Government adequate records of such inspections.

(End of clause)

(b) When it is desired to require contractors to maintain an inspection system in accordance with Military Specification MIL-45208 (see 14-303), the

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clause in (a) above shall be included in the contract with the following additional sentence.

The inspection system shall be in accordance with the edition of Military Specification MIL-45208 in effect on the date of this contract (1967 AUG)

7-602.11 Inspection and Acceptance.

INSPECTION AND ACCEPTANCE (1976 OCT)

(a) All work (which term includes but is not restricted to materials, workmanship, and manufacture and fabrication of components) shall be subject to inspection and test by the Government at all reasonable times and at all places prior to acceptance. Any such inspection and test is for the sole benefit of the Government and shall not relieve the Contractor of the responsibility of providing quality control measures to insure that the work strictly complies with the contract requirements. No inspection or test by the Government shall be construed as constituting or implying acceptance. Inspection or test shall not relieve the Contractor of responsibility for damage to or loss of the material prior to acceptance, nor in any way affect the continuing rights of the Government after acceptance of the completed work under the terms of paragraph (f) of this clause, except as hereinabove provided.

(b) The Contractor shall, without charge, replace any material or correct any workmanship found by the Government not to conform to the contract requirements, unless in the public interest the Government consents to accept such material or workmanship with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(c) If the Contractor does not promptly replace rejected material or correct rejected workmanship, the Government (1) may, by contract or otherwise, replace such material or correct such workmanship and charge the cost thereof to the Contractor, or (2) may terminate the Contractor's right to proceed in accordance with the clause of this contract entitled "Termination for Default - Damages for Delay - Time Extension."

(d) The Contractor shall furnish promptly, without additional charge, all facilities, labor, and material reasonably needed for performing such tests and convenient inspection and test as may be required by the Contracting Officer. All inspection and test by the Government shall be performed in such manner as not unnecessarily to delay the work. Special, full scale, and performance tests shall be performed as described in this contract. The Government reserves the right to charge to the Contractor any additional cost of inspection or test when material or workmanship is not ready at the time specified by the Contractor for inspection or test or when reinspection or retest is necessitated by prior rejection.

(e) Should it be considered necessary or advisable by the Government at any time before acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the Contractor shall, on request, promptly furnish all necessary facilities, labor and material. If such work is found to be defective or nonconforming in any material respect, due to the fault of the Contractor or his subcontractor, he shall delay all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, an equitable adjustment shall be made in the contract price to compensate the Contractor for the additional services involved in such examination and reconstruction and, if completion of the work has been delayed thereby, he shall, in addition, be granted a suitable extension of time.

(f) Unless otherwise provided in this contract, acceptance by the Government shall be made as promptly as practicable after completion and inspection of all work required by this contract, or that portion of the work that the Contracting Officer determines can be accepted separately. Acceptance shall be final and conclusive except as regards latent defects, fraud, or such gross mistakes as may amount to fraud or as regards the Government's rights under any warranty or guarantee.

(End of clause)

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become a part of or annexed to a building or structure erected, altered or repaired by (name of contractor) for the United States of America, and that the vendors from whom the property was purchased, the dates and numbers of the invoices covering the purchases, the total amount of the invoices of each vendor, the North Carolina State and local sales and use taxes paid thereon, above separately, and the cost of property withdrawn from warehouse stock and North Carolina State and local sales and use taxes paid thereon are as set forth in the attachments hereto.

(End of clause)

Note: In ship repair contracts, change paragraph (a) to read as follows:

(a) As used throughout this clause, the term "materials" means materials, supplies, fixtures and equipment which become a part of or are annexed to any vessel altered or repaired under this contract.

7-602.28 *Reserved.*7-602.29 *Termination for Convenience of the Government.*

(a) *Contracts Over \$55,000.* In accordance with 8-701(a), insert the following clause.

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT—CONSTRUCTION (1974 APF)

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall:

- (i) stop work under the contract on the date and to the extent specified in the Notice of Termination;
- (ii) place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portion of the work under the contract as is not terminated;
- (iii) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;
- (iv) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;
- (v) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;
- (vi) transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any, directed by the Contracting Officer, (A) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (B) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the Government.

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7-602.27 *Federal, State, Local and Foreign Taxes.* In accordance with Section XI, Part 4, insert the appropriate clause set forth in 7-103.10, and in accordance with 11-302, the following clause.

NORTH CAROLINA STATE AND LOCAL SALES AND USE TAX (1977 2A/N)

(a) As used throughout this clause, the term "materials" means building materials, supplies, fixtures and equipment which become a part of or are annexed to any building or structure erected, altered, or repaired under this contract.

(b) If this is a fixed-price type contract as defined in the Armed Services Procurement Regulation, the contract price includes North Carolina State and local sales and use taxes to be paid with respect to materials, notwithstanding any other provision of this contract. If this is a cost-reimbursement type contract as defined in such regulation, any North Carolina State and local sales and use taxes paid by the Contractor with respect to materials shall constitute an allowable cost under this contract.

(c) At the time specified in paragraph (d) below:

(i) The Contractor shall furnish the Contracting Officer certified statements setting forth the cost of the materials purchased from each vendor and the amount of North Carolina State and local sales and use taxes paid thereon. In the event the Contractor makes several purchases from the same vendor, such certified statement shall indicate the invoice numbers, the inclusive dates of the invoices, the total amount of the invoices and the North Carolina State and local sales and use taxes paid thereon. Such statement shall also include the cost of any tangible personal property withdrawn from the Contractor's warehouse stock and the amount of North Carolina State and local sales and use taxes paid thereon by the Contractor. Any local sales and use taxes included in the Contractor's statement must be shown separately from the State sales and use taxes. The Contractor shall furnish such additional information as the Commissioner of Revenue of the State of North Carolina may require to substantiate a refund claim for sales or use taxes.

(ii) The Contractor shall obtain and furnish to the Contracting Officer similar certified statements by its subcontractors.

(d) If this contract is completed before the next October 1, the certified statements to be furnished pursuant to paragraph (c) above shall be submitted within sixty (60) days after completion. If this contract is not completed before the next October 1, such certified statements shall be submitted on or before the 30th day of November of each year and shall cover taxes paid during the twelve-month period which ended the preceding September 30.

(e) The certified statements to be furnished pursuant to paragraph (c) above shall be in the following form:

I hereby certify that during the period _____ to _____ (name of contractor or subcontractor) paid North Carolina State and local sales and use taxes aggregating \$ _____ (State) and \$ _____ (local) with respect to building materials, supplies, fixtures and equipment which have

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to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 85 STAT 97 for the Renegotiation Board, for the period from the date such status payment is received by the Contractor to the date on which such status is repaid to the Government; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten days after the date of such retention or disposition, or such later date as determined by the Contracting Officer by reason of the circumstances.

(1) Unless otherwise provided for in this contract, or by applicable statute, the Contractor shall— from the effective date of termination until the expiration of three years after final settlement under this contract—preserve and make available to the Government at all reasonable times at the office of the Contractor, but without direct charge to the Government, all its books, records, documents and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions thereof.

(End of clause)

(b) Contracts Not Exceeding \$25,000. In accordance with 8-705.2, insert the following clause:

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (1965 JAN)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the interest of the Government. If this contract is so terminated, the rights, duties and obligations of the parties hereto shall be in accordance with the applicable Sections of the Armed Services Procurement Regulation in effect on the date of this contract.

(End of clause)

7-602.30 Notice and Assistance Regarding Patent and Copyright Infringement. In accordance with 9-104, insert the clause in 7-103.23.

7-602.31 Authorization and Consent. In accordance with 9-102.1 and 18-902, insert the appropriate clause in 7-103.22 or 7-302.21.

7-602.32 Composition of Contractor.

COMPOSITION OF CONTRACTOR (1965 JAN)

If the Contractor hereunder is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder.

(End of clause)

7-602.33 Site Investigation.

SITE INVESTIGATION (1965 JAN)

The Contractor acknowledges that he has investigated and satisfied himself as to the conditions affecting the work, including but not restricted to those bearing upon transportation, disposal, handling and storage of materials, availability of labor, water, electric power, roads and uncertainties of weather, river stages, tides or similar physical conditions at the site, the conformation and conditions of the ground, the character of equipment and facilities needed preliminary to and during prosecution of the work. The Contractor further acknowledges that he has satisfied himself as to the character, quality and quantity of surface and subsurface materials or obstacles to be encountered insular as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from information presented by the drawings and specifications made a part of this contract. Any failure by the Contractor to

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acquire himself with the available information will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Government assumes no responsibility for any conclusions or interpretations made by the Contractor on the basis of the information made available by the Government.

(End of clause)

7-602.34 Protection of Existing Vegetation, Structures, Utilities, and Improvements.

PROTECTION OF EXISTING VEGETATION, STRUCTURES, UTILITIES, AND IMPROVEMENTS (1965 JAN)

(a) The Contractor will preserve and protect all existing vegetation such as trees, shrubs, and grass on or adjacent to the site of work which is not to be removed and which does not unreasonably interfere with the construction work. Care will be taken in removing trees authorized for removal to avoid damage to vegetation to remain in place. Any limbs or branches of trees broken during such operations or by the careless operation of equipment, or by workmen, shall be trimmed with a clean cut and painted with an approved tree pruning compound as directed by the Contracting Officer.

(b) The Contractor will protect from damage all existing improvements or utilities as or near the site of the work, the location of which is made known to him, and will repair or restore any damage to such facilities resulting from failure to comply with the requirements of this contract or the failure to exercise reasonable care in the performance of the work. If the Contractor fails or refuses to repair any such damage promptly, the Contracting Officer may have the necessary work performed and charge the cost thereof to the Contractor.

(End of clause)

7-602.35 Operations and Storage Areas.

OPERATIONS AND STORAGE AREAS (1965 JAN)

(a) All operations of the Contractor (including storage of materials) upon Government premises shall be confined to areas authorized or approved by the Contracting Officer. The Contractor shall hold and save the Government, its officers and agents, free and harmless from liability of any nature occasioned by his operations.

(b) Temporary buildings (storage sheds, shops, offices, etc.) may be erected by the Contractor only with the approval of the Contracting Officer, and shall be built with labor and materials furnished by the Contractor without expense to the Government. Such temporary buildings and utilities shall remain the property of the Contractor and shall be removed by him at his expense upon the completion of the work. With the written consent of the Contracting Officer, such buildings and utilities may be abandoned and need not be removed.

(c) The Contractor shall, under regulations prescribed by the Contracting Officer, use only established roadways or construct and use such temporary roadways as may be authorized by the Contracting Officer. Where materials are transported in the prosecution of the work, vehicles shall not be loaded beyond the loading capacity recommended by the manufacturer of the vehicle or prescribed by any Federal, State or local law or regulation. When it is necessary to cross curbs or sidewalks, protection against damage shall be provided by the Contractor and any damaged roads, curbs, or sidewalks shall be repaired by, or at the expense of the Contractor.

(End of clause)

7-602.36 Modification Proposals—Price Breakdown. The requirements of this clause are in addition to and do not limit the requirements of 3-807.3 and 18-206 for the submission of cost or pricing data on DD Form 633.

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ment shall be liable only for payment in accordance with the payment provisions of this contract for services rendered prior to the effective date of termination.
(End of clause)

7-1902.17 *Authorization and Consent.* Except in contracts for stevedoring services and in accordance with 7-103.22, insert the clause therein.
7-1902.18 *Notice and Assistance Regarding Patent and Copyright Infringement.* Except in contracts for stevedoring services and in accordance with 7-103.23, insert the clause therein.

7-1902.19 *Reserved.*
7-1902.20 *Equal Opportunity Pre-Award Clearance of Subcontractors.* In accordance with 23-201.4, insert the clause in 7-104.22.

7-1902.21 *Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era.* Insert the clause in 7-103.27.

7-1902.22 *Pricing of Adjustments.* Insert the clause in 7-103.26.
7-1902.23 *Time of Delivery.* Insert a delivery clause in accordance with 7-104.92.

7-1902.24 *Affirmative Action for Handicapped Workers.* Insert the clause in 7-103.28.

7-1902.25 *Clean Air and Water.* In accordance with 1-2302.2, insert the clause in 7-103.29.

7-1902.26 *Invoices.* Insert the clause in 7-103.30.

7-1903 *Classes To Be Used When Applicable in Fixed-Price Service Contracts.*

7-1903.1 *Classes for Fixed-Price Service Contracts Involving Construction Work.*

(a) In accordance with 12-106 and 18-703, insert the clauses in 7-602.23.
(b) In accordance with 7-602.20 and 7-602.24, insert the clauses therein in addition to the clause in 7-104.3.

7-1903.2 *Workmen's Compensation and War Hazard Insurance Overseas.* In accordance with 10-403, insert the appropriate clause(s) in 7-104.2.

7-1903.3 *Notice to the Government of Labor Disputes.* In accordance with 7-104.4, insert the clause therein.

7-1903.4 *Notice of Radioactive Materials.* In accordance with 7-104.80, insert the clause therein.

7-1903.5 *Filing of Patent Applications.* In accordance with 9-106, insert the clause in 7-104.6.

7-1903.6 *Additional Bond Security.* If the contract will require the contractor to furnish a bond in connection therewith, insert the clause in 7-103.9.

7-1903.7 *Reporting and Refund of Royalties.* In accordance with 7-104.8, insert the appropriate clause or clauses therein.

7-1903.8 *Rights in Data.* In accordance with 7-104.9, insert the appropriate clause, or clauses, therein.

7-1903.9 *Ground and Flight Risk.* In accordance with 10-404, insert the clause in 7-104.10.

7-1903.10 *Military Security Requirements.* In accordance with 7-104.12, insert the clause therein.

7-1903.11 *Utilization of Small Business and Small Disadvantaged Business Concerns.* In accordance with 1-707.3, insert one or more of the clauses in 7-104.14.

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and charge to the Contractor any cost occasioned to the Government that is directly related to the performance of such services; or (ii) terminate this contract for default as provided in the clause of this contract entitled "Default."

(c) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the services to be performed hereunder. Records of all inspections work by the Contractor shall be kept complete and available to the Government during the term of this contract and for such longer period as may be specified elsewhere in this contract.
(End of clause)

7-1902.5 *Payments.* In accordance with 7-103.7, insert the clause therein.

7-1902.6 *Assignment of Claims.* In accordance with 7-103.8, insert the clause therein.

7-1902.7 *Federal, State, Local and Foreign Taxes.* In accordance with 7-103.10, insert the appropriate clause therein.

7-1902.8 *Default.* In accordance with 7-103.11, insert the clause therein.

7-1902.9 *Disputes.* In accordance with 7-103.12, insert the appropriate clause therein.

7-1902.10 *Reserved.*

7-1902.11 *Discounts.*

DISCOUNTS (1971 NOV)

In connection with any discount offered, time will be computed from the date of completion of performance of the services or from the date correct invoice or voucher is received in the office specified by the Government, if the latter is later than date of completion of performance. Payment is deemed to be made for the purpose of earning the discount on the date of mailing of the Government check.
(End of clause)

When SF 33A is used, the above clause will be substituted for subparagraph (b) of clause 9, Discounts (see 16-101.1(i)).

7-1902.12 *Contract Work Hours and Safety Standards Act—Overtime Compensation.* In accordance with 12-301, 12-302, and 12-306, insert the clauses in 7-103.16.

7-1902.13 *Equal Opportunity.* In accordance with 12-807.1, insert the applicable clause in 7-103.18.

7-1902.14 *Officials Not To Benefit.* Insert the clause in 7-103.19.

7-1902.15 *Covenant Against Contingent Fees.* Insert the clause in 7-103.20.

7-1902.16 *Termination for Convenience of the Government.*

(a) Except in stevedoring contracts and except as provided in (b) below, insert the appropriate clause in 7-103.21.

(b) If it has been reasonably determined that termination for convenience would not result in a claim for anything but the services rendered, the following clause may be used, regardless of contract amount, in lieu of any other termination for convenience clause. See 8-705.1(b).

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (1968 FEB)

The Contracting Officer, by written notice may terminate this contract, in whole or in part, when it is in the best interests of the Government. If this contract is so terminated, the Govern-

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(f) The rights and remedies of the Government provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

(g) As used in paragraph (d)(1) of this clause, the term "subcontractor or supplier" means subcontractors or suppliers at any tier.

(End of clause)

During a period of national emergency, paragraph (d) of the above clause may be changed by deleting the word "unforeseeable" and inserting the phrase "other than normal weather", after the word "causes" wherever it appears.

7-2101.8 Termination for Convenience of the Government.

(a) Insert the following clause in contracts exceeding \$25,000 in value. In accordance with E-621, the last sentence of paragraph (j) of the clause may be deleted in contracts with agencies of the United States Government, foreign governments or agencies thereof, or State or local governments or agencies thereof.

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (1976 OCT)

(a) The performance of work under this contract may be terminated by the Government in accordance with this clause in whole, or from time to time in part, whenever the Contracting Officer shall determine that such termination is in the best interest of the Government. Any such termination shall be effected by delivery to the Contractor of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective. Upon receipt by the Contractor of the Notice of Termination, if title to property is vested in the Contractor under this contract, it shall revert to the Government notwithstanding any other provision of this contract, except as to such property as the Contractor has disposed of by bona fide sale or property which has been removed from the site by the Contractor.

(b) After receipt of a Notice of Termination, and except as otherwise directed by the Contracting Officer, the Contractor shall:

- (i) stop work under the contract on the date and to the extent specified in the Notice of Termination;
- (ii) place no further orders or subcontracts for materials, services or facilities, except as may be necessary for completion of such portions of the work under the contract as is not terminated;
- (iii) terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the Notice of Termination;
- (iv) assign to the Government, in the manner, at the times, and to the extent directed by the Contracting Officer, all of the right, title, and interest of the Contractor under the orders and subcontracts so terminated, in which case the Government shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;
- (v) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the Contracting Officer, to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;
- (vi) transfer title and deliver to the Government, in the manner, at the times, and to the extent, if any, directed by the Contracting Officer, (A) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the Notice of Termination, and (B) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the Government.

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7-2101.4 Specifications and Drawings. Insert the clause in 7-602.2.

7-2101.5 Changes. Insert the clause in 7-602.3.

7-2101.6 Differing Site Conditions. Insert the clause in 7-602.4.

7-2101.7 Termination for Default — Damages for Delay — Time Extensions.

TERMINATION FOR DEFAULT — DAMAGES FOR DELAY — TIME EXTENSIONS

(1976 OCT)

(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. In addition, if title to property is vested in the Contractor under this contract it shall revert to the Government notwithstanding any other provision of this contract, except as to such property as the Contractor has disposed of by bona fide sale or property which has been removed from the site by the Contractor. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specified time.

(b) If fined and agreed liquidated damages are provided in the contract and if the Government terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

(c) If fined and agreed liquidated damages are provided in the contract and if the Government does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another Contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually adverse weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

(2) The Contractor, within ten (10) days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in the "Disputes" clause of this contract.

(e) If, after notice of termination of the Contractor's right to proceed under the provisions of this clause, it is determined for any reason that the Contractor was not in default under the provisions of this clause, or that the delay was extenuable under the provisions of this clause, the rights and obligations of the parties shall, if the contract contains a clause providing for termination for convenience of the Government, be the same as if the notice of termination had been issued pursuant to such clause. If, in the foregoing circumstances, this contract does not contain a clause providing for termination for convenience of the Government, the contract shall be equitably adjusted to compensate for such termination and the contract modified accordingly; failure to agree to any such adjustment shall be a dispute concerning a question of fact within the meaning of the clause of this contract entitled "Disputes".

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(3) The Government may from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Contractor in connection with the terminated portion of this contract whenever in the opinion of the Contracting Officer the aggregate of such payments shall be within the amount to which the Contractor will be entitled hereunder. If the total of such payments is in excess of the amount finally agreed or determined to be due under this clause, such excess shall be payable by the Contractor to the Government upon demand, together with interest computed at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 85 STAT 97 for the Renegotiation Board, for the period from the date such excess payment is received by the Contractor to the date on which such excess is repaid to the Government; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Contractor's claim by reason of retention or other disposition of termination inventory until ten (10) days after the date of such retention or disposition, or such later date as determined by the Contracting Officer by reason of the circumstances.

(4) Unless otherwise provided for in this contract, or by applicable statute, the Contractor shall— from the effective date of termination until the expiration of three (3) years after final settlement under this contract—preserve and make available to the Government at all reasonable times at the office of the Contractor but without direct charge to the Government, all his books, records, documents and other evidence bearing on the costs and expenses of the Contractor under this contract and relating to the work terminated hereunder, or, to the extent approved by the Contracting Officer, photographs, microphotographs, or other authentic reproductions thereof.

(End of clause)

(b) Insert the following clause in contracts not exceeding \$25,000.

TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (1976 OCT)

The Contracting Officer, by written notice, may terminate this contract, in whole or in part, when it is in the interest of the Government. If this contract is so terminated, the rights, duties and obligations of the parties hereto shall be in accordance with the applicable Sections of the Armed Services Procurement Regulations in effect on the date of this contract. In addition, upon receipt by the Contractor of the Notice of Termination, if title to property is vested in the Contractor under this contract, it shall revert to the Government notwithstanding any other provision of this contract, except as to such property as the Contractor has disposed of by bona fide sale or property which has been removed from the site by the Contractor.

(End of clause)

7-2101.9 *Disputes*. Insert the appropriate clause in 7-602.6.

7-2101.10 *Assignment of Claims*. Insert the clause in 7-602.8.

7-2101.11 *Conditions Affecting the Work*. Insert the clause in 7-602.14.

7-2101.12 *Site Investigation*. Insert the clause in 7-602.33.

7-2101.13 *Protection of Existing Vegetation, Structures, Utilities, and Improvements*.

PROTECTION OF EXISTING VEGETATION, STRUCTURES, UTILITIES, AND IMPROVEMENTS (1976 OCT)

(a) The Contractor will preserve and protect all existing vegetation such as trees, shrubs, and grass on or adjacent to the site of work which is not to be removed and which does not unreasonably interfere with the dismantling or demolition work. Care will be taken in removing trees authorized for removal to avoid damage to vegetation to remain in place. Any limbs or branches of trees broken during such operations or by the careless operation of equipment, or by workers, shall be trimmed with a clean cut and painted with an approved tree pruning compound as directed by the Contracting Officer.

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(b) The Contractor will protect from damage all existing improvements or utilities at or near the site of the work, including adjacent property of a third party, the location of which is made known to him, and will repair or restore any damage to such facilities resulting from failure to comply with the requirements of this contract or the failure to exercise reasonable care in the performance of the work. If the Contractor fails or refuses to repair any such damage promptly, the Contracting Officer may have the necessary work performed and charge the cost thereof to the Contractor.

(End of clause)

7-2101.14 *Permits and Responsibilities*.

PERMITS AND RESPONSIBILITIES (1976 OCT)

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any applicable Federal, State, and municipal laws, codes, and regulations, in connection with the prosecution of the work. He shall be similarly responsible for all damages to persons or property that occur as a result of his fault or negligence. He shall take proper safety and health precautions to protect the work, the workmen, the public, and the property of others.

(End of clause)

7-2101.15 *Other Contracts*. Insert the clause in 7-602.15.

7-2101.16 *Liability for Government Property*.

LIABILITY FOR GOVERNMENT PROPERTY (1976 OCT)

As to:

- (i) items of property, title to which remains in the Government and which are to be delivered to the Government by the Contractor in the performance of the work; and
- (ii) items of property, title to which is vested in the Contractor but which under the termination clauses of this contract is reverted to the Government upon notice of termination;

the Contractor assumes the risk of and shall be responsible for any loss thereof or damage thereto except for reasonable wear and tear incident to removal and delivery to the Government.

(End of clause)

7-2101.17 *Workmanship*.

WORKMANSHIP (1976 OCT)

All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may, in writing, require the Contractor to remove from the work any employee the Contracting Officer deems incompetent, careless or otherwise objectionable.

(End of clause)

7-2101.18 *Superintendence by Contractor*. Insert the clause in 7-602.12.

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TERMINATION OF CONTRACTS

8-602.5 *Memorandum by the Contracting Officer.* In all cases where a contract is terminated for default or where a procedure authorized by 8-602.4 is followed, the PCO—or in the Air Force the contracting officer designated for this purpose, shall prepare a memorandum for the contract file explaining fully the reasons for the action taken.

8-602.6 *Repurchase Against Contractor's Account.*

(a) Where the supplies or services are still required after termination, repurchase of supplies or services which are the same as or similar to those called for in the contract, shall be made against the contractor's account as soon as practicable after termination. Such repurchase shall be at as reasonable a price as practicable considering the quality required by the Government and the time within which the supplies or services are required. The contract of repurchase may be made for a quantity in excess of the undelivered quantity terminated for default, when such excess quantity is needed, but excess cost may be charged against the defaulting contractor for no more than the undelivered quantity terminated for default (including variations in quantity permitted by the terminated contract). Generally, the PCO's decision to repurchase will be made prior to issuance of the termination notice.

(b) If the repurchase is for a quantity not in excess of the undelivered quantity terminated for default, the requirements of 10 U.S.C. 2304 (a), with respect to formal advertising, are inapplicable. However, the PCO may use formal advertising procedures. If the PCO decides to negotiate the repurchase contract, he may either (1) use any authority listed in 3-201 through 3-217 (10 U.S.C. 2304(a)(1)-(17)), as appropriate, or (2) if none of those authorities to negotiate is used, the contract shall identify the procurement as a repurchase in accordance with the provisions of the Default clause in the defaulted contract. If the repurchase is for a quantity in excess of the undelivered quantity terminated for default, the entire quantity shall be treated as a new procurement.

(c) If repurchase is effected at a price in excess of the price of the supplies terminated, the PCO shall make a written demand on the contractor for the total amount of such excess giving due consideration to any increases or decreases in other ascertainable costs such as transportation, discounts, etc., and shall take such other action as is required by Appendix E, Part 6, for collecting claims in favor of the Government.

8-602.7 *Other Damages.*

(a) If a contract is terminated for default or if a course of action in lieu of termination for default is followed (see 8-602.4), the PCO shall take appropriate action in accordance with Appendix E, Part 6, for ascertainment and collection of any liquidated damages to which the Government may be entitled under the contract. Pursuant to the contract provisions for liquidated damages in 7-105.5, such damages are in addition to any excess cost of repurchase.

(b) If the Government has suffered any other ascertainable damages as a result of the contractor's default, the PCO, on the basis of legal advice, shall take appropriate action to assert the Government's claim for such damage in accordance with Appendix E, Part 6.

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Part 7—Clauses

8-700 Scope of Part. This Part contains directions for certain contract clauses related to the termination of contracts for the convenience of the Government and for default. Special purpose clauses when authorized by Departmental procedures and consistent with the policies set forth in this Regulation may be used in appropriate cases.

8-701 Termination Clause for Fixed-Price Contracts.

(a) Except as otherwise permitted by 8-705, the clause in 7-103.21(b) shall be used in any fixed price contract in excess of \$25,000 for supplies or experimental, developmental, or research work other than experimental, developmental, or research work with educational or nonprofit institutions, when no profit is contemplated. The clause in 7-602.29(a) shall be used in all fixed price construction contracts in excess of \$25,000.

(b) The clause in 7-607.4 covering terminations for convenience and terminations for default shall be included in all fixed-price architect-engineer contracts.

(c) In accordance with E-621, the last sentence of paragraph (j) of the clauses in 7-103.21(b) and 7-602.29(a) may be deleted in contracts with agencies of the United States Government, foreign governments or agencies thereof, state or local governments or agencies thereof, or nonprofit contracts with nonprofit educational or research institutions.

8-702 Termination Clause for Cost-Reimbursement Type Contracts.

(a) The clause in 7-203.10 shall be used in any cost-reimbursement type contract, as defined in 3-405, for supplies and experimental, developmental, or research work other than experimental, developmental, or research work with educational or nonprofit institutions where no fee is contemplated. The clause in 7-605.26 shall be used in all cost-reimbursement type construction contracts.

(b) Reserved.

(c) In any contract for Architect-Engineer services where the clause in 7-203.10 is used, the term "Architect-Engineer" shall be substituted for the term "Contractor" wherever that term appears in the clause and paragraph (e)(1)(D)(II) shall be deleted and the following clause substituted therefor:

(II) In the event of the termination of this contract for the default of the Architect-Engineer, the total fee payable shall be such proportionate part of the fee as the weighted value of the actual working drawings completed bears to the weighted value of the working drawings required or contemplated by the contract. (1970 JUL)

(d) In accordance with E-621, the last sentence of paragraph (j) of the clauses in 7-203.10 and 7-605.26 may be deleted in contracts with agencies of the United States Government, foreign governments or agencies thereof, state or local governments or agencies thereof, or nonprofit contracts with nonprofit educational or research institutions.

8-703 Termination Clause for Cost Reimbursement Type Subcontracts. The following termination clause is suggested for use in cost-reimbursement type subcontracts.

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(II) In the event of the termination of this contract for the default of the Seller, the total fee payable shall be such proportionate part of the fee (or, if this contract calls for articles of different types, of such part of the fee as is reasonably allocable to the type of article under consideration) as the total number of articles delivered to and accepted by the Buyer bears to the total number of articles of a like kind called for by this contract.

If the amount determined under this subparagraph (I) is less than the total payment thereunder made to the Seller, the Seller shall repay to the Buyer the excess amount, or

(i) If the settlement includes only the fee, the amount thereof will be determined in accordance with subparagraph (I)(D) above.

(f) In arriving at the amount due the Seller under this clause there shall be deducted (i) all unliquidated advance or other payments thereunder made to the Seller, applicable to the terminated portion of this contract, (ii) any claim which the Buyer may have against the Seller in connection with this contract, and (iii) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things acquired by the Seller or sold pursuant to the provisions of this clause and not otherwise recovered by or credited to the Buyer.

(g) In the event of a partial termination, the portion of the fee which is payable with respect to the work under the terminated portion of the contract shall be equitably adjusted by agreement between the Seller and the Buyer, and such adjustment shall be evidenced by an amendment to this contract.

(h) The Buyer may, from time to time, under such terms and conditions as it may prescribe, make partial payments and payments on account against costs incurred by the Seller in connection with the terminated portion of the contract whenever in the opinion of the Buyer the aggregate of such payments shall be within the amount to which the Seller will be entitled hereunder. If the total of such payments is in excess of the amount finally determined to be due under this clause, such excess shall be payable by the Seller to the Buyer upon demand, together with interest computed at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 85 STAT 97 for the Renegotiation Board, for the period from the date such excess payment is received by the Seller to the date on which such excess is repaid to the Buyer; provided, however, that no interest shall be charged with respect to any such excess payment attributable to a reduction in the Seller's claim by reason of retention or other disposition of terminable inventory until ten (10) days after the date of such retention or disposition, or such later date as determined by the Buyer by reason of the circumstances.

(End of clause)

8-704 Research and Development Contracts with Educational and Other Non-profit Institutions.

8-704.1 Termination Clause.

(a) The clause in 7-302.10(b) shall be used in any contract for experimental, developmental, or research work (whether fixed price or cost reimbursement type) with an educational institution when such contract is placed on a no-fee or no-profit basis except that in the case of organizations other than educational institutions, paragraph (d) shall be deleted and the paragraph in 7-302.10(c) shall be used.

(b) The clause in 7-302.10(c) shall be used in contracts with a nonprofit organization other than an educational institution.

8-704.2 Suggested Clause for Subcontracts. The clause in 7-302.10(b), suitably altered to indicate the relationship between the prime contractor and subcontractor, is suggested for use in subcontracts placed with educational or nonprofit institutions; provided, such subcontracts incorporate, or are negotiated on the basis of, the cost principles set forth in Section XV; and provided further, such subcontracts are placed on the no-fee or no-profit basis.

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8-705 Short Form Termination Clauses for Fixed-Price Type Contracts.

8-705.1 Supply and Service Contracts.

(a) To facilitate the handling of purchases under fixed-price supply or service contracts not to exceed \$25,000, the short form termination clause in 7-103.21(a) is authorized for use in lieu of any other clause providing for termination for the convenience of the Government; provided, such contracts obligate the Government to order or otherwise to be liable for a minimum quantity.

(b) To facilitate the obtaining of services where it can reasonably be determined that the kind and volume of service required would not, in the event of termination for convenience of the Government, present a basis for a termination claim other than for services rendered (such as, but not limited to, most contracts for rental of unreserved garage space, meals for inductees, or laundry and dry-cleaning services), the short form termination clause in 7-1902.16(b) is authorized for use in such service contracts, regardless of dollar value, in lieu of any other clause providing for termination for the convenience of the Government.

(c) Where DD 1155 is utilized for purchases not in excess of \$25,000 and the additional general provisions are incorporated, clause 17 of that form shall be used in lieu of those specified in (a) and (b) above.

8-705.2 Construction Contracts. Generally, there is no need for a termination clause in construction contracts not in excess of \$25,000. However, when the contracting officer determines that a termination clause should be included in such a contract, the clause in 7-602.29(b) shall be used, except where DD Form 1155 is utilized, clause 17 of that form shall be used in lieu of the clause in 7-602.29(b).

8-705.3 Reserved.

8-706 Subcontract Termination Clause. The following termination clause is suggested for use in fixed-price subcontracts.

TERMINATION (1974 APR)

(a) The performance of work under this contract may be terminated, in whole or from time to time in part, by the buyer in accordance with this clause. Termination of work hereunder shall be effected by delivery to the seller of a Notice of Termination specifying the extent to which performance of work under the contract is terminated, and date upon which such termination becomes effective.

(b) After receipt of a Notice of Termination and except as otherwise directed by the buyer, the seller shall:

(i) stop work under the contract on the date and to the extent specified in the Notice of Termination;

(ii) place no further orders or subcontracts for materials, services, or facilities except as may be necessary for completion of such portions of the work under the contract as may not be terminated;

(iii) terminate all orders and subcontracts to the extent that they relate to the performance of any work terminated by the Notice of Termination;

(iv) assign to the buyer, in the manner, and to the extent directed by the buyer all of the right, title and interest of the seller under the orders or subcontracts so terminated;

(v) settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts subject to the approval or ratification of the buyer to the extent he may require, which approval or ratification shall be final for all the purposes of this clause;

(vi) transfer title and deliver in the manner, to the extent, and at the times directed by the buyer (A) the fabricated or unfabricated parts, work in process, completed work, supplies and other material produced as a part of, or acquired in connection with the

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(End of clause)

In accordance with E-621, the last sentence of paragraph (h) in the above clause may be deleted in subcontracts with agencies of the United States Government, foreign governments or agencies thereof, state or local governments or agencies thereof, or nonprofit contracts with nonprofit educational or research institutions.

8-707 Default Clause for Fixed-Price Supply Contracts. Insert the clause in 7-103.11, except for purchase orders.

8-708 Exorable Delays Clause for Cost-Reimbursement Type Contracts.

(a) *General.* The clause in 7-203.11 shall be used in all cost-reimbursement type supply contracts as defined in 7-202, in all cost-reimbursement type construction contracts, and in all cost-reimbursement type research and development contracts that contain the Termination clause in 7-203.10(a). It may be used in contracts that contain the Termination clause in 7-203.10(b) or (c).

(b) *Architect-Engineer Contracts.* The following clause shall be inserted in each cost-reimbursement type Architect-Engineer contract:

EXCUSABLE DELAYS (JAN 1968)

The Architect-Engineer shall not be in default by reason of any failure in performance of this contract in accordance with its terms (including any failure by the Architect-Engineer to make progress in the prosecution of the work hereunder which endangers such performance) if such failure arises out of causes beyond the control and without the fault or negligence of the Architect-Engineer. Such causes may include but are not restricted to: acts of God or of the public enemy; acts of the Government in either its sovereign or contractual capacity; fires, floods, epidemics, quarantine restrictions, strikes, and unusually severe weather; but in every case, the failure to perform must be beyond the control and without the fault or negligence of the Architect-Engineer. Upon request of the Architect-Engineer, the Contracting Officer shall ascertain the facts and extent of such failure and, if he shall determine that any failure to perform was occasioned by any cost or more of the said causes, the completion dates shall be revised accordingly subject to the rights of the Government under the clause of this contract entitled "Termination".

(End of clause)

8-709 Default Clause for Fixed-Price Construction Contracts. The clause in 7-602.5 shall be used in each fixed-price construction contract in excess of \$25,000.

8-710 Default Clause for Fixed-Price Research and Development Contracts. See 7-302.9.

8-711 Default Clause for Fixed-Price Architect-Engineer Contracts. See 7-607.4.

8-712 Special Termination Costs.

(a) The clause in 7-103.3 is authorized for use in an incrementally funded contract when:

- (i) the contract term is two years or more;
- (ii) the contract is estimated to require total RDT&E financing in excess of \$25 million, or total production investment in excess of \$100 million;
- (iii) adequate resources are available within existing appropriated amounts to cover the contingent reserved liability for special termination costs in the event of contract termination; and

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(iv) the use of the clause in the contract is approved by the Secretary of the Department concerned or his designee.

The clause may be used in circumstances other than those in (i) and (ii) above when approved by the Secretary of the Department concerned or his designee. Any addition to the categories of special termination costs listed in paragraph (a)(i) through (v) of the clause in 7-103.3 shall be processed in accordance with 1-109.3.

(b) The contractor and the contracting officer shall agree upon an amount that represents their best estimate of the total special termination costs to which the contractor would be entitled in the event of termination of the contract. Such amount shall be inserted in the clause.

(c) A provision allowing for negotiated adjustments of the amount reserved for special termination costs may be inserted as paragraph (d) of the clause. Contract provisions for periodic adjustments by mutual agreement of the parties may be established based on, among other things, (i) set time periods within the contract, (ii) the Government's incremental assignment of funds to the contract, or (iii) the time when certain performance milestones are accomplished by the contractor. Provisions for such adjustments may be considered desirable in contracts containing unusually long performance periods, or in contracts where the contractor's cost risk associated with the contingent special termination costs, in the event of Government termination, fluctuates extensively over the period of the contract, depending on the scope of work to be performed during a certain period of the contract, or the amount of funds to be assigned to the contract during any one increment.

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the invitation for bids that supplies (or such supplies apart from relatively minor modifications to be made thereto) normally are or have been sold or offered for sale by any supplier to the public in the commercial open market.

(b) When a supply contract calls in part for specific components or spare parts which normally are or have been sold or offered for sale by any supplier to the public in the commercial open market, or such items with relatively minor modifications, the Patent Indemnity clause in 7-104.5 shall be modified by adding to the end of the clause either of the sentences in 7-104.5(a).

9-103.2 Reserved.

9-103.3 *Patent Indemnification in Negotiated Contracts.* A patent indemnity clause is not required to be included in negotiated contracts, but may be included (i) in negotiated construction contracts, (ii) as authorized in 9-103.1(B), and (iii) in negotiated contracts for supplies where such supplies normally are or have been sold or offered for sale to the public in the commercial open market, or are such supplies with relatively minor modifications made thereto. Ordinarily, the contracting officer, in consultation with the contractor, should be able to determine whether the supplies being purchased normally are on sale or have been sold or offered for sale to the public in the commercial open market.

(a) Subject to the foregoing and to the prohibitions in 9-103, the clause in 7-104.5 is approved for use in negotiated contracts for construction work or supplies.

(b) When a supply contract calls in part for specific components or spare parts which normally are or have been sold or offered for sale to the public in the commercial open market, or such items with relatively minor modifications, the Patent Indemnity clause in 7-104.5 shall be modified by adding to the end of the clause either of the sentences in 7-104.5(a).

9-103.4 *Waiver of Indemnity by the Government.* If it is desired to exempt one or more specified United States patents from the patent indemnity clause in 7-104.5, authority shall first be obtained from the Secretary or his designee, and the clause in 7-104.5(b) shall be included in the contract, in addition to the patent indemnity clause.

9-104 *Notice and Assistance.* The Government should be notified by the contractor of all claims of infringement in connection with the performance of a Government contract which come to the contractor's attention. The contractor should also assist the Government, to the extent of evidence and information in the possession of the contractor, in connection with any suit against the Government, or any claims against the Government made before suit has been instituted, on account of any alleged patent or copyright infringement arising out of or resulting from the performance of the contract. Accordingly, the clause in 7-103.23 shall be included in all contracts in excess of \$25,000 for supplies, services, construction, or experimental, developmental, or research work; provided, that the clause shall not be included in contracts when both performance and delivery are to be outside the United States, its possessions, or Puerto Rico, unless the contract indicates that the supplies are ultimately to be shipped into the United States, its possessions, or Puerto Rico. For proper action to be taken by the contracting officer with respect to reports of notices or claims of patent infringement received by him under the provisions of this paragraph 9-104, see Part 4 of this Section.

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Unless prohibited by 9-102(c), the clause in 7-302.21 shall be included in all contracts calling exclusively for experimental, developmental, or research work, and may be included in contracts calling for both supplies and experimental, developmental, or research work where the latter work is a primary purpose of the contract. In all other contracts for both supplies and experimental, developmental, or research work, the Authorization and Consent clause in 7-103.22 shall be used. If the clause in 7-302.21 is included in a contract, the clause in 7-103.22 shall not be included.

9-103 *Patent Indemnification of Government by Contractor.* In order that the Government may be reimbursed for liability for patent infringement arising out of or resulting from the performance of construction contracts or contracts for supplies which normally are or have been sold or offered for sale to the public in the commercial open market or which are the same as such supplies with a relatively minor modification thereof a clause providing for indemnification of the Government is to be included in such contracts in accordance with the instructions set forth below. A patent indemnity clause shall not be used in contracts:

- (i) when the Authorization and Consent clause in 7-302.21 applicable to research and development contracts is authorized, except that in contracts calling also for supplies of the kind described above, a patent indemnity clause may be used with respect to such supplies;
- (ii) when the contract is for supplies which clearly are not or have not been sold or offered for sale to the public in the commercial open market. However, even in the foregoing instance, a patent indemnity clause may be included where (A) in the case of contracts to be awarded by formal advertising it is desired to obtain an indemnity as to specific components or spare parts so sold or offered for sale, in which case the clause shall be modified pursuant to 9-103.1(b); or (B) in the case of contracts to be awarded either by formal advertising or negotiation, a patent owner contends that the prospective procurement would infringe his patent and the low bidder or offeror is willing to indemnify the Government as to such patent either (1) without increase in price on the basis that the patent is invalid or not infringed, or (2) for other good reasons;
- (iii) when both performance and delivery are to be outside the United States, its possessions, or Puerto Rico, unless the contract indicates that the supplies are ultimately to be shipped into the United States, its possessions, or Puerto Rico, in which case the instructions of 9-103.1 or 9-103.3 are applicable; or
- (iv) when the contract is for an amount of \$25,000 or less, except that, as a matter of administrative convenience, the clause need not be deleted where it is a part of a standard form being used for contracts of \$25,000 or less, since it is self-deleting as to such contracts.

9-103.1 *Patent Indemnification in Formally Advertised Contracts—Commercial Status Predetermined.*

(a) Except as prohibited by 9-103, the clause in 7-104.5 is appropriate in formally advertised construction contracts and shall be included in formally advertised contracts for supplies when it has been determined in advance of issuing

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7-104.65 in all other contracts requiring work on a Government installation. Neither clause is required, however, for contracts (i) of \$25,000 or less, (ii) when only a small amount of work is required on a Government installation (e.g., a few brief visits per month), or (iii) when all work on a Government installation is to be performed outside the United States, its possessions, and Puerto Rico. The coverage specified in 10-501 is the minimum insurance required and shall be included in the clause in 7-603.10 or in the contract schedule. Additional coverage and higher limits may be required by the contracting officer.

(b) The clause in 7-104.65 may also be included in contracts described in (a) (i), (ii), and (iii) above when the contracting officer judges this to be in the interest of the Government. In such contracts, if appropriate, any of the kinds of insurance listed in 10-501 may be omitted from the Schedule, and the limits may be lowered.

10-406 Capture and Detention of Contractor Employees. The clause in 7-104.94 is authorized for use when the employees of a contractor are subject to capture and detention under circumstances which may be outside the scope of the War Hazards Compensation Act (42 U.S.C. 1701 et seq.).

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Part 5—Insurance Under Cost-Reimbursement Type Contracts

10-500 Scope of Part. This Part sets forth the policy of the Departments with respect to insurance under cost-reimbursement type contracts for supplies or services.

10-501 Policy. The types of insurance listed below, with the minimum amounts of liability indicated, ordinarily shall be required in cost-reimbursement contracts and subcontracts thereunder when the provisions of the prime contract are extended to the subcontract. (Insurance written on a single limit basis must be equal to or greater than the combined required minimums indicated.) An approved program of self-insurance, as provided in 10-303, may be substituted for any of the types of insurance ordinarily required.

10-501.1 Workers' Compensation and Employers' Liability Insurance.

(a) Compliance with applicable workers' compensation and occupational disease statutes shall be required. In jurisdictions where all occupational diseases are not compensable under applicable law, insurance for occupational disease shall be required under the employers' liability section of the insurance policy; however, such additional insurance shall not be required when contract operations are commingled with the contractor's commercial operations so that it would be impracticable to require such coverage. Employers' liability coverage in the minimum amount of \$100,000 shall be required except in states with exclusive or monopolistic funds which do not permit the writing of workers' compensation by private insurance carriers (Nevada, North Dakota, Ohio, Washington, West Virginia, and Wyoming). The clause in 7-104.2(a) shall be included in all public work contracts as described therein to be performed outside the United States.

(b) When the clause in 7-104.2(b) is required for contractor programs of self-insurance, and the Chief of the Contracting Office determines that the contractor shall not purchase insurance against the liability described in 10-403(d)(2), the clause in 7-104.2(c) shall be inserted in the contract.

(c) Each contract containing the clause in 7-104.2(c) shall contain:

- (i) the estimated cost for war hazard losses;
- (ii) the clause at 7-203.4(a) appropriately limited to cover allowable war hazard cost;
- (iii) the Examination of Records clause (7-104.15); and
- (iv) a provision similar to the following:

The portion of this contract providing for the Contractor to afford protection to his employees and by subcontractors to their employees against war hazard risks

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sioner may otherwise require. The requirements of the Commissioner are set forth in regulations which, in pertinent part, provide:

"To substantiate a refund claim for sales or use taxes paid on purchases of building materials, supplies, fixtures and equipment by its contractor, the claimant must secure from such contractor certified statements setting forth the cost of the property purchased from each vendor and the amount of sales and/or use taxes paid thereon. In the event the contractor makes several purchases from the same vendor, such certified statement must indicate the invoice numbers, the inclusive dates of the invoices, the total amount of the invoices and the sales and use taxes paid thereon. Such statement must also include the cost of any tangible personal property withdrawn from the contractor's warehouse stock and the amount of sales or use tax paid thereon by the contractor. Similar certified statements by his subcontractors must be obtained by the general contractor and furnished to the claimant. Any local sales or use taxes included in the contractors' statements must be shown separately from the State sales or use taxes."

(c) To assure that the United States will be in a position to obtain refunds of North Carolina State and local sales and use taxes to which it is entitled, the clause in 7-602.27 shall be inserted in all construction contracts to be performed in North Carolina, including vessel repair contracts.

(d) The clause in 7-602.27 requires construction contractors, including vessel repair contractors, to submit to contracting officers by November 30 each year certified statements covering North Carolina State and local sales and use taxes paid during the twelve month period which ended the preceding September 30. It will be the responsibility of each contracting officer concerned to assure that contractors comply with this requirement and to obtain the annual refund of North Carolina State and local sales and use taxes to which his activity may be entitled. The application for refund must be filed each year before March 31 and in the manner and form required by the Commissioner of Revenue of the State of North Carolina. Copies of the form to be used in filing refund claims may be obtained by writing to the State of North Carolina Department of Revenue, Raleigh, North Carolina 27602.

Part 4—Contract Clauses

11-401 Fixed-Price Type Contracts. The clauses prescribed herein are for use in fixed-price type contracts except those to be performed entirely outside the United States, its possessions, and Puerto Rico.

11-401.1 Advertised and Certain Negotiated Contracts.

(a) *Use of Clause.* The clause in 7-103.10(a) shall be used in:

- (i) all formally advertised contracts except in construction contracts which do not exceed \$25,000;
- (ii) all competitively negotiated fixed-price contracts in excess of \$25,000;
- (iii) all noncompetitive negotiated fixed-price contracts in excess of \$25,000, when use of the clause in 7-103.10(b) is not required; and
- (iv) any negotiated fixed-price contract in excess of \$2,500 but not in excess of \$25,000, at the discretion of the contracting officer. However, this clause shall not be used in purchases made under Section III, Part 6.

(b) *Description.* The clause provides that the contract price includes all applicable taxes. It provides for an increase or decrease in the contract price to compensate for changes in applicable Federal excise taxes or duties, except for social security or other employment taxes. It does not provide for any adjustment in the contract price to compensate for changes in State or local taxes.

11-401.2 Noncompetitive Negotiated Contracts.

(a) *Use of Clause.* The clause in 7-103.10(b) shall be used in all noncompetitive negotiated fixed-price contracts in excess of \$25,000, when the contracting officer is satisfied (i) that the contract price does not include contingencies for State and local taxes and (ii) that unless this clause is used the contract price will include such contingencies.

(b) *Description.* The clause provides that the contract price includes all applicable Federal, State, and local taxes. It provides for an increase or decrease in the contract price to compensate for changes in Federal excise taxes or duties, and, with some exceptions, for changes in State and local taxes.

11-401.3 Supplementary Clause for Possessions of the United States and Puerto Rico. When a contract will be performed in whole or in part in a possession of the United States or in Puerto Rico, and either the clause in 7-103.10(a) or that in 7-103.10(b) is used, the contract shall contain the supplementary clause in 7-103.10(c).

11-401.4 Matters Requiring Special Consideration.

(a) A contract may, in accordance with (b) below, provide that the contract price include or exclude a specific tax, or require that the contractor take certain actions with regard to nonpayment, payment, protest or other treatment of a specific tax. Such special treatment may be required, for example, where the State or local tax law has been recently changed, where there is doubt as to the applicability or allocability of the tax, or where the applicability of the tax is being litigated.

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SECTION XIV

ACQUISITION QUALITY

14-000 Scope of Section. This Section prescribes policies and procedures (i) to assure that supplies and services acquired by the Department of Defense conform to the quality and quantity set forth in the contract and (ii) for the acceptance functions associated therewith.

- (a) The Departments shall develop and manage a cost effective quality program to achieve the following objectives:
- (1) Assure that all services provided and products designed, developed, purchased, produced, stored, distributed, operated, maintained, or disposed of, by contractors for the Department of Defense, conform to specified requirements;
 - (2) Effectively assure that only minimum essential quality and related technical requirements are specified in contracts;
 - (3) Tailor contractual quality requirements to meet the needs of each acquisition.
- (b) The Departments will plan and implement a quality program as an integral part of all phases of the acquisition and support process, and will conduct quality audits to assure the attainment of quality products and services.

14-001 Definitions. As used in this Section, the words and terms described in this paragraph shall have the meanings set forth below.

14-001.1 Government Acquisition Quality Assurance means the Government function by which the Government determines whether a contractor has fulfilled his contract obligations pertaining to quality and quantity. This function is related to and generally precedes the act of acceptance as defined in 14-001.6 below.

14-001.2 Contract Quality Requirements means the detailed requisites for quality incumbent on the contractor, consisting of (i) all quality requirements contained in a contract, and (ii) the detailed contractual requisites provided by 14-101 incumbent on the contractor to substantiate conformance of product or service to quality requirements of the contract.

14-001.3 Inspection means the examination and testing of supplies or services (including, when appropriate, raw materials, components, and intermediate assemblies) to determine whether they conform to contract requirements.

14-001.4 Testing is an element of inspection and generally denotes the determination by technical means of the properties or elements of supplies, or components thereof, including functional operation, and involves the application of established scientific principles and procedures.

14-001.5 Subcontractor means any supplier, distributor, vendor, or firm which furnishes supplies or services to or for a prime contractor or another subcontractor.

14-001.6 Acceptance means the act of an authorized representative of the Government by which the Government assumes for itself, or as agent of another, ownership of existing and identified supplies tendered or approves specific services rendered, as partial or complete performance of the contract on the part of the contractor.

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14-001.7 Off-The-Shelf Item means an item produced and placed in stock by a contractor prior to the contractor receiving orders or contracts for the sale of the item. The contractor may produce the items to either commercial or military federal item specifications or descriptions. Off-the-shelf items include items stocked by distributors for which Government contracts may be received.

14-001.8 Quality means the composite of material attributes including performance features and characteristics of a product or service to satisfy a given need.

14-001.9 Quality Program is a program which is developed, planned and managed to carry out cost effectively all efforts to effect the quality of materials and services from concept through validation, full-scale development, production, deployment, and disposal.

14-001.10 Quality Assurance is a planned and systematic pattern of all actions necessary to provide adequate confidence that adequate technical requirements are established; products and services conform to established technical requirements; and satisfactory performance is achieved.

14-001.11 Quality Audit is a systematic examination of the acts and decisions with respect to quality in order to independently verify or evaluate the operational requirements of the Quality program or the specification or contract requirements of the product or service.

14-001.12 Metrology is the science of weights and measures used to determine conformance to technical requirements including the development of standards and systems for absolute and relative measurements.

14-001.13 Calibration is the comparison of a measurement system or device of unverified accuracy to a measurement system or device of known or greater accuracy to detect and correct any variation from required performance specifications of the unverified measurement system or device.

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such as to require control of work operations, in-process controls, and inspection, as well as attention to other factors (e.g., organization, planning, work instructions, documentation control, advanced metrology). The objectives and essential elements of a quality program are prescribed in MIL-Q-9858 which shall be referenced in contracts when a quality program requirement has been established.

14-101.5 Criteria for Applying Contract Quality Requirements

(a) Suggested adds in proper selection of contract quality requirements:

- (i) Classification by type of contract quality requirement:
 - (A) No Specific Contract Quality Requirement. Generally used in purchases under Section III, Part 6, where there is no specific obligation on the contractor for the performance of inspection and no Government acquisition quality assurance actions can be performed at source.
 - (B) Contractor Responsibility Clause. (See 14-101.1.) Use of this requirement alone is restricted to purchases under Section III, Part 6.
 - (C) Standard Inspection Requirement. (See 14-101.2.) Must be used on all fixed price supply contracts over \$10,000 not subject to small purchase procedures. It may be used alone or in conjunction with Contractor Responsibility clause on purchases under Section III, Part 6.
 - (D) MIL-I-45208 and MIL-Q-9858. (See 14-101.3 and 14-101.4.) Technical personnel shall be consulted before including one of these specifications in a contract. The Standard Inspection Requirement in (C) above must be used when either one of these specifications is used.
 - (E) No additional contract quality requirement shall be specified for commercial items acquired under a commercial item description.
- (ii) Classification by contract item technical description:
 - (A) Commercial (catalogs, drawings, industrial standards).
 - (B) Military-Federal (drawings, specifications).
 - (C) Off-the-shelf (See 14-001.7).
- (iii) Classification by type of items:
 - (A) Complex items have quality characteristics, not wholly visible in the end item, for which contractual conformance must progressively be established through precise measurements, tests and controls accomplished during purchasing, manufacturing, assembly, and functional operations either as an individual item or in conjunction with other items.
 - (B) Noncomplex items have quality characteristics for which simple measurement and test of the end item is sufficient to determine conformance to contract requirements.
- (iv) Classification by type of application:
 - (A) Critical. A critical application of an item is one in which the failure of the item could injure personnel or jeopardize a military mission. Critical items may be either:
 - (i) peculiar, meaning items which have only one application, or
 - (ii) common, meaning items which have multiple applications.
 Whether peculiar or common, purchases of critical items must have contract quality requirements.

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Part I—General

14-101 Types of Contract Quality Requirements. There are five basic categories of contract coverage for assuring conformance of products or services to contract requirements:

- (a) not including any specific quality requirement in the contract, in which case the Government does not perform any acquisition quality assurance actions at source, but instead relies on the contractor's internal control to obtain the supplies or services specified in the contract;
- (b) contractor responsibility provisions (14-101.1);
- (c) standard inspection requirement (14-101.2);
- (d) MIL-I-45208 Inspection System Requirement (14-101.3); and
- (e) MIL-Q-9858 Quality Program Requirement (14-101.4). MIL-I-45208, Inspection System Requirement, or MIL-Q-9858, Quality Program Requirement, shall not be specified for off-the-shelf items or commercial items obtained with a commercial item description.

14-101.1 Contractor Responsibility Provisions, making the contractor responsible for the inspection and test of products before offering them to the Government, are effected by:

- (i) citing in the contract Federal-Military Specifications which contain a "Responsibility for Inspection" clause in Section 4, "Quality Assurance Provisions" of the Specifications;
- (ii) citing in the contract Federal-Military drawings which carry a note relative to the contractor's responsibility for inspection and test and including the clause in 7-103.24 in the contract.

14-101.2 Standard Inspection Requirement is a requirement that the contractor establish and comply with an inspection system acceptable to the Government. This requirement is included in the standard inspection clauses (see, for example, paragraph (e) of the Inspection clause in 7-103.5(a)) and is not further defined by a Government specification. This requirement is appropriate when for reasons of practicability (e.g., purchase of a commercial item) or because of the nature of the supplies (i.e., the item serves a function that is not materially or consequentially related to military operations), it is not considered necessary to describe further what constitutes an acceptable inspection system.

14-101.3 Inspection System Requirement is a requirement, in addition to the Standard Inspection Requirement, that the contractor establish and maintain an inspection system in accordance with a Government specification. This requirement shall be referenced in contracts when technical requirements are such as to require control of quality by in-process as well as final end item inspection, including control of such elements of the manufacturing process as measuring and testing equipment, drawings and changes, inspection, documentation and records. The objectives and essential elements of an inspection system are prescribed in MIL-I-45208, which shall be referenced in contracts when an inspection system requirement has been established.

14-101.4 Quality Program Requirement is a requirement, in addition to the Standard Inspection Requirement, that the contractor establish and maintain a quality program in accordance with a Government specification. Such a requirement shall be established when the technical requirements of the contract are

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14-102 Responsibilities of the Contractor.

(a) The contractor is responsible for carrying out his obligations as set forth in the terms and conditions of the contract and in the applicable specifications. Most Department of Defense contracts include, or reference, standard requirements, such as those in general provisions, special clauses for an inspection system or quality program, and performance and product specification requirements. The contractor is responsible for controlling product quality and for offering to the Government for acceptance only those supplies and services that conform to contract requirements and, when required, for maintaining and furnishing substantiating evidence of this conformance.

(b) The control of quality by the contractor may relate to, but is not limited to:

- (i) manufacturing processes, to assure that the product is produced in accordance with technical requirements;
- (ii) drawings, specifications, and engineering changes, to assure that manufacturing methods and operations reflect technical requirements;
- (iii) testing and examination, to assure that practices and equipment provide the means for optimum evaluation of characteristics subjected to inspection;
- (iv) reliability and maintainability assessment (life, endurance, and continued readiness);
- (v) fabrication and delivery of products to assure that only conforming products are tendered to the Government;
- (vi) technical documentation, including drawings, specifications, handbooks, manuals, and other technical publications; and
- (vii) preservation, packaging, packing and marking.

14-103 Responsibilities of the Government. The Government shall determine the type and extent of Government acquisition quality assurance actions required, based upon the particular acquisition.

(a) These actions may include:

- (i) inspection of supplies and services;
- (ii) review of the contractor's inspection system, quality program, or of any other means employed by the contractor to control quality and to comply with contract requirements;
- (iii) maintenance of Government records to reflect actions, deficiencies, and corrective measures; and
- (iv) review and evaluation of quality information, including reports from the user, to initiate required corrective actions or to adjust Government acquisition quality assurance actions.

(b) The Government shall hold contractors responsible for the quality of products and services by means of:

- (i) contract provisions that place responsibility on contractors;
- (ii) the Government's exercising its right to reject or return contractor-responsible defective items for repair, correction or replacement; and
- (iii) warranty clauses, when appropriate.

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(B) Noncritical. A noncritical application is any application which is not critical. Noncritical items may also be either peculiar or common.

(b) Application of the Criteria. Decisions must be made as to whether the item is off-the-shelf, or commercial or Military-Federal, complex or noncomplex and whether its application is critical or noncritical, peculiar or common. Once these decisions are made, the table below will indicate the proper contract quality requirement.

Item Description	Kind of Item	Application	Type of Contract Quality Requirement
Commercial	Noncomplex	Noncritical	14-101(a)
Commercial	Noncomplex	Common	14-101(a)
Commercial	Noncomplex	Noncritical	14-101(a)
Commercial	Complex	Peculiar	14-101(c)
Commercial	Complex	Critical	14-101(c)
Commercial	Complex	Noncritical	14-101(c)
Commercial	Complex	Common	14-101(c)
Commercial	Complex	Peculiar	14-101(c)
Commercial	Complex	Critical	14-101(c)
Military-Federal	Noncomplex	Noncritical	14-101(d)
Military-Federal	Noncomplex	Common	14-101(d)
Military-Federal	Noncomplex	Noncritical	14-101(d)
Military-Federal	Complex	Peculiar	14-101(f)
Military-Federal	Complex	Critical	14-101(f)
Military-Federal	Complex	Noncritical	14-101(f)
Military-Federal	Complex	Common	14-101(f)
Military-Federal	Complex	Peculiar	14-101(f)
Military-Federal	Complex	Critical	14-101(f)
Off-the-Shelf	All	Noncritical	14-101(g)
Off-the-Shelf	All	Critical	14-101(g)

(c) The table in (b) above is intended for use as a guide in selecting the contract quality requirement normally considered appropriate for the given item criteria. However, where circumstances warrant, a contract quality requirement of a greater or lesser degree than that arrived at through use of this table may be specified by the PCO except for off-the-shelf items as defined in 14-001.7. Contract quality requirements may be tailored to meet the needs of the specific acquisitions.

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(c) The Government shall consider the use of:

- (i) contractual means for encouraging excellence in the conduct of contractor-responsible quality efforts;
 - (ii) incentive fee or award fee arrangements for achieving quality goals;
 - (iii) reduced Government surveillance when contractor's quality performance so indicates; and
 - (iv) other noncontractual motivation techniques.
- (d) Contractors shall be provided maximum flexibility in establishing efficient and effective quality programs within specified contractual requirements.

14-103.1 Subcontract. Government acquisition quality assurance at subcontractor's plants shall be performed only when necessary to assist the contract administration office cognizant at the prime contractor's plant. Paragraph 14-407 provides guidance on Government acquisition quality assurance actions at the subcontract level.

14-103.2 Specialized Inspections Reserved to the Government. Although contracts generally require that contractors are responsible for performing inspection prior to submitting supplies to the Government, there are situations when contracts will provide for specialized inspections to be performed solely by the Government. Among situations for which specialized Government inspection is required are the following:

- (i) test requirements necessitate the use of specialized test equipment or facilities not ordinarily available in suppliers' plants or commercial laboratories (e.g., ballistic testing of ammunition, unusual environmental tests, or simulated service tests); or
- (ii) the contract requires Government testing for first article approval (see Section I, Part 19).

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Part 2—Responsibilities of Government Organizations

14-201 Organization Responsible for Technical Requirements.

(a) The activity responsible for technical requirements (e.g., specifications, drawings and standards) is responsible for prescribing inspection, testing, or other contract quality requirements that are essential to assure the integrity of products and services.

(b) To the extent feasible, alternative but substantially equivalent inspection methods shall be provided in order to obtain wide competition and low cost. Contractor-recommended alternatives may be authorized when in the interest of the Government and after approval by the activity responsible for technical requirements.

(c) The activity responsible for technical requirements may also prepare instructions regarding the type and extent of Government inspections pertaining to contracts for specific supplies or services that are complex or for which unusual requirements have been established. Such instructions shall be kept to a minimum taking into account the policy contained in 14-403(a). Normally, issuance of these instructions will not be appropriate for standard commercial items except when items having critical characteristics are being purchased. After issuance of these instructions, production problems, product-oriented visits, user experience and input from the contract administration office shall be analyzed periodically to determine whether conditions warrant a change in type and extent of the inspection requirements. Such analysis may result in decreasing or increasing Government inspection. These instructions shall be prepared on a contract-by-contract basis and shall not be issued:

- (i) as a substitute for incomplete contract quality requirements;
 - (ii) where the contract does not impose equal or greater inspection requirements on the contractor;
 - (iii) encompassing broad or general designations such as "all requirements," "all characteristics," or "all characteristics in the classification of defects;"
 - (iv) on routine administrative procedures; or
 - (v) specifying continued inspection requirements when statistically sound sampling will provide an adequate degree of protection.
- (d) In the preparation of such instructions, the technical activity shall consider, to the extent available and applicable, such factors as:
- (i) the past quality history of the contractor;
 - (ii) the criticality of the material acquired in relation to its ultimate use considering such factors as reliability, safety and interchangeability;
 - (iii) problems encountered in the development of the product;
 - (iv) problems encountered in the acquisition of the same or similar material;
 - (v) previously generated feedback data from receiving, testing or using activities; and
 - (vi) other contractor's experience in overcoming manufacturing problems.

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Part 3—Contract Provisions

14-301 Quality Clauses.

(a) The appropriate clauses referenced in 14-302 through 14-304 shall be inserted in contracts other than those entered into by use of DD Form 1155, Order for Supplies and Services/Request for Quotations (see Section III, Part 6).

(b) In purchases made by use of DD Form 1155 there is a requirement for the contractor to perform inspection; however, the nature of the item may make it desirable in exceptional cases to include other clauses listed in 14-302 through 14-304.

14-302 Standard Inspection Clauses. Where inspection is sufficient to assure that the supplies and services conform to contract requirements (see 14-101.2), the appropriate standard inspection clause prescribed in the listing below shall be inserted in the contract:

- (i) 7-103.24 and 7-103.5(a), (b) or (c);
- (ii) 7-203.5(a);
- (iii) 7-302.4(a) or (b);
- (iv) 7-402.5(a)(1) or (3);
- (v) 7-402.5(b);
- (vi) 7-602.10(a);
- (vii) 7-602.11;
- (viii) 7-702.6;
- (ix) 7-703.6;
- (x) 7-704.8;
- (xi) 7-901.21; or
- (xii) 7-1902.4 or 7-1909.5.

14-303 Inspection System Requirements. When the technical requirements of the contract are such as to require control of quality by in-process as well as final end item inspection, including control of such elements of the manufacturing process as measuring and testing equipment, drawings and changes, inspection, documentation, and records, the appropriate inspection system clause listed below, referencing the latest revision of MIL-4-5208, shall be used:

- (i) 7-103.5(a), (b) or (c); 7-103.24 and 7-104.33;
- (ii) 7-203.5(a) and (b);
- (iii) 7-302.4(a) or (b) and (c);
- (iv) 7-402.5(a)(1) or (3) and (c);
- (v) 7-402.5(b) and (c);
- (vi) 7-602.10(a) and (b);
- (vii) 7-703.44; or
- (viii) 7-901.21 and 7-901.25.

14-304 Quality Program Requirements.

(a) When the technical requirements of the contract are such as to require control of work operations, in-process controls, inspections and tests, as well as attention to other factors (e.g., organization, planning, work instructions, documentation control, advanced metrology), the appropriate clause listed below, referencing the latest revision of MIL-Q-9858, shall be used. This paragraph does not apply to construction contracts.

- (i) 7-103.5(a), (b) or (c); 7-103.24 and 7-104.28;

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When knowledge of the determining factors, which resulted in the requirement for Government inspection, would be useful to the contract administration office in performing the acquisition quality assurance function, these factors should be provided to the contract administration office.

14-202 Purchasing Office.

(a) The purchasing office is responsible after coordinating, where necessary, with the technical activity for contractually formalizing requirements for quality and, within the provisions of 14-201(c), issuing Government inspection instructions to the contract administration office. The purchasing office shall include, in each solicitation and resultant contract, by contract clause, exhibit or specification reference, appropriate requirements for the contractor's control of quality for the supplies or services to be acquired (see 14-302 through 14-304).

(b) The purchasing office may conduct, in conjunction where necessary, with the activity responsible for technical requirements, product-oriented surveys and evaluations to determine the adequacy of the technical requirements relating to quality and product conformance to design intent. The purchasing office may arrange with the contract administration office to participate in pre-award surveys, post-award, and preproduction conferences, and first article testing. The purchasing office may aid the contract administration office in the transition from research and development to production, aid the technical activity in improving the quality requirements in contracts when first designated for competitive acquisition, and aid in ascertaining the source of difficulties associated with user experience reports.

14-203 Contract Administration Office.

(a) Except as otherwise specified in the contract, the contract administration office cognizant at a plant is responsible for the performance of Government acquisition quality assurance actions. The contract administration office shall verify that the contractor has fulfilled contract quality requirements. It is the contract administration office responsibility to develop and apply effective and efficient procedures for Government acquisition quality assurance. The contract administration office shall perform specific Government inspection actions when these actions are required in writing by the purchasing office. In implementing written Government inspection instructions, the contract administration office shall review these instructions and when appropriate, make recommendations to the purchasing office for their improvement in terms of both technical effectiveness and cost, particularly with respect to the utilization of Department of Defense personnel, equipment, and facilities. Written Government inspection instructions shall be continued on schedule as prescribed until the recommendation has been acted upon. The purchasing office is obligated to take appropriate action on such recommendation.

(b) The contract administration office shall report to the purchasing office any observed deficiencies in design or technical requirements, including contract quality requirements, and recommend necessary changes to the contract, specifications, or other requirements which will provide more effective operations or eliminate unnecessary costs.

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- (ii) 7-203.5(a) and 7-204.10;
- (iii) 7-302.4(a) or (b) and 7-303.15;
- (iv) 7-402.5(a)(1) or (3) and 7-403.15;
- (v) 7-402.5(b) and 7-403.15; or
- (vi) 7-901.21 and 7-901.26.

(b) The contracting officer may delete nonapplicable portions of MIL-Q-9858 in contracts for material maintenance.

14-305 Places of Performance of Government Acquisition Quality Assurance Actions.

14-305.1 *General.* Each contract shall designate the place or places where the Government reserves the right to perform those acquisition quality assurance actions that it considers necessary to determine that supplies and services conform to contract requirements. Where the contract provides for Government acquisition quality assurance actions at source, the place or places designated for such actions may not be changed without authorization of the contracting officer.

14-305.2 Government Acquisition Quality Assurance at Source.

(a) When a contract requires the contractor to establish and maintain an inspection system or a quality program in accordance with 14-101.3 or 14-101.4, Government acquisition quality assurance actions generally shall be performed at source.

(b) In addition to (a) above, Government acquisition quality assurance actions shall be performed at source where:

- (i) performance of such actions at any other point would require uneconomical disassembly or destructive testing;
- (ii) special instruments, gauges, or facilities required for performance of such actions are available only at source;
- (iii) performance of such actions at any other point would destroy or require the replacement of costly special packing and packaging;
- (iv) Government acquisition quality assurance during performance is essential; or
- (v) supplies are destined for points of embarkation for overseas shipment (except as provided in 3-606.2, 14-305.3(b), and 14-306(c)).

(c) Where the contract provides for the performance of Government acquisition quality assurance actions at source, these actions shall be taken at such times and places (including any stage in the manufacturing process at both the contractor's and his subcontractor's plants) as may be necessary to determine conformance to contract requirements. In the event that it is in the best interest of the Government to authorize shipment before all Government acquisition quality assurance actions can be taken at source, the contract shall be modified to the extent appropriate prior to shipment, if delivery is f.o.b. origin, (i) to make the delivery term f.o.b. destination or otherwise to make the contractor responsible for risk of loss or damage in transit, and (ii) where delivery remains f.o.b. origin, to require the contractor to reimburse the Government for the cost of shipping and other expenses incurred by the Government in the event of rejection at destination.

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(d) If a contractor's purchase order or subcontract includes FMS requirements and "quality assurance only" is requested at source, the requesting CAO shall clearly indicate "FMS Requirement" on the face of the document and provide the FMS case identifier code, associated item quantity and related DoD prime contract number and contract line/subline item number. When more than one FMS case is involved, the information shall be provided for each.

14-305.3 Government Acquisition Quality Assurance at Destination.

(a) Government acquisition quality assurance actions that can be performed at destination are normally limited to inspection of supplies. For many acquisitions, such inspection by the Government is sufficient. Supplies shall be inspected by the Government at destination when:

- (i) they are purchased "off-the-shelf" and do not require technical inspection or no direct contract quality requirement is specified (14-101.5);
- (ii) necessary testing equipment is located only at destination;
- (iii) perishable subsistence supplies are purchased within the United States, except that perishable subsistence supplies destined for overseas shipment will normally be inspected for condition and quantity at points of embarkation;
- (iv) brand name items are purchased for authorized resale, except that where supplies are destined for direct overseas shipment, inspection (and acceptance) will be made by the contracting officer or the official charged with such responsibility on the basis of a tally sheet evidencing receipt of shipment signed by the port transportation officer or other designated official at the transshipment point; or
- (v) otherwise determined to be in the best interest of the Government.

(b) In no event shall a contract provide for Government inspection at a port of embarkation when the supplies are destined for overseas shipment, unless the contracting officer first determines that inspection functions can be provided at such destination. Similarly, overseas inspection shall not be required for supplies shipped from the United States except in unusual circumstances—as, for example, where inspection overseas is essential in conjunction with installation, operation, or other use of the supplies or equipment—and then only when the contracting officer first determines that inspection can be performed, or makes necessary arrangements for its performance, overseas.

14-306 Acceptance of Supplies or Services.

(a) Acceptance of supplies or services is the responsibility of the activity to which the function is assigned by the purchasing office. When a Government activity uses services of another Government activity or department for the purpose of acceptance, acceptance by the other activity or department is binding upon the activity for which the services are performed. Unless there are valid reasons to the contrary, acceptance shall be at origin (see 19-104).

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(b) Depending upon the provisions of the contract, acceptance may be effected prior to, at the time of, or after delivery. Acceptance shall ordinarily be evidenced by execution of an acceptance certificate on the applicable inspection and receiving report form (DD Form 250, DD Form 1155, or Standard Form 44). When acceptance is accomplished at a point other than destination, supplies cannot be inspected at destination for acceptance purposes. However, such supplies should be examined at destination for identity, damage in transit, quantity and condition.

(c) In certain instances where small losses would be incurred in the event of defects or where knowledge of the successful contractor's reputation or past performance provides assurance that the supplies would be replaced without contest, a Certificate of Conformance may be used as the sole basis for acceptance. To permit the Government this option, and at the discretion of the PCO, the Certificate of Conformance clause 7-104.100 may be inserted in solicitations and contracts requiring the contractor to certify that supplies comply with contract requirements. In no case shall the Government's right to inspect supplies under the inspection provisions of the contract be prejudiced.

14-307 Place of Acceptance.

Each contract shall specify the place of acceptance. A contract which provides for Government acquisition quality assurance actions only at source shall ordinarily provide for acceptance at source. A contract which provides for performance of Government acquisition quality assurance actions at destination shall ordinarily provide for acceptance at destination. Bulk petroleum contracts shall specify the point at which the Government takes title to the product.

14-308 Government Acquisition Quality Assurance Actions on Small Purchases.

(a) In determining the type and extent of Government acquisition quality assurance actions to be required on small purchases, the criticality of application of the item, the amount of possible losses, and the likelihood of uncontested replacement of defective supplies shall be considered.

(b) Government acquisition quality assurance of small purchases shall be at destination, unless the provisions of 14-305.2(a) or (b) apply. Government acquisition quality assurance actions shall be performed at source if defective supplies can harm personnel or equipment. In such case, one of the types of contract quality requirements described in 14-101 shall be included in the contract.

(c) Unless detailed Government acquisition quality assurance actions are necessary, inspection of small purchases shall consist of examination of:

- (i) type and kind;
- (ii) quantity;
- (iii) condition;
- (iv) operability, if readily determinable; and
- (v) preservation, packaging, packing and marking, if applicable.

Part 4—Government Acquisition Quality Assurance Actions

14-401 General. This Part sets forth policies and procedures for performance of Government acquisition quality assurance actions by contract administration offices, designed to provide a systematic product-oriented plan, appropriate distribution of effort, and maintenance of suitable records.

14-402 Planning.

(a) Government acquisition quality assurance actions to determine a contractor's compliance with contract quality requirements shall be systematically planned, taking into consideration the relative importance of the product and the variety of tasks required of the available resources. Systematic planning shall include:

- (i) review and analysis of pre-award surveys, post-award conferences, technical data packages, and first article approvals;
 - (ii) identification of the specific products, processes and procedures to be subjected to Government acquisition quality assurance as well as the specific characteristics of such products, processes, or procedures to be verified (in the absence of identification of specific characteristics by the purchasing office, those established by the contractor will be used to the maximum extent possible);
 - (iii) provisions for effective distribution and utilization of the Government's efforts and resources between inspection of products and inspection of the contractor's methods of regulating quality; and
 - (iv) provisions for keeping and using records.
- (b) Planning to determine the extent of Government acquisition quality assurance actions shall include as a minimum:
- (i) possible effect of failure on the health or safety of personnel, or on associated or related equipment;
 - (ii) tactical, strategic, or technical importance;
 - (iii) complexity and the need for required reliability;
 - (iv) pertinency, completeness, and reliability of the contractor's quality records;
 - (v) previous quality history of the contractor; and
 - (vi) unit cost.

14-403 Implementation.

(a) Determination of conformance to contract quality requirements shall be made on the basis of objective evidence of quality. In determining the acceptability of supplies or services, the contract administration office shall make optimum use of quality data generated by contractors. To the extent that contractor quality data are available and reliable, as determined by the contract administration office, such data shall be used to adjust the amount of Government acquisition quality assurance to a minimum consistent with proper assurance that the supplies or services accepted conform to contract quality requirements.

(b) When the contract requires the contractor to conduct particularly expensive tests involving destruction of supplies, extended periods of time for conducting the tests, or other factors contributing to high-testing costs, the tests shall be coordinated between the contractor and the Government to the maximum extent

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practicable to avoid the need for later independent Government examination and testing.

(c) The following basic actions shall be taken to determine the contractor's compliance with the contract quality requirements:

- (i) review and evaluation of the contractor's inspection procedures;
 - (ii) review and evaluation of the contractor's selection, calibration, maintenance, and use of gauges and measuring and test equipment;
 - (iii) review and evaluation of the contractor's quality records; and
 - (iv) performance of product verification inspection by the Government.
- (d) Because of configuration, innumerable design characteristics, and life and reliability requirements, the quality of complex supplies and equipment cannot be adequately evaluated by inspection only; such supplies and equipment must be produced under regulated conditions if adequate assurance of product quality is to be realized. Systematic control of manufacturing processes by the producer is an essential prerequisite for assuring the quality of such items. It is also essential that the Government verify systematically that such control is, in fact, established and maintained by contractors.

(e) The Government, under the Inspection clause in 7-103.5, reserves the right to charge to the contractor any additional cost of Government inspection and test when supplies are not ready at the time such inspection and test is requested by the contractor or when reinspection or retest is necessitated by prior rejection. When a contract contains this clause, a record shall be maintained of the additional cost occasioned the Government by the delay, reinspection or retest. Such record shall include a description of any delay, the reasons for any reinspection or retest, and a statement of the hours spent by the Government, including wait time, as well as the cost of any applicable travel and transportation. When the Quality Assurance Representative considers that the circumstances warrant the assessment of the additional costs occasioned the Government by the delay, reinspection or retest, he shall forward his recommendation together with the record of additional costs to the contracting officer. If the contracting officer determines that such additional costs should be charged to the contractor, he shall notify the contractor, in writing, of his determination to exercise the Government's right under the inspection clause and demand payment of such costs in accordance with the collection procedures established under Appendix E, Part 6. In arriving at any such recommendation and determination, consideration should be given to the frequency of such delay, reinspection or retest under both current and prior contracts; the cause of such delay, reinspection or retest; and the expense of recovering the additional costs. Charges for such delay, reinspection or retest normally should not be assessed when such delay, reinspection or retest occurs only occasionally, or results from causes beyond the contractor's control, or when the expense of recovery outweighs the costs to be recovered. Costs shall be determined at the standard DoD reimbursable rate in effect at the time of the delay, reinspection or retest.

14-404 Maintenance of Government Records. Suitable records shall be maintained by the contract administration office as part of the performance records of contractors in order to reflect:

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- (i) the nature of all Government acquisition quality assurance actions, including when appropriate the number of observations made and the number and type of deficiencies;
- (ii) decisions regarding the acceptability of the products, the processes, and the requirements, together with action taken to correct deficiencies; and
- (iii) distribution of Government acquisition quality assurance effort.

14-405 Quality Evaluation Data. The contract administration office shall establish a system providing a minimum for the collection, evaluation and use of quality data developed (1) by the contractor during manufacture and (2) by the Government through acquisition quality assurance actions and reports by users during initial use phase, where available. The objectives of the system are to:

- (i) provide a foundation for technical actions aimed at maintaining and making needed improvements in the quality characteristics of both current and future products (subject to military requirements and cost considerations);
- (ii) upgrade the methods and practices used to assure quality during manufacture, delivery, and use of the item;
- (iii) provide a basis for managerial decisions relative to the allocation of Government acquisition quality assurance resources among different products and activities; and
- (iv) determine production source capabilities as measured by product quality.

14-406 Nonconforming Supplies and Services.

(a) It is the policy of the Government that supplies or services which do not conform in all respects to the contract requirements should be rejected. Ordinarily, they will be rejected when the failure to conform adversely affects one or more of the following major areas: (i) performance, (ii) durability, (iii) reliability, (iv) interchangeability, (v) effective use or operations, (vi) weight or appearance (where a factor), or (vii) health or safety. However, there may be circumstances (e.g., reasons of economy or urgency) when acceptance of such nonconforming supplies or services is in the interests of the Government. Except as provided in (d) below, final decision for acceptance shall be made by the principal contracting officer based on information furnished by the contract administration office. The information shall be in writing except that in urgent cases it may be furnished orally and confirmed in writing. The information shall include:

- (i) information explaining in what respect the supplies or services fail to conform to the contract requirements;
- (ii) if feasible, a request from the contractor for acceptance of the supplies or services;
- (iii) reasons for recommending acceptance or rejection of the supplies or services offered; and
- (iv) if acceptance is recommended, what adjustment is deemed appropriate or has been offered by the contractor (if known).

The principal contracting officer shall, in appropriate cases, obtain the concurrence of the military activity responsible for the technical requirements. In addition:

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tion, where health factors are involved, concurrence shall also be obtained from the Surgeon General of the Military Department concerned.

(b) Contractors ordinarily shall be given an opportunity to correct or replace nonconforming supplies or services if this can be done within the required delivery schedule. Unless the contract provides otherwise, such correction or replacement shall be made without additional cost to the Government. Paragraph (c) of the standard inspection clause in 7-103.5(a) reserves to the Government the right to charge the contractor the cost of Government reinspection and retests because of prior rejection.

(c) Rejection of nonconforming supplies or services need not be in writing unless (i) the supplies have been rejected at a point other than the contractor's plant, (ii) the contractor persists in offering nonconforming supplies or services for acceptance, or (iii) delivery or performance was late without excusable cause. Any written notice of rejection shall state the reasons for rejection. It is important that a notice of rejection be furnished to the contractor promptly, because if timely notice of rejection is not furnished, acceptance may in certain cases be implied as a matter of law.

(d) When nonconformance of supplies or services is minor in that it does not affect (i) performance, (ii) durability, (iii) reliability, (iv) interchangeability, (v) effective use or operation, (vi) weight or appearance (where a factor), or (vii) health or safety, the contract administration office shall make the determination regarding the acceptance or rejection of such nonconforming supplies or services, except when authority to do so is withheld by the principal contracting officer. The contract administration office may establish a joint contractor-contract administration office Material Review Board to assist in making this determination. Acceptance of nonconforming supplies which affect (i) performance, (ii) durability, (iii) reliability, (iv) interchangeability, (v) effective use or operation, (vi) weight or appearance (where a factor), or (vii) health or safety is outside the scope of Material Review Board disposition and must be handled as specified by 14-406(a).

(e) Each contract under which nonconforming supplies or services are accepted under (a) above shall be modified to provide for an equitable price reduction or other consideration. In the case of minor nonconformances, as discussed in (d) above, the contract shall not be modified, except when it appears to the contract administration office that the savings to the contractor in fabricating the nonconforming supplies or performing the nonconforming services exceed the administrative cost to the Government of processing a contract modification (normally \$50), or the best interests of the Government otherwise require that the contract be modified.

(f) Repeated tender of nonconforming supplies or services, including those with only minor defects, should be discouraged by appropriate action such as rejecting the supplies or services whenever feasible and documenting the contractor's performance record.

14-407 Government Acquisition Quality Assurance Actions at Subcontract Level.

14-407.1 General. Government acquisition quality assurance actions at the subcontract level do not relieve the contractor of any of his responsibilities under

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the contract and do not establish any contractual relationship between the Government and the subcontractor. Such actions are to assist the contract administration office for the prime contract to determine that the prime contractor is assuring conformance of subcontracted supplies or services with contract requirements. When the Government elects to perform selected acquisition quality assurance actions at the subcontract level, the prime contractor shall be requested to assure that appropriate Government access authority is provided.

14-407.2 Conditions. Government acquisition quality assurance actions at the subcontract level shall be performed when:

- (i) the item is to be shipped from the subcontractor's plant to the using activity;
- (ii) the conditions for inspection at source established in 14-305.2(a) or (b) are applicable; or
- (iii) the contract specifies that certain inspection is to be made by the Government, and such inspection can be performed only at the subcontractor's plant.

14-407.3 Selective Evaluation at the Subcontract Level. Selective evaluation of the contractor's control of his subcontractors may be requested by the contract administration office responsible for the contract in order to provide that office with additional assurance that supplies and services being received from subcontractors conform to quality requirements. Communications between contract administration offices concerning acquisition quality assurance actions to be performed shall be through Government channels. Requests for selective evaluation shall indicate Government acquisition quality actions to be performed, e.g., specific characteristics, processes and procedures to be verified, tests to be witnessed, and records, reports, and certificates to be evaluated.

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14-408 Inspection Stamping.

(a) There is one Department of Defense inspection approval marking design for identification of material which has been inspected for conformance to only a portion of the contract quality requirements, and another for material which has been completely inspected for all contract quality requirements at source. The designs and their uses are as follows:

(i) *Partial (Circle) Inspection Approval Stamp.* This stamp is circular and is used by or under the direct supervision of the Government representative to identify contract or subcontract material which has been subjected to only a portion of the contract quality requirements applicable to the material at the time and place of Government acquisition quality assurance. Partial inspection approval stamping shall identify, for Government personnel, material which complies and all contract quality requirements applicable at the time and place of Government acquisition quality assurance, excepting those listed as uninspected on the associated Material Inspection and Receiving Report (DD Form 250), packing list, or comparable document.

(ii) *Complete (Square) Inspection Approval Stamp.* This stamp is square and is used by or under the direct supervision of the Government representative to identify contract or subcontract material which has satisfied all contract quality requirements. Complete inspection approval stamping shall identify, for Government personnel, material which is in complete conformance with all contract quality requirements applicable to the material at the time and place of inspection. Complete inspection approval establishes that material which once was partially approved has subsequently received complete approval. One imprint of the square stamp will void multiple imprints of the circle stamp.

(b) The marking of each item is neither required nor prohibited. Ordinarily, the stamping of shipping containers, packing lists, or lot routing tickets adequately serves to provide the necessary indication status and to control or facilitate the movement of material. No material shall be stamped in such a way as to damage the material.

(c) The placing of a Department of Defense Inspection Approval Stamp upon material does not mean that the material has been accepted by the Government. Acceptance is ordinarily evidenced by execution of the acceptance certificate on the applicable inspection and receiving report.

(d) NASA Publications include detailed policies and procedures regarding the use of National Aeronautics and Space Administration (NASA) Quality Status Stamps. When requested by NASA Centers, the Government representative shall use NASA Quality Status Stamps and apply the procedures of current NASA requirements for all NASA delegations.

14-409 Authorizing Shipment of Supplies.

14-409.1 *General.* Ordinarily, a representative of the contract administration office shall sign or stamp the shipping papers accompanying Government source-inspected supplies of both prime contracts and subcontracts to release them for

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shipment. In accordance with the criteria in 14-409.2(a), however, an alternative procedure may be used in which the contractor assumes the responsibility for the release for shipment of such supplies inspected at his or his subcontractor's facilities, just as the contractor may be given the authority for other functions pertaining to the control of quality. When this alternative procedure is used, it will release Department of Defense manpower for technical functions by eliminating routine signing or stamping of the papers accompanying each shipment.

14-409.2 *Alternative Procedures—Contractor Release for Shipment.*

(a) The contract administration office may give the contractor authorization in writing to release supplies for shipment when:

- (i) the stamping or signing of the shipping papers by a representative of the contract administration office impairs the operation of a planned Government acquisition quality assurance program or places an unreasonable demand on the Government representative's time; and
 - (ii) there is sufficient continuity of production to permit the establishment of a systematic and continuing Government evaluation of the contractor's control of quality; and
 - (iii) the contractor has a record of satisfactory product quality including quality pertaining to preparation for shipment.
- (b) When there is an indication that the conditions in (a)(i) or (ii) above no longer prevail, the authorization shall be withdrawn in writing.
- (c) When the alternative procedure is used, the contractor shall:
- (i) type or stamp, and sign, the following statement on the required copy or copies of the shipping paper(s) or on an attachment thereto—

The supplies comprising this shipment have been subjected to and have passed all examinations and tests required by the contract, were shipped in accordance with authorized shipping instructions, and conform to the quality, identity and condition called for in contractual requirements and to the quantity shown on this document. This shipment was released in accordance with paragraph 14-409 of the Defense Acquisition Regulation for Authorizing Shipment of Supplies under authorization of (Name and Title of the authorized representative of the Contract Administration Office) in a letter dated (Date of authorizing letter).

(Signature and Title of Contractor's designated representative)

and

- (ii) release shipment and process, in accordance with established instructions, the DD Form 250 (Material Inspection and Receiving Report) or any other receiving report authorized by this Regulation.

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Part 5—Contract Administration of Special Commodities

14-501 General. Special commodities are those that are subject to statutory requirements, support agreements with other than Department of Defense activities, or specific Office of Secretary of Defense policy guidance.

14-502 Subsidies.

(a) Any Federal activity capable of assuring wholesomeness and quality in food, including medical service personnel of the Military Departments, may be designated by the purchasing office to perform Government acquisition quality assurance actions on a reimbursable basis when appropriate, for subsistence contract items.

(b) The following is an explanation of particular terms used in this Part:

- (i) *Subsistence*—food for, and provisions to be used in, feeding of personnel and animals;
- (ii) *Medical Service Personnel*—officers and enlisted personnel of the Medical Services of the Departments of the Army, Navy, and Air Force designated to perform the required inspections of subsistence;
- (iii) *Wholesomeness of Food*—that characteristic possessed by a food product which promotes good health and well being in the consumer; and
- (iv) *Quality of Food*—the required elements or characteristics stated in the specification or other contractual document which the food must possess to comply with the desired degree of excellence exclusive of those characteristics required to assure wholesomeness.

(c) The Surgeons General of the Military Departments are responsible for the acceptance criteria, technical requirements, and inspection procedures needed to assure wholesomeness of foods. Wholesomeness assurance measures will include but not be limited to:

- (i) establishment of standards or tolerances to evaluate wholesomeness from a microbiological, toxicological, and radiological viewpoint;
- (ii) inspection of sources for sanitation including sources of component items when required;
- (iii) approval of manufacturing processes to assure that technical procedures required to assure wholesomeness are incorporated and used; and
- (iv) use of test and examination techniques during processing or for the finished item to detect insanitary practices or unwholesome food.

(d) Maximum utilization shall be made of existing inspection and grading services of other Federal agencies to perform acquisition quality assurance actions in processing plants economically and efficiently. However, an adequate Government acquisition quality assurance workload shall be retained for training of medical service personnel and to provide a base for rotation of personnel between the continental United States and overseas.

14-503 Petroleum. The contract administration office may authorize the release of petroleum supplies without requiring the signing or stamping of shipping papers by a representative of the contract administration office, if the alternative procedures of 14-409.2 are used. In that event on petroleum servicing

contracts for receiving, storing, and issuing Government-owned petroleum products, the contractor shall be required to type or stamp and to sign the following statement on each copy of the shipping papers.

I certify that the above supplies were (a) in the quantity indicated, (b) taken from Government-owned and approved stocks, and (c) loaded into inspected and approved containers. This statement was released in accordance with paragraph 14-503 of the Defense Acquisition Regulations under authorization of (Name and title of the authorized representative of the Contract Administration Office) in a letter dated (Date of authorizing letter).
(Signature and Title of Contractor's designated Representative)

14-504 Construction Projects.

- (a) On-site inspection of buildings and other structures is normally performed by the Military Department responsible for their construction.
- (b) Government acquisition quality assurance actions for construction materials and supplies acquired for military and civil works projects shall be performed by the contract administration office in accordance with this Section.
- (c) The functions in (a) and (b) above will be performed so as to assure compatibility of buildings and structures and installed equipment.

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Part 6—Other Agencies, Governments and Organizations

14-601 General. Except for the special quality assurance provisions below concerning the Federal Aviation Administration and NATO, performance of government acquisition quality assurance and other contract administration services for and by other government agencies, foreign governments and international organizations is in accordance with Section XX, Parts 5 and 6.

14-602 Federal Aviation Administration. Under Public Law 85-726 (72 Stat. 776, 49 U.S.C. 1423), the Federal Aviation Administration (FAA) has certain responsibilities and prerogatives in connection with the issuance and continuation of various certificates applicable to the design, manufacture, and airworthiness criteria of certain types of commercial aircraft and of aircraft equipment and accessories. The FAA evaluations are not a substitute for normal Department of Defense evaluations of the contractor's quality assurance measures. Actual records of such FAA evaluations may be of benefit, however, and should be utilized to maximum advantage by the contract administration office. That office is responsible for assuring that the supplies and services conform to the terms of the contract and that any required certificates and approvals are in the possession of the contractor prior to acceptance.

14-603 Quality Assurance Among NATO Countries. The NATO Standardization Agreements (STANAG) 4107—Mutual Acceptance of Government Quality Assurance sets forth procedures, terms and conditions under which mutual government quality assurance of military material and services is to be performed by the national authority of one NATO country on request of another NATO country, or a NATO organization. This agreement, with certain reservations, has been ratified by the United States and other nations in the North Atlantic Treaty Organization. The Military Departments may request NATO countries to perform quality assurance in accordance with STANAG 4107. Military Departments will also perform quality assurance in accordance with STANAG 4107 when requested by a NATO country. As a reservation to STANAG 4107, the U.S. Government reserves the right to require reimbursement for work performed for other NATO countries and organizations. Paragraph 20-506 applies. NATO Standardization Agreement (STANAG) 4108, Allied Quality Assurance Publications. This STANAG provides for the application of Allied Quality Assurance Publications (AQAP's). Its annexes furnish a list of AQAP's and the criteria for the application of those AQAP's which are contractually required in contracts between NATO countries.

14-604 International Military Sales (Non-NATO). Department of Defense components shall:

- (1) perform quality assurance (QA) services on international military sales contracts or in accordance with existing agreements;
- (11) assure conformance to technical and quality requirements of international military sales contracts;

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- (111) keep Government personnel and contractors informed on the use of QA publications; and
- (1v) specify appropriate quality requirements in contracts awarded to other countries, and delegate QA services to the host government whenever satisfactory services are available, as appropriate.

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buy certain goods or services upon specified terms and conditions. DD Form 1707 shall not be used for simplified small purchases.

(3) Pending the publication of a new edition of the form, the solicitation representation prescribed by 7-2003.74 shall be added as item 4 of the Representations and Certifications of Standard Form 18.

16-102.2 Award/Contract (Standard Form 26).

(a) General. Standard Form 26 is designed for use primarily when entering into contracts resulting from negotiation where the signature of both parties on a single document is appropriate. (See also 16-102.3 for use of this form as an award pursuant to receipt of a firm offer on Solicitation, Offer, and Award (Standard Form 33) and 3-410.2(a) for use of this form to place orders against basic ordering agreements.)

(b) Conditions for Use. This form, in conjunction with appropriate General Provisions as provided in (c) and (d) below, is prescribed for use in negotiated contracts except:

- (i) contracts for which Solicitation, Offer, and Award (Standard Form 33) is used in accordance with 16-102.3;
- (ii) contracts for the construction, alteration, or repair of buildings, bridges, roads or other kinds of real property;
- (iii) procurements for which special contract forms are prescribed by ASPR (for example, 16-503, 16-504 and 16-505); and
- (iv) procurements for which purchase order and related forms are authorized by Part 3 of this Section.

(c) Negotiated Supply and Services Contracts.

(1) Except as provided in (b) above, Award/Contract (Standard Form 26) shall be used with Standard Form 32 (General Provisions (Supply Contract)) (see 16-205) or with required nonpersonal services clauses, and any other forms containing contract provisions which are prescribed by ASPR or Departmental procedures, for entering into negotiated fixed-price contracts to which Section VII, Part 1, is applicable.

(2) Except as provided in (b) above, Award/Contract (Standard Form 26) shall be used with other forms containing contract provisions which are prescribed by ASPR or Departmental procedures for entering into negotiated cost reimbursement type contracts to which Section VII, Part 2, is applicable.

(d) Special Negotiated Contracts. Award/Contract (Standard Form 26) may be used for special procurements where clauses other than those on Standard Form 32 have been authorized. For example, cost-reimbursement research and development contracts with clauses prescribed by Section VII, Part 4; contracts for stevedoring services; time and materials contracts; personal and professional services contracts; and contracts for instruction of military personnel at educational institutions.

(e) Corporate Certificate. Where a corporate certificate is considered necessary or desirable, it may be executed on a typed sheet, identified by Procurement Instrument Identification (contract) number, and attached to Award/Contract (Standard Form 26).

(f) Schedule and Continuation Sheet. Standard Form 36 (Continuation Sheet) shall be used for the Schedule and Continuation Sheets (see 16-101.2(d)).

(g) Effective Date. The effective date shown on the Award/Contract (Standard Form 26) is the date agreed to by the contracting parties as the date on which the terms and conditions of the contract take effect. This date may be dif-

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and (iii) are not modified, may be incorporated by reference to the ASPR paragraph number, clause title and date. No other contract clauses shall be incorporated by reference but they shall be set forth in full in the solicitation.

(c) Award of contracts shall be accomplished by completing the Award portion of Standard Form 33 and furnishing a copy of the form, so completed, to each successful offeror. Alternatively, such award may be accomplished by completing the Award portion of Standard Form 26 and furnishing it to each successful offeror. Papers previously forwarded to offerors need not accompany the offeror's copy of the Award document. The required use of the Award portion of Standard Form 33 or Standard Form 26 does not preclude the additional use of informal documents, including telegrams, as notices of awards.

(d) Continuation Sheet (Standard Form 36) shall be used when additional space is required for Schedule, Amendment/Modification, or Award; however, where the columns thereon are not required, a blank sheet may be used. The appropriate Procurement Instrument Identification number (see Section XX, Part 2) and page number shall be shown on all continuation sheets.

16-102 Forms for Negotiated Supply or Services Contracts (Standard Forms 18, 26, 30, 32*, 33, 33A* and 36; DD Forms 1665, and 1707.)

When DD Form 1707 is used in accordance with Standard Form 32, Apr. 1975 edition, and Standard Form 33A, Jan. 1978 edition, see 16-101.

16-102.1 Request for Quotation (Standard Form 18), and Information to Offerors or Quoters (DD Form 1707).

(a) General. Standard Form 18 is authorized and DD Form 1707 is prescribed for obtaining price, cost, delivery, and related information from suppliers. DD Form 1707 may be reproduced locally, unless such action is precluded by Departmental direction.

(b) Conditions for Use.

(1) Standard Form 18 is authorized and DD Form 1707 is prescribed for use in other than simplified small purchases when it appears reasonably certain that the acquisition will be consummated by (i) a fixed-price contract involving negotiation or (ii) a cost-reimbursement contract. Continuation Sheet (Standard Form 36) may be used as required. One copy of DD Form 1707, and two copies of Standard Form 18 shall be sent to each prospective supplier and he shall be requested to return one signed copy of his quotation.

(2) Standard Form 18 may be used for simplified purchases made in accordance with Section III, Part 6, when written solicitations (other than by telegram) of quotations are required. (See 3-608.2(c)(1) for use of DD Form 1155 as a request for quotations.) Two copies of Standard Form 18 shall be sent to each prospective supplier and he shall be requested to return only one signed copy. A quotation submitted on this form or on DD Form 1155 is not to be construed as an offer which can be accepted by the Government to form a binding contract. Therefore, issuance by the Government of a purchase order pursuant to a supplier's quotation does not constitute a contract, but the purchase order is an offer by the Government to the supplier to

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(c) During a period of national emergency, paragraph (d) (1) of the "Termination for Default—Damages for Delay—Time Extensions" clause of Standard Form 23-A may be changed by deleting the words "unforeseeable causes" in the two places where they appear in the first sentence and substituting therefor the words "causes, other than normal weather".

(f) Deletion or modification of provisions in the above forms shall be accomplished in the "Alterations" paragraph of Standard Form 23, or in an "Alterations" paragraph added in the schedule of Standard Form 19, or in the specifications, as may be appropriate.

16-402.2 Negotiated Construction Contract Forms.

16-402.1 *General.* Use of the forms prescribed in 16-401 is optional for negotiated construction contracts. When used for negotiated contracts, the forms shall be adapted by lining out or obliterating the words "sealed" and "publicly opened" and adding language to (i) indicate the authority for negotiation, and (ii) replace paragraphs 7 and 8 of the Standard Form 22 with either the Late Technical Proposals provision in 7-2002.3 or the Late Proposal provision in 7-2002.4.

16-402.2 Contracts Not Exceeding \$25,000.

(a) When procurements are negotiated in accordance with 18-302, either DD Form 1155, revised as indicated below and in 16-303, or Standard Form 19 with the appropriate changes indicated in 16-401.1(i), 16-401.2, 16-401.3, and 16-402.1, shall be used.

(b) Where DD Form 1155 is used for procurement of construction in the United States, its possessions and Puerto Rico, the following shall be accomplished:

(1) The following provisions on DD Form 1155r shall be deleted:

1. Inspection and Acceptance
2. Variation in Quantity
3. Payments
4. Discounts
15. Fast Payment Procedure
16. Service Contract Act of 1965
17. Changes
18. Termination for Default

(2) The following provisions from the reverse of Standard Form 19 shall be added to DD Form 1155r:

1. Changes and Changed Conditions (in the last line of (e), the reference to "Clause 3" shall be changed to "the 'Disputes' clause")
2. Termination for Default—Damages for Delay—Time Extensions (in the last line of (b), the reference to "Clause 3" shall be changed to "the 'Disputes' clause")
4. Responsibility of Contractor
5. Material and Workmanship
6. Payments to Contractor clause is revised in 16-401.1(i). However, if period of performance is less than one month or the total amount does not warrant progress payments, a single payment may be made in accordance with procedures in 16-401.2(a).

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PROCUREMENT FORMS

(3) The applicable additional clauses required by 3-608.2(b)(1) shall be added to DD Form 1155r, and where it is indicated that the low quotation may exceed \$2,000, the following shall be accomplished:

- (i) Standard Form 19-A, as modified in 16-401.1(ii), shall be attached along with the appropriate wage rate determination.
- (ii) In accordance with 10-102.4, the provision in 7-2003.25 shall be added.
- (iii) The following language shall be inserted on the face page of the DD Form 1155 prior to issuance:

"If this quotation exceeds \$2,000, the offeror shall furnish with his quotation a bid guaranty in an amount equal to _____% of his quotation. Failure to submit the guaranty on time may be cause for rejection of the quotation."

"If this quotation exceeds \$2,000, notice to proceed will be issued upon receipt of acceptable payment and performance bonds."

and

(iv) Notice of payment and performance bonds shall be added in accordance with 10-103 and 16-401.2(c)(iii)(1)(B).

(c) Where DD Form 1155 is used for procurement of construction outside the United States, its possessions and Puerto Rico, the following shall be accomplished:

(1) The following provisions on DD Form 1155r-1 shall be deleted:

1. Inspection and Acceptance
2. Variation in Quantity
3. Payments
11. Examination of Records
13. Changes
14. Termination for Default

(2) The provisions from the reverse of Standard Form 19 listed in (b)(2) above also shall be added to DD Form 1155r-1.

(3) The applicable additional clauses required by 3-608.2(b)(2) shall be added to DD Form 1155r-1.

16-402.3 *Cost-Plus-Fixed-Fee Contracts.* When the use of a cost-plus-fixed-fee contract is authorized (18-112) and the appropriate determination has been made (3-405), the format below shall be used, together with the clauses required by 7-605 and 7-606. If the work is to be performed outside the United States, its possessions or Puerto Rico, such contract clauses shall be deleted or modified as necessary to reflect statutory requirements, agreements between the United States and the host foreign country, and agreements between the parties. For labor requirements applicable to overseas contracts, see 18-703.2.

Contract
(Negotiated)
COST-PLUS-FIXED-FEE CONSTRUCTION CONTRACT
DEPARTMENT OF THE
CONTRACTOR AND ADDRESS
CONTRACT FOR CONSTRUCTION OF

16-402.3

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preparations. Where such an amendment is issued within a period of ten days prior to the date set for bid opening, a minimum of ten days lead time, except in emergencies, shall be allowed prospective bidders to prepare new or revised bids. The nature of any emergency preventing a ten day lead time will be documented.

18-207 Opening of Bids. See 2-402 and 18-108.1(c).

18-208 Cancellation of Invitations for Bids.

(a) Before opening, see 2-209.

(b) After opening, see 2-404.1 and 18-704.2.

18-209 Prequalification of Bidders.

(a) The prequalification of bidders procedure is used when it is necessary to assure timely and efficient performance of critical construction projects by limiting bidding to concerns of proven competence to perform in the required manner. The result of a prequalification is a list of bidders who are determined to be qualified to bid on a specific construction project.

(b) The Head of a Procuring Activity may authorize the prequalification of bidders when he determines in writing that a construction project is of such urgency or complexity as to require prequalification.

(c) Procedures to be used shall be approved by the Head of a Procuring Activity. They shall provide, in connection with small business concerns that:

- (i) if the qualifying authority is of the opinion that a small business concern is not qualified for reasons relating to responsibility, the recommendation of the appropriate Small Business Regional Office shall be requested;
- (ii) if that office expresses the opinion that the concern appears to have the requisite responsibility, it shall be permitted to submit a bid; and
- (iii) if a small business concern submits the lowest responsive bid and is found to be non-responsible, the procedures prescribed by 1-705.4 shall be followed.

18-210 Award. No award shall be made at a price which, with allowances for Government imposed contingencies and overhead, exceeds the statutory authorization for the project unless the limitations for a particular contract can be and have been waived (see 18-110(c)). The effect of changes in wage rate determinations on award is discussed in 18-704.2.

18-211 Notice of Award. Award shall be made to the successful bidder as provided in 2-407.1. If a notice of award is issued, it shall:

- (i) identify the invitation;
- (ii) identify the contractor's bid;
- (iii) set forth the award price;
- (iv) specify date of commencement of work, or advise contractor that a notice to proceed will be issued;
- (v) advise contractor that a formal contract must be executed before commencement of work; and
- (vi) inform contractor that performance and payment bonds must be furnished.

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Part 3—Negotiations

18-301 Limitation on Authority to Negotiate Contracts. Contracts for construction (see 18-101.1) shall be formally advertised whenever such method is feasible and practicable (see 18-102) under existing conditions and circumstances (but see 1-705.5(c)(2)(H)(ii) and 1-706.2), even though negotiation may be authorized as indicated hereafter.

18-301.1 Work in the United States. Contracts for construction mentioned above, to be performed in the United States, its possessions and Puerto Rico shall not be negotiated unless authorized pursuant to the following subsections of 10 U.S.C. 2304 (a): (1), (2), (3), (10), (11), (12), (15), or for contracts with Small Business Administration, (17). The appropriate code provision will be cited in the contract as authority for the negotiation. (See respectively, 3-202, 3-203, 3-210, 3-211, 3-212, and 3-215.) Contracts to be performed in the possessions of the United States and Puerto Rico may not be negotiated pursuant to 10 U.S.C. 2304 (a) (6), (3-206).

18-301.2 Work Outside the United States. Contracts for construction to be performed outside the United States, its possessions or Puerto Rico shall be negotiated unless formal advertising is authorized in accordance with 18-102. The appropriate subsection of the code will be cited in all contracts as authority for negotiation.

18-302 Small Purchases. Procurements of construction of \$25,000 or less may be negotiated in accordance with Section III, Part 6, and 16-402.2. Standard Form 19 or DD Form 1155, as appropriate, may be used for purchases of \$25,000 or less.

18-303 Profit or Fee.

18-303.1 Fixed-Price Construction and Architect-Engineer Contracts. The guidance set forth in 3-808, while not required, may be used in considering profit as an element of price under fixed-price construction and architect-engineer contracts.

18-303.2 Cost-Reimbursement Type Construction Contracts.

(a) The fees of prime contractors under cost-plus-fixed-fee construction contracts shall be negotiated in accordance with Departmental procedures which have been approved by the Assistant Secretary of Defense (Installations and Logistics).

(b) The target fee of prime contractors in incentive fee contracts shall be established using the criteria and fee schedules provided for under Departmental procedures as a guide in conjunction with the reasonableness of the target cost, the maximum and minimum fees to be established and the fee adjustment formula.

(c) Limitations on fees in both of the above type contracts are set forth in 3-405.6(c)(2).

18-303.3 Cost-Reimbursement Type Architect-Engineer Contracts. (See Part 4 of this Section.) The fees under cost-reimbursement type architect-engineer contracts shall be established in accordance with applicable criteria provided in Departmental procedures.

18-304 Subcontracting Programs. See Section XXIII.

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clusively for experimental, developmental, or research work in the field of construction or architect-engineering. Where the contract calls for either experimental, developmental, or research work or supplies and materials, in addition to either construction or architect-engineer work, the clause in 7-103.22 shall be used.

18-903.3 Patent Indemnification of Government by Contractor.

18-903.3.1 General. A patent indemnity clause shall not be included in contracts calling solely for architect-engineer or experimental, developmental, or research work in the field of construction.

18-903.3.2 Patent Indemnity Clause in Supply Contracts. See 9-103. The clause required by 9-103.1 relating to the procurement of supplies is applicable when the procurement is solely for construction materials or supplies as such, as distinguished from "construction" as defined in 18-101.1.

18-903.3.3 Patent Indemnity Clause in Construction Contracts.

(a) Except where complete performance is to be accomplished outside the United States, its possessions, and Puerto Rico, all contracts in excess of \$25,000 calling for "construction" as defined in 18-101.1 shall contain the clause in 7-602.16(a) (see Standard Form 23-A).

(b) If it is determined that the construction will necessarily involve the use of structures, products, materials, equipment, processes, or methods which are non-standard, noncommercial or special, the contract may list them in the specifications and may expressly exclude them from the patent indemnification by inserting in the contract the clause in 7-602.16(b).

18-903.4 Waiver of Indemnity by the Government. Exemption of specific patents from the patent indemnity provisions of the clauses prescribed in 18-903.2 and 18-903.3(a) shall be made only upon the authorization of the Secretary concerned or his authorized representative in accordance with 9-103.4.

18-904 Notice and Assistance.

Subject to the prohibitions of 9-104, all contracts calling for construction work shall include the Notice and Assistance Regarding Patent and Copyright Infringement clause in 7-103.23.

18-905 Approval of Restricted Designs. Specifications for construction should allow for maximum latitude in the use of various types of commercially available products, materials, equipment or processes which will meet objective Government requirements. However, Government requirements may necessitate, or the architect-engineer may contemplate the use of structures, products, materials, equipment or processes which are available only from a sole source. In such event the architect-engineer should report to the contracting officer the items known to him to be sole source, and the reasons therefore, and advise the contracting officer of the extent to which such items are considered necessary to meet the Government's requirements. This will make possible timely planning and arrangements for the use of sole source items, or where appropriate, to consider alternate items. It is to be emphasized that this procedure is not intended to restrict the use of patented, or copyrighted items, but is merely to give the Government an opportunity to consider whether the specifications being drawn by the architect-engineer, in regard to any one item, are unnecessarily restricted, according to objective Government requirements, to a single sole item. The procedure is primarily for use in instances where the proposed design is expected

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to be conventional or standard and where the design may be used in subsequent procurements. For this purpose, the clause in 7-608.13 may be inserted in architect-engineer contracts.

18-906 Procurement of Infringement Claims. See Section IX, Part 4.

18-907 Classified Contracts. See 9-106.

18-908 Patent Rights.

(a) Any construction or architect-engineer contract which calls for or can be expected to involve the design, for use in the construction or operation of a Government facility, of novel structures, machines, products, materials, processes, or equipment (including construction equipment), and any contract having as one of its purposes the performance of experimental, developmental, or research work or test and evaluation studies involving such work, should include a patent rights clause in accordance with the policy and guidance of 9-701.

(b) Any construction or architect-engineer contract which calls for or can be expected to involve only standard types of construction to be built by previously developed equipment, methods, and processes shall not include a patent rights clause. The term "standard types of construction" as used herein means construction in which the distinctive features, if any, in all likelihood will amount to no more than:

(i) variations in size, shape or capacity of otherwise structurally orthodox and conventionally acting single structural members or multi-member structural groupings; or

(ii) purely artistic or esthetic (as distinguished from functionally significant) architectural configurations and designs of both structural and nonstructural members or groupings, which may or may not be sufficiently novel or meritorious to qualify for protection under the design patent or copyright laws.

Rights of the Government in and to any such distinctive design or copyright features, as distinguished from inventions of a mechanical or functional nature resulting from an architect-engineer contract or from a contract for construction involving architect-engineer services are provided for in the clause in 7-607.7(b) or in 7-603.42(a)(2) entitled "Drawings and Other Data to Become Property of Government."

(c) Construction and architect-engineer contracts which require the development of novel structures, machines, products, equipment (including construction equipment), materials or processes shall include the clause in 7-603.42(a)(2) or 7-607.7(b) in addition to the appropriate "Patent Rights" clause prescribed by Section IX.

18-909 Patent Royalties. The provisions of 9-110, 9-111, and 9-112 are applicable to contracts for construction or construction supplies.

18-910 Acquisition and Use of Plans, Specifications and Drawings.

18-910.1 Architectural Design and Data Clauses for Architect-Engineer or Construction Contracts.

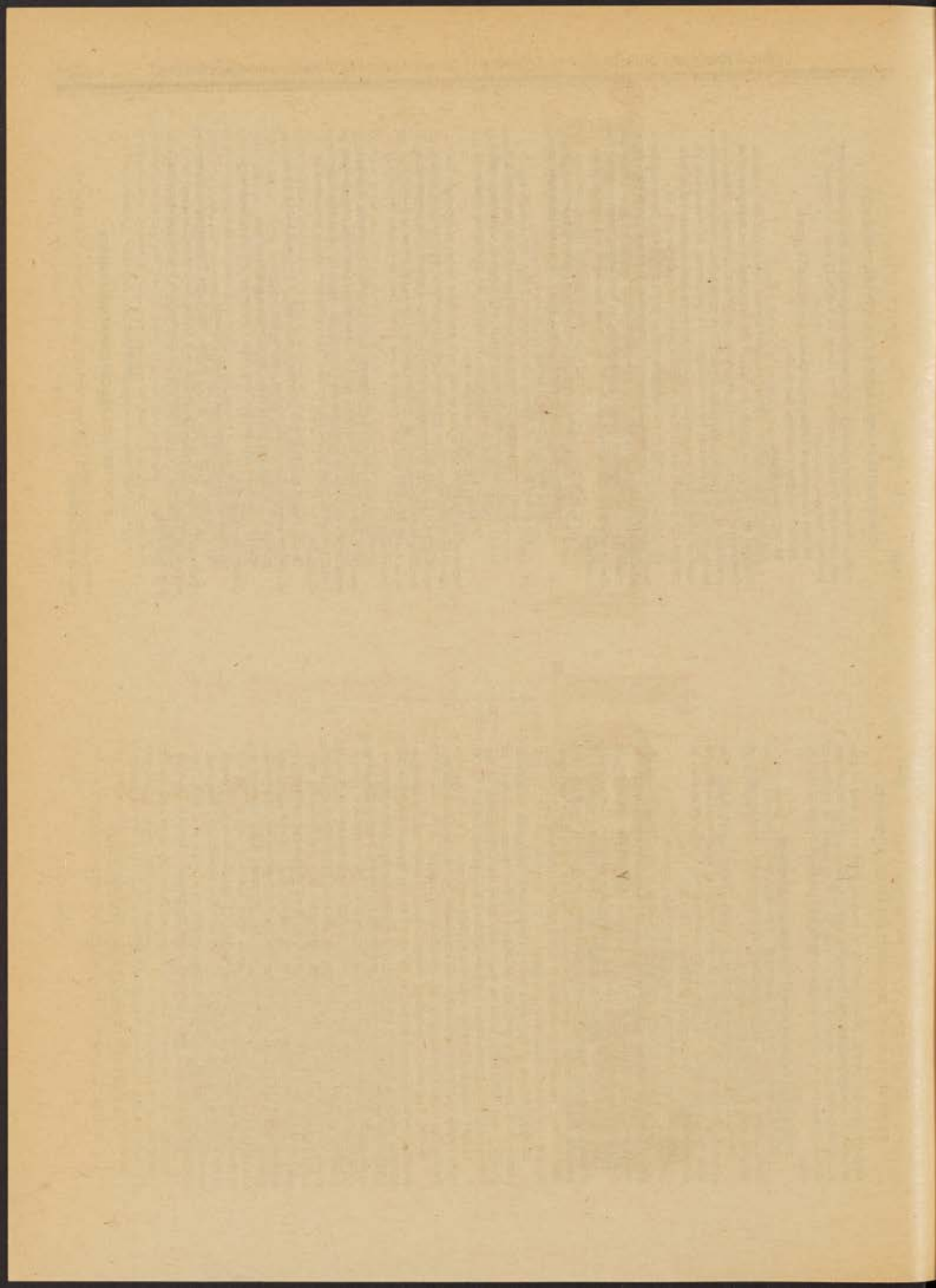
(a) Plans and Specifications and As-Built Drawings.

(1) Except as provided in (2) below, insert the "Government Rights (Unlimited)" clause in 7-607.7(a) in contracts calling for architect-engineer services or in 7-603.42(a)(1) in contracts for construction involving architect-engineer services.

18-910.1

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January 25, 1983

Part III

Department of Justice

Equal Employment Opportunity Commission

**Procedures for Complaints of
Employment Discrimination Filed Against
Recipients of Federal Financial
Assistance**

DEPARTMENT OF JUSTICE

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

28 CFR Part 42

29 CFR Part 1691

[Attorney General Order No. 992-83]

Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance

AGENCY: Department of Justice and Equal Employment Opportunity Commission.

ACTION: Final rule.

SUMMARY: This rule establishes procedures for handling complaints of employment discrimination filed on or after the effective date of the rule with Federal fund granting agencies under Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the State and Local Fiscal Assistance Act of 1972, as amended, and other provisions of Federal law which prohibit discrimination on grounds of race, color, religion, sex or national origin in programs or activities receiving Federal financial assistance. The rule allows the fund granting agency to refer complaints to the Equal Employment Opportunity Commission (EEOC). For complaints covered both by Title VII of the Civil Rights Act of 1964, as amended, or the Equal Pay Act of 1963 and by Title VI of the Civil Rights Act of 1964, or other statutes under the fund granting agency's jurisdiction, the rule contemplates that complaints solely alleging employment discrimination against an individual will be referred to EEOC and that EEOC will conduct the investigation and conciliation efforts in most cases. The rule, therefore, will reduce duplicative efforts by different Federal agencies to enforce differing employment discrimination prohibitions, and thereby will reduce the burden on employers covered by more than one of those prohibitions. At the same time it will allow the Federal fund granting agencies to focus their resources on allegations of services discrimination and systemic employment discrimination. Employment discrimination complaints over which the Federal fund granting agency does not have jurisdiction will be transferred to EEOC. This rule is not a "major rule" as defined by Section 1(b) of Executive Order 12291.

EFFECTIVE DATE: March 28, 1983.

FOR FURTHER INFORMATION CONTACT:

Stuart Frisch, Acting Director, Coordination Division, Coordination and Guidance Services, Office of Legal Counsel, Equal Employment Opportunity Commission, 2401 E Street, NW., Washington, D.C. 20506; (202) 653-9133; or David L. Rose, Chief, Federal Enforcement Section, Civil Rights Division, Department of Justice, Washington, D.C. 20530; (202) 633-3831.

SUPPLEMENTARY INFORMATION:

I. Background

The authority of the Equal Employment Opportunity Commission (EEOC) to enforce prohibitions against employment discrimination on the basis of race, color, national origin, sex, or religion overlaps with the authority of Federal funding agencies to enforce prohibitions against employment discrimination by recipients of Federal funds. There is, therefore, a potential for duplicative efforts by Federal agencies that may cause needless burdens on the recipients, such as separate investigations by EEOC and other Federal agencies of the same complaint. In addition, victims of discrimination may be confused about where to file their complaints of employment discrimination and may, therefore, inadvertently lose their rights.

EEOC has responsibility to coordinate the Federal effort to enforce Federal equal employment opportunity law. Executive Order 12067, 43 FR 28967. The Attorney General has responsibility to coordinate Federal enforcement of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* ("Title VI") and Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* ("Title IX"). Executive Order 12250, 45 FR 72995. EEOC and the Department of Justice hereby promulgate this regulation in order to coordinate enforcement of Federal equal employment opportunity law and to minimize the potential for duplicative investigations of employers covered by such laws.

The regulation allows Federal funding agencies to refer to EEOC complaints of employment discrimination covered by Title VI or similar provisions, Title IX, or the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. 1221 *et seq.* (the "revenue sharing act"), if they are also covered by Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* ("Title VII") or the Equal Pay Act of 1963, 29 U.S.C. 206(d). These complaints are called "joint complaints." EEOC, acting under its own authority and the delegated authority of

the agency, would conduct an investigation of the allegations of employment discrimination and attempt to conciliate the complaint.

Under the regulation an agency must determine within thirty days of receipt of a complaint of employment discrimination whether it has jurisdiction over the complaint. If an agency does not have jurisdiction but EEOC may have jurisdiction, then the agency must transfer the complaint to EEOC. As a result, complainants are protected against losing their private rights because they filed their complaints with the wrong agency.

Joint complaints solely alleging employment discrimination against an individual will be referred to EEOC. If special circumstances warrant agency investigation of such a joint complaint, an agency may do so but it must first determine that EEOC will not independently investigate a similar complaint. In contrast, an agency is required to retain joint complaints alleging a pattern or practice of employment discrimination unless special circumstances warrant referral of the complaint to EEOC.

The procedures established by this regulation should reduce duplicative investigations by various Federal agencies of similar complaints of employment discrimination against an employer. Because agencies will refer to EEOC all joint complaints solely alleging employment discrimination against an individual, agencies will be able to focus their efforts on possible instances of systemic employment discrimination or discrimination in the provision of services to beneficiaries of Federally assisted programs. Consequently, agencies will be better able to perform their civil rights enforcement responsibilities. At the same time, the regulation will remove needless burdens on recipients of Federal funds.

The proposed regulation was published for public comment on April 17, 1981. We received and analyzed 14 comments from employers and their representatives, agencies and civil rights groups. Most of the comments were favorable. Our response to the comments and an explanation for significant changes in the proposed rule are set forth in the section-by-section analysis, *infra*. As an overview, we have made the following major changes:

(1) The regulation now applies to complaints of employment discrimination covered by the revenue sharing act. As a result, the Office of Revenue Sharing of the Department of the Treasury may refer to EEOC complaints covered by the revenue

sharing act if they are also covered by Title VII or the Equal Pay Act.

(2) The rule now provides that an agency must refer all joint complaints solely alleging employment discrimination against an individual to EEOC. If, however, an agency determines that special circumstances warrant its investigation of the complaint, then it may do so provided that its investigation will not duplicate independent efforts by EEOC.

(3) The regulation has been reorganized so that it will parallel the chronological processing of a complaint.

In addition, we received a number of comments from civil rights groups and others on Title IX coverage. Many urged that we delay promulgating this rule until the Supreme Court determined the extent to which Title IX covers employment. Promulgation of the rule was not delayed for that reason. Since the purpose of the rule is to avoid duplication of effort, the scope of Title IX coverage was not viewed as critical. We note that the Supreme Court has ruled that Title IX covers employment discrimination and that the Department of Education's implementing regulations concerning employment discrimination are valid. *North Haven Board of Education v. Bell*, — U.S. —, 50 U.S.L.W. 4501 (May 17, 1982).

II. Section-by-Section Analysis

Section 1 (28 CFR 42.601; 29 CFR 1691.1). This section describes the purpose and application of this regulation. When this regulation was published for comment, this section stated that the rule would not apply to complaints of employment discrimination filed under the revenue sharing act. At that time, EEOC and the Department of the Treasury's Office of Revenue Sharing ("ORS") planned to enter into a new Memorandum of Agreement concerning the matters covered by this regulation. After publication, EEOC and ORS decided to forego their separate Memorandum and to have their relationship covered by this rule. Accordingly, the existing Memorandum of Agreement between EEOC and ORS, dated October 11, 1974, is superseded by this rule.

This approach was supported in a comment written by various civil rights groups. That comment urged that the proposed rule be amended to incorporate the time limits in the revenue sharing act, 31 U.S.C. 1245, because in their view EEOC would be bound by revenue sharing act time limits when it processes a joint complaint referred by ORS. We have not incorporated those time limits because we believe the revenue sharing act time

limits are "directive" and that the revenue sharing act does not create a private right of action against ORS for failure to comply with the time limits. As such, the effect of those time limits are similar to the time limits in Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b), on EEOC determinations of reasonable cause. See *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977).

This rule does not affect existing Memoranda of Understanding between EEOC and the Office of Federal Contract Compliance Programs of the Department of Labor, between EEOC and the Federal Communications Commission and between EEOC and the Office of the Federal Inspector of the Alaska Natural Gas Transportation System.

Section 2 (28 CFR 42.602; 29 CFR 1691.2). This section provides for the sharing of information by EEOC and Federal fund granting agencies. It provides for the exchange of information relevant to EEOC and agency efforts to fulfill their respective enforcement responsibilities. The exchange of information is, therefore, not limited to information relevant to specific complaints of employment discrimination. Such a limitation, which was proposed by one comment, would unduly restrict government efforts to coordinate investigations of systemic employment discrimination.

Section 3 (28 CFR 42.603; 29 CFR 1691.3). Title VII places confidentiality requirements on EEOC. 42 U.S.C. 2000e-5(b), 2000e-8(e); 29 CFR 1601.22, 1601.26. This section provides that when EEOC supplies information, which is subject to Title VII's confidentiality requirements, to an agency, the agency is bound to observe Title VII's confidentiality requirements as would EEOC, except in two cases. An agency would not be bound by the requirements when: (1) It obtains the same information which it received from EEOC from an independent source, or (2) EEOC has obtained the information in the course of investigating a joint complaint and the agency plans to use the information in an enforcement proceeding. In the latter case, the agency is not bound by Title VII's confidentiality requirements because the agency had delegated its investigative authority to EEOC. EEOC, therefore, obtained the information under the agency's authority, as well as Title VII. Accordingly, the information may be used by the agency in an enforcement proceeding.

This section has been revised in order to make it clear that it applies to all information, which EEOC provides to an agency, that is subject to Title VII's confidentiality requirements. In

addition, we have deleted our attempt to summarize the confidentiality requirements in order to avoid the possible implication—noted by one comment—that the section was not intended to be coextensive with the requirements of Title VII.

Section 4 (28 CFR 42.604; 29 CFR 1691.4). Section 4 provides that in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice, agencies shall consider Title VII case law and EEOC guidelines, unless inapplicable. This section is an effort to foster a uniform approach to Federal equal employment opportunity law. Subsequent to the publication for comment of the proposed regulation, the Supreme Court granted certiorari in an employment discrimination case to review the issue of whether Title VI prohibits only intentional discrimination. *Guardians Association v. Civil Service Commission*, 633 F.2d 232 (2d Cir. 1980), cert. granted, No. 81-431 (January 11, 1982). By conditioning consideration of Title VII case law and EEOC Guidelines on their applicability, this Section will be able to accommodate the Supreme Court's decision on this legal issue.

Section 5 (28 CFR 42.605; 29 CFR 1691.5). This section provides time limits and procedures for agency processing of complaints of employment discrimination filed against recipients of Federal funds.

Section 5 has been restructured in an attempt to clarify the agency's responsibilities. Within ten days of receipt of a complaint of employment discrimination, an agency shall notify the respondent that it has received a complaint. This requirement of notification to the respondent within ten days is intended to be consistent with the notice requirement in Section 706(b) of Title VII, 42 U.S.C. 2000e-5(b); see also 31 CFR 51.61(b)(1). The consistency is necessary because complaints received by an agency which are transferred or referred to EEOC are deemed charges received by EEOC. The failure to provide such notice within ten days, however, does not bar the charging party from enforcing his or her Title VII rights. *E.g., EEOC v. Burlington Northern, Inc.*, 644 F.2d 717 (8th Cir. 1981). Similarly, an agency's failure to meet any of the time limits set in this regulation will not bar the Government from taking enforcement action based upon the complaint involved. See *Occidental Life Insurance Co. v. EEOC*, 432 U.S. 355 (1977).

Section 5(b) expressly requires an agency to determine whether it has

jurisdiction over the complaint and whether EEOC may have jurisdiction over the complaint under Title VII or the Equal Pay Act. This requirement was implicit in the proposed rule and is now stated expressly in order to eliminate possible confusion. In addition, those determinations are to be made within thirty days of receipt of the complaint.

The rule distinguishes between a "transfer" and a "referral." A transfer occurs when an agency does not have jurisdiction over the complaint but EEOC may have jurisdiction. A transfer should, therefore, occur when an agency determines that it does not have jurisdiction over such a complaint. After a complaint is transferred, an agency has no further obligations in regard to the complaint.

A referral may occur when an agency and EEOC both have jurisdiction over the complaint. Such complaints are called "joint complaints." Under the rule, an agency may refer a joint complaint to EEOC for investigation and conciliation.

An agency may refer a joint complaint to EEOC without first consulting EEOC. The rule places a time limit on such referrals, requiring that they occur within thirty days of agency receipt of the complaint. The addition of this time limit will insure that agencies act promptly on joint complaints.

The proposed rule distinguished between "individual" and "systemic" joint complaints. The guidelines established by the proposed rule were that individual complaints should ordinarily be referred by the agency, while systemic complaints should ordinarily be retained by the agency.

Section 5(e) requires an agency to refer to EEOC all joint complaints solely alleging employment discrimination against an individual. The reason the rule now requires that all joint complaints solely alleging employment discrimination against an individual be referred to EEOC is to protect the rights of complainants who may be confused about where to file their complaints. By requiring agencies to refer all individual complaints to EEOC, the rule insures that the rights of complainants will be preserved under the statute of the funding agency and under Title VII.

An agency may investigate a joint complaint that it is required to refer to EEOC under Section 5(e) if it determines that special circumstances warrant such action and that its investigation will not be duplicative of an EEOC investigation. While the rule does not define what special circumstances would warrant agency investigation, one example would be where an agency is in the process of conducting a compliance

review of the respondent and determines that it can handle the complaint expeditiously.

If there has been a dual filing (i.e., with the agency and EEOC), then it would be unwarranted for an agency to begin an investigation if EEOC already had one under way. The agency may investigate the complaint only if EEOC agrees to defer its investigation pending the agency investigation. If, on the other hand, there has not been a dual filing, then the agency may investigate the complaint if special circumstances warrant such action and EEOC will defer its investigation of the referred complaint pending the agency investigation.

Section 5(f) requires an agency to retain joint complaints that allege a pattern or practice of employment discrimination unless special circumstances warrant referral of the complaint to EEOC. Because several comments requested clarification of the term used in the proposed rule—"systematic acts of employment discrimination"—we have replaced that term with the term "pattern or practice," which is a term that is used in statutes such as Title VII and the revenue sharing act. See *Teamsters v. United States*, 431 U.S. 324 (1977); *United States v. Ironworkers, Local 86*, 443 F.2d 544, 552 (9th Cir.), cert. denied, 404 U.S. 984 (1971).

Several comments suggested that agencies should be encouraged or required to refer joint complaints of systemic employment discrimination to EEOC. We have not adopted these suggestions because the investigation of such complaints is often fundamental to agency compliance programs and EEOC's resources to investigate those complaints are limited. Indeed, EEOC ordinarily limits the investigation of systemic complaints to the allegations which directly affect the complainant. Agencies should take these factors into account in deciding whether special circumstances warrant referral of pattern or practice complaints to EEOC.

We have also revised the procedures for handling joint complaints that allege discrimination in employment and in other (non-employment) practices of the recipient. Under the proposed rule, an agency had discretion to refer the employment aspects of the complaint but was required to retain the other aspects. If the agency referred the employment aspects of the complaint, then the agency and EEOC were required to coordinate their investigations. Several comments suggested that dividing these kinds of complaints between the agency and EEOC would be more burdensome to the

respondent and would not increase efficiency. As a result, the rule now requires an agency to handle the entire complaint, absent special circumstances. In addition, the agency shall determine whether the complainant has filed a similar charge with EEOC. If the complainant has filed such a charge, then the agency and EEOC will coordinate their activities and upon agency request, EEOC will ordinarily defer its investigation pending the agency investigation. These changes should reduce the potential for duplicative investigations.

Finally, four additions have been made to the notice requirements upon referral of a joint complaint. First, the agency shall advise EEOC if it wants to receive advance notice of conciliation negotiations. Second, the agency shall advise EEOC whether it wants EEOC to investigate the facts "concerning the relationship between the alleged discrimination and the recipient's Federally assisted programs or activities." Third, the agency shall, where appropriate, advise EEOC whether a primary objective of financial assistance is to provide employment. EEOC needs this information in order to determine what information it must gather. See *infra*, Section 8. Because the revenue sharing act and Title IX, as well as some other grant statutes, cover employment discrimination without regard to whether a primary objective of the funds is to provide employment, this requirement does not apply to referrals under those statutes. Fourth, the agency shall inform the complainant and the recipient that the date the agency received the complaint will be deemed the date it was received by EEOC.

Section 6 (28 CFR 42.606; 29 CFR 1691.6). Under the proposed rule, an employment discrimination complaint covered by Title VII, which was filed with an agency, was treated as a Title VII charge. But the proposed rule did not provide for EEOC involvement or the issuance of a notice of right to sue under Title VII unless the agency transferred or referred the complaint to EEOC. In order to eliminate the confusion, Section 6(a) provides that a complaint filed with an agency will be deemed a charge received by EEOC only if an agency transfers or refers the complaint to EEOC. In such cases, the date the complaint was received by the agency will be deemed the date it was received by EEOC. Such complaints will be deemed charges filed with EEOC in accordance with the requirements of Section 706 of Title VII and EEOC's regulations. 29 CFR 1601.13; See *Mohasco Corp. v. Silver*, 447 U.S. 807

(1980). Because of the special nature of these complaints, EEOC will request that a State and local fair employment practice agency, which is a deferral agency, waive its right to the statutory period of exclusive processing, except when the deferral agency has earlier received the complaint and commenced its fact-finding or investigation.

Section 6(b) is new. It provides that EEOC shall, where appropriate, seek information concerning "whether the alleged discrimination is in a program or activity that receives Federal financial assistance." In addition, Section 6(b) concerns those referrals where employment discrimination is covered only if it causes discrimination with respect to beneficiaries or potential beneficiaries of the assisted programs, i.e., where the financial assistance does not have as a primary objective the provision of employment. Of course, none of the referrals under the revenue sharing act or Title IX will be subject to this kind of limitation. This subsection requires EEOC to seek sufficient information to allow the referring agency to determine whether the alleged employment discrimination causes discrimination against beneficiaries or potential beneficiaries of the assisted program. As one agency noted in its comment, if EEOC did not gather this information, then the agency would have to do so before it reached its determination on the merits in cases where EEOC found cause, was unable to conciliate and returned the complaint to the agency. In order to avoid having the referring agency conduct an investigation after EEOC has finished its investigation, this new provision was added. This provision does not, however, give EEOC authority to make determinations about "whether the alleged employment discrimination is in a program or activity that receives Federal financial assistance" or whether it causes discrimination against beneficiaries or potential beneficiaries of the assisted program.

Section 6(c) and (d) appeared elsewhere in the proposed rule.

Section 6(e) is new. It provides that when EEOC agrees to defer an investigation of a complaint it has received pending an agency's investigation of the complaint, it shall give due weight to the agency's determination concerning the complaint. This requirement parallels the requirement that an agency give due weight to an EEOC determination concerning a complaint it had referred to EEOC.

Section 7 (28 CFR 42.607; 29 CFR 1691.7). This section on EEOC dismissals of complaints has been simplified. The

proposed rule distinguished between dismissals based upon untimely filings, failure to state a claim and lack of reasonable cause. Under EEOC regulations, however, EEOC may dismiss a charge for other reasons. 29 CFR 1601.19 (c), (d) and (e). The final rule does not distinguish between kinds of dismissals. It, therefore, may not be read to limit EEOC's ability to dismiss a joint complaint.

This section has also been revised to provide that EEOC, rather than the referring agency, is to notify the complainant and the respondent of the dismissal, the reasons for dismissal and the effect it has on the complainant's rights. The proposed rule required the referring agency to give this notice but EEOC is in a better position to give this notice and to give it sooner. In addition, the section now expressly provides that notice goes to the recipient, as well as the complainant, that EEOC transmits its file to the referring agency and that EEOC issues a notice of right to sue under Title VII when it dismisses a complaint.

Section 8 (28 CFR 42.608; 29 CFR 1691.8). We received several comments suggesting that a referring agency should not be allowed to investigate a case after an EEOC dismissal. On the other hand, we also received a comment stating that a referring agency should not be allowed to close a complaint which is timely and states a claim under Title VI, simply because it is untimely or fails to state a claim under Title VII.

We believe that, consistent with an agency's statutory obligations, an agency should make determinations under Title VI, Title IX, or the revenue sharing act. Section 8, therefore, provides that a referring agency shall give "due weight" to EEOC's dismissal of the Title VII allegations of a joint complaint. If a complaint is dismissed because a charge is not timely under Title VII but the complaint is timely under Title VI, then little weight is due EEOC's dismissal. If, on the other hand, EEOC determines after investigation that there is not reasonable cause to believe the allegations of employment discrimination are true, then the referring agency should give great weight to EEOC's dismissal. Indeed, should the referring agency decide to take action despite EEOC's no cause finding, the agency is required to justify that decision in writing to the Assistant Attorney General and the Chairman of the EEOC. Still, the agency retains the authority to conduct additional investigation if necessary to discharge its duties.

Section 8 also provides that the referring agency shall determine its

course of action within 30 days. This limit makes the section consistent with the time limit for referring agency determinations in unresolved complaints where EEOC found reasonable cause and was unable to conciliate. Section 10(a). The agency is also required to notify the respondent, as well as the complainant, of its determination.

Section 9 (28 CFR 42.609; 29 CFR 1691.9). Section 9 provides the procedure for EEOC reasonable cause determinations and conciliation efforts. The proposed rule provided that agencies shall participate in settlement and conciliation negotiations.

"Settlement" negotiations are part of EEOC's rapid charge processing during which EEOC also conducts its preliminary investigation. We have determined that if agencies are required to participate in this phase of EEOC's work, then the agencies will save little work by referring joint complaints to EEOC. Section 9(a), therefore, provides that, upon EEOC's request, the referring agency shall participate in conciliation negotiations, which occur after a reasonable cause determination, but not in settlement negotiations. In addition, the rule has been revised to require EEOC to provide advance notice of any conciliation negotiations to agencies that request such notice.

Section 9(b) has been revised to state more clearly what happens when EEOC finds cause and is unable to conciliate. Section 9(b) provides that EEOC issues a notice of failure of conciliation in accordance with its rules and transmits the file to the referring agency. In complaints against private employers, EEOC determines whether it will litigate and, in accordance with its regulations, issues a notice of right to sue. Complaints against public employers are referred to the Department of Justice. EEOC and the Department of Justice are required to notify agencies if they decide to bring suit. Section 12(b).

Section 10 (28 CFR 42.610; 29 CFR 1691.10). Section 10 provides the procedure for agency enforcement of complaints where EEOC has made a reasonable cause determination and conciliation efforts have failed. The section has only been revised slightly. The referring agency is required to give due weight to EEOC's determination and to make its determination, within thirty days, of whether the recipient has violated any applicable civil rights provision which it has responsibility to enforce. Although one agency commented that the period should be lengthened, we believe that no change is necessary because the agency should be able to make its determination based

upon material in the EEOC file. Indeed, under the revisions of the rule EEOC will gather information for agency use not only on whether the alleged employment discrimination occurred, but also on whether it is covered by the relevant statute. Section 6(b). Should the agency need additional information to make its determination, it should attempt promptly to obtain the information.

Section 10(b) addresses cases where the referring agency has determined that the recipient has violated a civil rights provision which it has a responsibility to enforce. This subsection has been revised to require that the referring agency notify the complainant, as well as the recipient, if it determines that a civil rights provision has been violated.

In addition, Section 10 (c) has been revised to provide that when a referring agency determines that its civil rights provisions have not been violated, it must so notify the complainant and the recipient, and inform EEOC and the Department of Justice of the basis of its decision.

Section 11 (28 CFR 42.611; 29 CFR 1691.11). Section 11 provides that when EEOC negotiates a settlement prior to a determination or a conciliation agreement after a determination, EEOC shall so notify the referring agency. The referring agency may not take further action on the complaint of employment discrimination. The agency may, however, take the existence of the complaint into account in scheduling the recipient for a review under the agency's regulations.

Section 12 (28 CFR 42.612; 29 CFR 1691.12). This section provides for interagency consultation on pattern or practice investigations, administrative enforcement and litigation concerning the employment practices of the recipients of Federal funds. The regulation contemplates that interagency consultation shall routinely occur before the specified actions are initiated but recognizes that prior consultation may not always be practical. When it is not practical, consultation should occur as soon as possible after the action is initiated.

Section 13 (28 CFR 42.613; 29 CFR 1691.13). This definition section has been modified only in relatively minor ways. First, the Age Discrimination in Employment Act has been deleted from the definition of a "joint complaint," Section 13 (f), and age from the definition of Title VI. Section 13 (i); See Section 1. EEOC is not required to investigate complaints under the Age Discrimination in Employment Act. It is only required to notify prospective defendants and attempt conciliation by

informal methods. Under the regulation, EEOC will, however, accept referrals of joint complaints which allege discrimination on the ground of age, as well as a ground covered by Title VII.

Second, the term "covered employment" was defined in the proposed rule to describe employment practices covered by Title VI. That definition provided, in part, that Title VI covers employment practices which "cause discrimination with respect to beneficiaries or potential beneficiaries of the assisted program." One comment argued that Title VI did not cover such employment practices. Courts have, however, recognized that employment discrimination which results in discrimination against beneficiaries or potential beneficiaries of a federally assisted program violates Title VI. E. g., *United States v. Jefferson County Board of Education*, 372 F.2d 836, 881-886 (5th Cir. 1966), cert. denied, 389 U.S. 840 (1967). In addition, the definition of "covered employment" is substantively identical to the one used in the Department of Justice's Coordination of Enforcement of Non-discrimination in Federally Assisted Programs regulation, 28 CFR 42.402(f), except that under this rule discrimination on the basis of religion or sex may also be covered. We have, however, deleted the definition because the term "covered employment" is not used in this regulation.

Third, for purposes of this rule, the term "Federal financial assistance" is defined to include funds disbursed under the revenue sharing act, even though for purposes other than this rule such funds do not constitute "Federal financial assistance." See, *Goolsby v. Blumenthal*, 590 F.2d 1369 (5th Cir. 1979) (en banc), cert. denied, 44 U.S. 970 (1980).

III. Regulatory Impact/Flexibility Analyses Not Required

This rule is not a "major rule" as defined by Section 1(b) of Executive Order 12291. The rule simply coordinates Federal agency investigation and enforcement of certain employment discrimination complaints. It will not have a major or significant impact on the economy. Accordingly, a regulatory impact analysis as described in Executive Order 12291 is not required. In addition, a regulatory flexibility analysis as described in the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., is not required because the rule will not "have a significant economic impact on a substantial number of small entities." 5 U.S.C. 605.

This action does not constitute a major Federal action significantly affecting the quality of the human

environment. Therefore, no environmental impact statement was prepared.

List of Subjects in 28 CFR Part 42 and 29 CFR Part 1691

Civil rights, Equal employment opportunity, and Nondiscrimination.

Signed at Washington, D.C. this 9th day of December 1982.

For the Commission.

Clarence Thomas,
Chairman.

Signed at Washington, D.C. this 3rd day of January 1983.

For the Department.

William French Smith,
Attorney General.

TITLE 29—[AMENDED]

Chapter XIV—Equal Employment Opportunity Commission

1. By virtue of the authority vested in me by Exec. Order No. 12067, 3 CFR 206 (1979), 43 FR 28967, and for the reasons set out in the preamble, the rules of the Equal Employment Opportunity Commission, at Chapter XIV of Title 29, Code of Federal Regulations, are hereby amended by adding as a new Part 1691, the following:

PART 1691—PROCEDURES FOR COMPLAINTS OF EMPLOYMENT DISCRIMINATION FILED AGAINST RECIPIENTS OF FEDERAL FINANCIAL ASSISTANCE

Sec.

- 1691.1 Purpose and application.
- 1691.2 Exchange of information.
- 1691.3 Confidentiality.
- 1691.4 Standards for investigation, reviews and hearings.
- 1691.5 Agency processing of complaints of employment discrimination.
- 1691.6 General rules concerning EEOC action on complaints.
- 1691.7 EEOC dismissals of complaints.
- 1691.8 Agency action on complaints dismissed by EEOC.
- 1691.9 EEOC reasonable cause determinations and conciliation efforts.
- 1691.10 Agency enforcement of unresolved complaints.
- 1691.11 EEOC negotiated settlements and conciliation agreements.
- 1691.12 Interagency consultation.
- 1691.13 Definitions.

Authority: E.O. 12250, 45 FR 72985 (November 4, 1980) and E.O. 12067, 43 FR 28967 (June 30, 1978).

§ 1691.1 Purpose and application.

The purpose of this regulation is to implement procedures for processing and resolving complaints of employment discrimination filed against recipients of Federal financial assistance subject to

Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the State and Local Fiscal Assistance Act of 1972, as amended, and provisions similar to Title VI and Title IX in Federal grant statutes.

Enforcement of such provisions in Federal grant statutes is covered by this regulation to the extent they relate to prohibiting employment discrimination on the ground of race, color, national origin, religion or sex in programs receiving Federal financial assistance of the type subject to Title VI or Title IX. This regulation does not, however, apply to the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Juvenile Justice and Delinquency Prevention Act, as amended, the Comprehensive Employment Training Act of 1973, as amended, or Executive Order 11246.

§ 1691.2 Exchange of information.

EEOC and agencies shall share any information relating to the employment policies and practices of recipients of Federal financial assistance that may assist each office in carrying out its responsibilities. Such information shall include, but not necessarily be limited to, affirmative action programs, annual employment reports, complaints, investigative files, conciliation or compliance agreements, and compliance review reports and files.

§ 1691.3 Confidentiality.

When an agency receives information obtained by EEOC, the agency shall observe the confidentiality requirements of Sections 706(b) and 709(e) of Title VII as would EEOC, except in cases where the agency receives the same information from a source independent of EEOC or has referred a joint complaint to EEOC under this regulation. In such cases, the agency may use independent source information or information obtained by EEOC under the agency's investigative authority in a subsequent Title VI, Title IX or revenue sharing act enforcement proceeding. Agency questions concerning confidentiality shall be directed to the Associate Legal Counsel for Legal Services, Office of Legal Counsel of EEOC.

§ 1691.4 Standards for investigation, reviews and hearings.

In any investigation, compliance review, hearing or other proceeding, agencies shall consider Title VII case law and EEOC Guidelines, 29 CFR Parts 1604-1607, unless inapplicable, in determining whether a recipient of Federal financial assistance has

engaged in an unlawful employment practice.

§ 1691.5 Agency processing of complaints of employment discrimination.

(a) Within ten days of receipt of a complaint of employment discrimination, an agency shall notify the respondent that it has received a complaint of employment discrimination, including the date, place and circumstances of the alleged unlawful employment practice.

(b) Within thirty days of receipt of a complaint of employment discrimination an agency shall:

(i) Determine whether it has jurisdiction over the complaint under Title VI, Title IX, or the revenue sharing act; and

(ii) Determine whether EEOC may have jurisdiction over the complaint under Title VII or the Equal Pay Act.

(c) An agency shall transfer to EEOC a complaint of employment discrimination over which it does not have jurisdiction but over which EEOC may have jurisdiction within thirty days of receipt of a complaint. At the same time, the agency shall notify the complainant and the respondent of the transfer, the reason for the transfer, the location of the EEOC office to which the complaint was transferred and that the date the agency received the complaint will be deemed the date it was received by EEOC.

(d) If an agency determines that a complaint of employment discrimination is a joint complaint, then the agency may refer the complaint to EEOC. The agency need not consult with EEOC prior to such a referral. An agency referral of a joint complaint should occur within thirty days of receipt of the complaint.

(e) An agency shall refer to EEOC all joint complaints solely alleging employment discrimination against an individual. If an agency determines that special circumstances warrant its investigation of such a joint complaint, then the agency shall determine whether the complainant has filed a similar charge of employment discrimination with EEOC.

(i) If an agency determines that the complainant has filed a similar charge of employment discrimination with EEOC, then the agency may investigate the complaint if EEOC agrees to defer its investigation pending the agency investigation.

(ii) If an agency determines that the complainant has not filed a similar charge of employment discrimination with EEOC, then the agency may investigate the complaint if special circumstances warrant such action. In

such cases, EEOC shall defer its investigation of the referred joint complaint pending the agency investigation.

(f) An agency shall not refer to EEOC a joint complaint alleging a pattern or practice of employment discrimination unless special circumstances warrant agency referral of the complaint to EEOC.

(g) If a joint complaint alleges discrimination in employment and in other practices of a recipient, an agency should, absent special circumstances, handle the entire complaint under the agency's own investigation procedures. In such cases, the agency shall determine whether the complainant has filed a similar charge of employment discrimination with EEOC. If such a charge has been filed, the agency and EEOC shall coordinate their activities. Upon agency request, EEOC should ordinarily defer its investigation pending the agency investigation.

(h) When a joint complaint is referred to EEOC for investigation, the agency shall advise EEOC of the relevant civil rights provision(s) applicable to the employment practices of the recipient, whether the agency wants to receive advance notice of any conciliation negotiations, whether the agency wants EEOC to seek information concerning the relationship between the alleged discrimination and the recipient's Federally assisted programs or activities and, where appropriate, whether a primary objective of the Federal financial assistance is to provide employment. The agency shall also notify the complainant and the recipient of the referral, the location of the EEOC office to which the complaint was referred, the identity of the civil rights provision(s) involved, the authority of EEOC under this regulation and that the date the agency received the complaint will be deemed the date it was received by EEOC. Specifically, the notice shall inform the recipient that the agency has delegated to EEOC its investigative authority under Title VI, Title IX, or the revenue sharing act, and the relevant act's implementing regulations. The agency, therefore, may use information obtained by EEOC under the agency's investigative authority in a subsequent Title VI, Title IX or revenue sharing act enforcement proceeding.

§ 1691.6 General rules concerning EEOC action on complaints.

(a) A complaint of employment discrimination filed with an agency, which is transferred or referred to EEOC under this regulation, shall be deemed a charge received by EEOC. For all

purposes under Title VII and the Equal Pay Act, the date such a complaint was received by an agency shall be deemed the date it was received by EEOC.

(b) When EEOC investigates a joint complaint it shall, where appropriate, seek sufficient information to allow the referring agency to determine whether the alleged employment discrimination is in a program or activity that receives Federal financial assistance and/or whether the alleged employment discrimination causes discrimination with respect to beneficiaries or potential beneficiaries of the assisted program.

(c) Upon referral of a joint complaint alleging a pattern or practice of employment discrimination, EEOC generally will limit its investigation to the allegation(s) which directly affect the complainant.

(d) If EEOC, in the course of an investigation of a joint complaint, is unable to obtain information from a recipient through voluntary means, EEOC shall consult with the referring agency to determine an appropriate course of action.

(e) If EEOC agrees to defer its investigation of a complaint of employment discrimination pending an agency investigation of the complaint, then EEOC shall give due weight to the agency's determination concerning the complaint.

§ 1691.7 EEOC dismissals of complaints.

If EEOC determines that the Title VII allegations of a joint complaint should be dismissed, EEOC shall notify the complainant and the recipient of the reason for the dismissal and the effect the dismissal has on the complainant's rights under the relevant civil rights provision(s) of the referring agency, and issue a notice of right to sue under Title VII. At the same time, EEOC shall transmit to the referring agency a copy of EEOC's file.

§ 1691.8 Agency action on complaints dismissed by EEOC.

Upon EEOC's transmittal of a dismissal under § 1691.7 of this part, the referring agency shall determine within thirty days, what, if any, action the agency intends to take with respect to the complaint and then notify the complainant and the recipient. In reaching that determination, the referring agency shall give due weight to EEOC's determination that the Title VII allegations of the joint complaint should be dismissed. If the referring agency decides to take action with respect to a complaint that EEOC has dismissed for lack of reasonable cause to believe that Title VII has been violated, the agency shall notify the Assistant Attorney

General and the Chairman of the EEOC in writing of the action it plans to take and the basis of its decision to take such action.

§ 1691.9 EEOC reasonable cause determinations and conciliation efforts.

(a) If EEOC, after investigation of a joint complaint, determines that reasonable cause exists to believe that Title VII has been violated, EEOC shall advise the referring agency, the complainant and the recipient of that determination and attempt to resolve the complaint by informal methods of conference, conciliation and persuasion. If EEOC would like the referring agency to participate in conciliation negotiations, EEOC shall so notify the agency and the agency shall participate. EEOC shall provide advance notice of any conciliation negotiations to referring agencies that request such notice, whether or not EEOC requests their participation in the negotiations.

(b) If EEOC's efforts to resolve the complaint by informal methods of conference, conciliation and persuasion fail, EEOC shall:

(i) Issue a notice of failure of conciliation to the recipient in accordance with 29 CFR 1601.25;

(ii) Transmit to the referring agency a copy of EEOC's investigative file, including its Letter of Determination and notice of failure of conciliation;

(iii) If the recipient is not a government, governmental entity or political subdivision, determine whether EEOC will bring suit under Title VII and, in accordance with 29 CFR 1601.28, issue a notice of right to sue under Title VII;

(iv) If the recipient is a government, governmental entity or political subdivision, refer the matter to the Attorney General in accordance with 29 CFR 1601.29. The Attorney General, or his or her delegate, will determine whether the Department of Justice will bring suit under Title VII and, in accordance with 29 CFR 1601.28, issue a notice of right to sue under Title VII.

§ 1691.10 Agency enforcement of unresolved complaints.

(a) Upon EEOC's transmittal of a reasonable cause determination and notice of failure of conciliation under § 1691.9(b)(ii) of this regulation, the referring agency shall determine, within thirty days, whether the recipient has violated any applicable civil rights provision(s) which the agency has a responsibility to enforce. The referring agency shall give due weight to EEOC's determination that reasonable cause exists to believe that Title VII has been violated.

(b) If the referring agency determines that the recipient has violated any applicable civil rights provision(s) which the agency has a responsibility to enforce, the agency shall so notify the complainant and the recipient and determine whether further efforts to obtain voluntary compliance are warranted. In reaching that determination, the agency shall give due weight to the failure of EEOC's efforts to resolve the complaint by informal methods. If the referring agency determines that further efforts to obtain voluntary compliance are not warranted or if such further efforts fail, the agency shall initiate appropriate enforcement proceedings under its own regulations.

(c) If the referring agency determines that the recipient has not violated any applicable civil rights provision(s) which the agency has a responsibility to enforce, the agency shall notify the complainant, the recipient, the Assistant Attorney General and the Chairman of the EEOC in writing of the basis of that determination.

§ 1691.11 EEOC negotiated settlements and conciliation agreements.

If the parties enter into a negotiated settlement (as described in 29 CFR 1601.20) prior to a determination or a conciliation agreement (as described in 29 CFR 1601.24) after a determination, EEOC shall notify the referring agency that the complaint has been settled. The agency shall take no further action on the complaint of employment discrimination thereafter except that the agency may take the existence of the complaint into account in scheduling the recipient for a review under the agency's regulations.

§ 1691.12 Interagency consultation.

(a) Before investigating whether the employment practices of a recipient of Federal financial assistance constitute a pattern or practice of unlawful discrimination or initiating formal administrative enforcement procedures on that basis, an agency shall, to the extent practical, consult with the Chairman of the EEOC and the Assistant Attorney General to assure that duplication of effort will be minimized.

(b) Prior to the initiation of any legal action against a recipient of Federal financial assistance alleging unlawful employment practices, the Department of Justice and/or EEOC shall, to the extent practical, notify the appropriate agency or agencies of the proposed action and the substance of the allegations.

§ 1691.13 Definitions.

As used in this regulation, the term:

(a) "Agency" means any Federal department or agency which extends Federal financial assistance subject to any civil rights provision(s) to which this regulation applies.

(b) "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice, or his or her delegate.

(c) "Chairman of the EEOC" refers to the Chairman of the Equal Employment Opportunity Commission, or his or her delegate.

(d) "EEOC" means the Equal Employment Opportunity Commission and, where appropriate, any of its District Offices.

(e) "Federal financial assistance" includes: (1) Grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance. For purposes of this regulation, the term "Federal financial assistance" also includes funds disbursed under the revenue sharing act.

(f) "Joint complaint" means a complaint of employment discrimination covered by Title VII or the Equal Pay Act and by Title VI, Title IX, or the revenue sharing act.

(g) "Recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under such program.

(h) "Revenue sharing act" refers to the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. 1221 *et seq.*

(i) "Title VI" refers to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d-4. Where appropriate, "Title VI" also refers to the civil rights provisions of other Federal statutes or regulations to the extent that they

prohibit employment discrimination on the grounds of race, color, religion, sex or national origin in programs receiving Federal financial assistance of the type subject to Title VI itself.

(j) "Title VII" refers to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*

(k) "Title IX" refers to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 to 1683.

TITLE 28—[AMENDED]**Chapter I—Department of Justice**

2. By virtue of the authority vested in me by Section 602 of Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. 2000d-1, Exec. Order No. 12250, 3 CFR 298 (1981), 45 FR 72295, and for the reasons set out in the preamble, the rules of the Department of Justice, at Part 42 of Title 28 of the Code of Federal Regulations, are hereby amended by adding as a new Subpart H, the following:

PART 42—NONDISCRIMINATION; EQUAL EMPLOYMENT OPPORTUNITY; POLICIES AND PROCEDURES

* * *

Sec.

- 42.601 Purpose and application.
- 42.602 Exchange of information.
- 42.603 Confidentiality.
- 42.604 Standards for investigation, reviews and hearings.
- 42.605 Agency processing of complaints of employment discrimination.
- 42.606 General rules concerning EEOC action on complaints.
- 42.607 EEOC dismissals of complaints.
- 42.608 Agency action on complaints dismissed by EEOC.
- 42.609 EEOC reasonable cause determinations and conciliation efforts.
- 42.610 Agency enforcement of unresolved complaints.
- 42.611 EEOC negotiated settlement and conciliation agreements.
- 42.612 Interagency consultation.
- 42.613 Definitions.

Authority: E.O. 12250, 45 FR 72995 (November 4, 1980) and E.O. 12067, 43 FR 28967 (June 30, 1978).

* * *

Subpart H—Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance**§ 42.601 Purpose and application.**

The purpose of this regulation is implement procedures for processing and resolving complaints of employment discrimination filed against recipients of Federal financial assistance subject to Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments

of 1972, the State and Local Fiscal Assistance Act of 1972, as amended, and provisions similar to Title VI and Title IX in Federal grant statutes.

Enforcement of such provisions in Federal grant statutes is covered by this regulation to the extent they relate to prohibiting employment discrimination on the ground of race, color, national origin, religion or sex in programs receiving Federal financial assistance of the type subject to Title VI or Title IX. This regulation does not, however, apply to the Omnibus Crime Control and Safe Streets Act of 1968, as amended, the Juvenile Justice and Delinquency Prevention Act, as amended, the Comprehensive Employment Training Act of 1973, as amended, or Executive Order 11246.

§ 42.602 Exchange of information.

EEOC and agencies shall share any information relating to the employment policies and practices of recipients of federal financial assistance that may assist each office in carrying out its responsibilities. Such information shall include, but not necessarily be limited to, affirmative action programs, annual employment reports, complaints, investigative files, conciliation or compliance agreements, and compliance review reports and files.

§ 42.603 Confidentiality.

When an agency receives information obtained by EEOC, the agency shall observe the confidentiality requirements of Sections 706(b) and 709(e) of Title VII as would EEOC, except in cases where the agency receives the same information from a source independent of EEOC or has referred a joint complaint to EEOC under this regulation. In such cases, the agency may use independent source information or information obtained by EEOC under the agency's investigative authority in a subsequent Title VI, Title IX or revenue sharing act enforcement proceeding. Agency questions concerning confidentiality shall be directed to the Associate Legal Counsel for Legal Services, Office of Legal Counsel of EEOC.

§ 42.604 Standards for investigation, reviews and hearings.

In any investigation, compliance review, hearing or other proceeding, agencies shall consider Title VII case law and EEOC Guidelines, 29 CFR Parts 1604-1607, unless inapplicable, in determining whether a recipient of Federal financial assistance has engaged in an unlawful employment practice.

§ 42.605 Agency processing of complaints of employment discrimination.

(a) Within ten days of receipt of a complaint of employment discrimination, an agency shall notify the respondent that it has received a complaint of employment discrimination, including the date, place and circumstances of the alleged unlawful employment practice.

(b) Within thirty days of receipt of a complaint of employment discrimination an agency shall:

(i) Determine whether it has jurisdiction over the complaint under Title VI, Title IX, or the revenue sharing act; and

(ii) Determine whether EEOC may have jurisdiction over the complaint under Title VII of or the Equal Pay Act.

(c) An agency shall transfer to EEOC a complaint of employment discrimination over which it does not have jurisdiction but over which EEOC may have jurisdiction within thirty days of receipt of a complaint. At the same time, the agency shall notify the complainant and the respondent of the transfer, the reason for the transfer, the location of the EEOC office to which the complaint was transferred and that the date the agency received the complaint will be deemed the date it was received by EEOC.

(d) If any agency determines that a complaint of employment discrimination is a joint complaint, then the agency may refer the complaint to EEOC. The agency need not consult with EEOC prior to such a referral. An agency referral of a joint complaint should occur within thirty days of receipt of the complaint.

(e) An agency shall refer to EEOC all joint complaints solely alleging employment discrimination against an individual. If an agency determines that special circumstances warrant its investigation of such a joint complaint, then the agency shall determine whether the complainant has filed a similar charge of employment discrimination with EEOC.

(i) If an agency determines that the complainant has filed a similar charge of employment discrimination with EEOC, then the agency may investigate the complaint if EEOC agrees to defer its investigation pending the agency investigation.

(ii) If an agency determines that the complainant has not filed a similar charge of employment discrimination with the EEOC, then the agency may investigate the complaint if special circumstances warrant such action. In such cases, EEOC shall defer its investigation of the referred joint

complaint pending the agency investigation.

(f) An agency shall not refer to EEOC a joint complaint alleging a pattern or practice of employment discrimination unless special circumstances warrant agency referral of the complaint to EEOC.

(g) If a joint complaint alleges discrimination in employment and in other practices of a recipient, an agency should, absent special circumstances, handle the entire complaint under the agency's own investigation procedures. In such cases, the agency shall determine whether the complainant has filed a similar charge of employment discrimination with EEOC. If such a charge has been filed, the agency and EEOC shall coordinate their activities. Upon agency request, EEOC should ordinarily defer its investigation pending the agency investigation.

(h) When a joint complaint is referred to EEOC for investigation, the agency shall advise EEOC of the relevant civil rights provision(s) applicable to the employment practices of the recipient, whether the agency wants to receive advance notice of any conciliation negotiations, whether the agency wants EEOC to seek information concerning the relationship between the alleged discrimination and the recipient's Federally assisted programs or activities and, where appropriate, whether a primary objective of the Federal financial assistance is to provide employment. The agency shall also notify the complainant and the recipient of the referral, the location of the EEOC office to which the complaint was referred, the identity of the civil rights provision(s) involved, the authority of EEOC under this regulation and that the date the agency received the complaint will be deemed the date it was received by EEOC. Specifically, the notice shall inform the recipient that the agency has delegated to EEOC its investigative authority under Title VI, Title IX, or the revenue sharing act, and the relevant act's implementing regulations. The agency, therefore, may use information obtained by EEOC under the agency's investigative authority in a subsequent Title VI, Title IX or revenue sharing act enforcement proceeding.

§ 42.606 General rules concerning EEOC action on complaints.

(a) A complaint of employment discrimination filed with an agency, which is transferred or referred to EEOC under this regulation, shall be deemed a charge received by EEOC. For all purposes under Title VII and the Equal Pay Act, the date such a complaint was

received by an agency shall be deemed the date it was received by EEOC.

(b) When EEOC investigates a joint complaint it shall, where appropriate, seek sufficient information to allow the referring agency to determine whether the alleged employment discrimination is in a program or activity that receives Federal financial assistance and/or whether the alleged employment discrimination causes discrimination with respect to beneficiaries or potential beneficiaries of the assisted program.

(c) Upon referral of a joint complaint alleging a pattern or practice of employment discrimination, EEOC generally will limit its investigation to the allegation(s) which directly affect the complainant.

(d) If EEOC, in the course of an investigation of a joint complaint, is unable to obtain information from a recipient through voluntary means, EEOC shall consult with the referring agency to determine an appropriate course of action.

(e) If EEOC agrees to defer its investigation of a complaint of employment discrimination pending an agency investigation of the complaint, then EEOC shall give due weight to the agency's determination concerning the complaint.

§ 42.607 EEOC dismissals of complaints.

If EEOC determines that the Title VII allegations of a joint complaint should be dismissed, EEOC shall notify the complainant and the recipient of the reason for the dismissal and the effect the dismissal has on the complainant's rights under the relevant civil rights provision(s) of the referring agency, and issue a notice of right to sue under Title VII. At the same time, EEOC shall transmit to the referring agency a copy of EEOC's file.

§ 42.608 Agency action on complaints dismissed by EEOC.

Upon EEOC's transmittal of a dismissal under § 42.607 of this regulation, the referring agency shall determine within thirty days, what, if any, action the agency intends to take with respect to the complaint and then notify the complainant and the recipient. In reaching that determination, the referring agency shall give due weight to EEOC's determination that the Title VII allegations of the joint complaint should be dismissed. If the referring agency decides to take action with respect to a complaint that EEOC has dismissed for lack of reasonable cause to believe that Title VII has been violated, the agency shall notify the Assistant Attorney General and the Chairman of the EEOC

in writing of the action it plans to take and the basis of its decision to take such action.

§ 42.609 EEOC reasonable cause determination and conciliation efforts.

(a) If EEOC, after investigation of a joint complaint, determines that reasonable cause exists to believe that Title VII has been violated, EEOC shall advise the referring agency, the complainant and the recipient of that determination and attempt to resolve the complaint by informal methods of conference, conciliation and persuasion. If EEOC would like the referring agency to participate in conciliation negotiations, EEOC shall so notify the agency and the agency shall participate. EEOC shall provide advance notice of any conciliation negotiations to referring agencies that request such notice, whether or not EEOC requests their participation in the negotiations.

(b) If EEOC's efforts to resolve the complaint by informal methods of conference, conciliation and persuasion fail, EEOC shall:

(i) Issue a notice of failure of conciliation to the recipient in accordance with 29 CFR 1601.25;

(ii) Transmit to the referring agency a copy of EEOC's investigative file, including its Letter of Determination and notice of failure conciliation;

(iii) If the recipient is not a government, governmental entity or political subdivision, determine whether EEOC will bring suit under Title VII and, in accordance with 29 CFR 1601.28, issue a notice of right to sue under Title VII;

(iv) If the recipient is a government, governmental entity or political subdivision, refer the matter to the Attorney General in accordance with 29 CFR 1601.29. The Attorney General, or his or her delegate, will determine whether the Department of Justice will bring suit under Title VII and, in accordance with 29 CFR 1601.28, issue a notice of right to sue under Title VII.

§ 42.610 Agency enforcement of unresolved complaints.

(a) Upon EEOC's transmittal of a reasonable cause determination and notice of failure of conciliation under § 42.609(b)(ii) of this regulation, the referring agency shall determine, within thirty days, whether the recipient has violated any applicable civil rights provision(s) which the agency has a responsibility to enforce. The referring agency shall give due weight to EEOC's determination that reasonable cause exists to believe that Title VII has been violated.

(b) If the referring agency determines that the recipient has violated any

applicable civil rights provision(s) which the agency has a responsibility to enforce, the agency shall so notify the complainant and the recipient and determine whether further efforts to obtain voluntary compliance are warranted. In reaching that determination, the agency shall give due weight to the failure of EEOC's efforts to resolve the complaint by informal methods. If the referring agency determines that further efforts to obtain voluntary compliance are not warranted or if such further efforts fail, the agency shall initiate appropriate enforcement proceedings under its own regulations.

(c) If the referring agency determines that the recipient has not violated any applicable civil rights provision(s) which the agency has a responsibility to enforce, the agency shall notify the complainant, the recipient, the Assistant Attorney General and the Chairman of the EEOC in writing of the basis of that determination.

§ 42.611 EEOC negotiated settlements and conciliation agreements.

If the parties enter into a negotiated settlement (as described in 29 CFR 1601.20) prior to a determination or a conciliation agreement (as described in 29 CFR 1601.24) after a determination, EEOC shall notify the referring agency that the complaint has been settled. The agency shall take no further action on the complaint of employment discrimination thereafter except that the agency may take the existence of the complaint into account in scheduling the recipient for a review under the agency's regulations.

§ 42.612 Interagency consultation.

(a) Before investigating whether the employment practices of a recipient of Federal financial assistance constitute a pattern or practice of unlawful discrimination or initiating formal administrative enforcement procedures on that basis, an agency shall, to the extent practical, consult with the Chairman of the EEOC and the Assistant Attorney General to assure that duplication of effort will be minimized.

(b) Prior to the initiation of any legal action against a recipient of Federal financial assistance alleging unlawful employment practices, the Department of Justice and/or EEOC shall, to the extent practical, notify the appropriate agency or agencies of the proposed action and the substance of the allegations.

§ 42.613 Definitions.

As used in this regulation, the term:

(a) "Agency" means any Federal department or agency which extends Federal financial assistance subject to any civil rights provision(s) to which this regulation applies.

(b) "Assistant Attorney General" refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice, or his or her delegate.

(c) "Chairman of the EEOC" refers to the Chairman of the Equal Employment Opportunity Commission, or his or her delegate.

(d) "EEOC" means the Equal Employment Opportunity Commission and, where appropriate, any of its District Offices.

(e) "Federal financial assistance" includes: (1) Grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance. For purposes of this regulation, the term "Federal financial assistance" also includes funds disbursed under the revenue sharing act.

(f) "Joint complaint" means a complaint of employment discrimination covered by Title VII or the Equal Pay Act and by Title VI, Title IX, or the revenue sharing act.

(g) "Recipient" means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such terms does not include any ultimate beneficiary under such program.

(h) "Revenue sharing act" refers to the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. 1221 *et seq.*

(i) "Title VI" refers to Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d-4. Where appropriate, "Title VI" also refers to the civil rights provisions of other Federal statutes or regulations to the extent that they prohibit employment discrimination on

the ground or race, color, religion, sex or national origin in programs receiving Federal financial assistance of the type subject to Title VI itself.

(j) "Title VII" refers to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*

(k) "Title IX" refers to Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 to 1683.

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