

SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

PART 234—MAJOR SYSTEM ACQUISITION

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

234.001 Definitions.

Systems means a combination of elements that will function together to produce the capabilities required to fulfill a mission need.

Systems acquisition means the design, development, and production of new systems. It also includes modifications to existing systems that involve redesign of the systems or subsystems.

[60 FR 61598, Nov. 30, 1995]

234.003 Responsibilities.

DoD 5000.1, Defense Acquisition, and DoD 5000.2-R, Mandatory Procedures for Major Defense Acquisition Programs (MDAPs) and Major Automated Information System (MAIS) Acquisition Programs, contain the DoD implementation of OMB Circular A-109.

[62 FR 34126, June 24, 1997]

234.005 General requirements.

234.005-70 Earned value management systems.

When an offeror provides an earned value management system (EVMS) plan as part of its proposal in accordance with paragraph (b) of the provision at 252.234-7000, the contracting officer shall forward a copy of the plan to the cognizant administrative contracting officer (ACO). The procuring contracting officer shall obtain the assistance of the ACO in determining the adequacy of the proposed EVMS plan.

[62 FR 9991, Mar. 5, 1997, as amended at 63 FR 11537, Mar. 9, 1998]

234.005-71 Solicitation provision and contract clause.

When the Government requires contractor compliance with DoD earned value management system criteria—

(a) Use the provision at 252.234-7000, Notice of Earned Value Management System, in solicitations; and

(b) Use the clause at 252.234-7001, Earned Value Management System, in solicitations and contracts.

[62 FR 9991, Mar. 5, 1997; 62 FR 11953, Mar. 13, 1997]

PART 235—RESEARCH AND DEVELOPMENT CONTRACTING

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36416, July 31, 1991, unless otherwise noted.

235.001 Definitions.

“Research and development” means those efforts described by the Research, Development, Test, and Evaluation (RDT&E) budget activity definitions found in the DoD Financial Management Regulation (DoD 7000.14-R), Volume 2B, Chapter 5.

[65 FR 32040, May 22, 2000]

235.006 Contracting methods and contract type.

(b)(i) Do not award a fixed-price type contract for a development program effort unless—

(A) The level of program risk permits realistic pricing;

(B) The use of a fixed-price type contract permits an equitable and sensible allocation of program risk between the Government and the contractor; and

(C) A written determination that the criteria of paragraphs (b)(i)(A) and (B) of this section have been met is executed—

(1) By the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) for—

(i) Research and development for non-major systems, if the contract is over \$25 million;

(ii) The lead ship of a class; or

(iii) The development of a major system (as defined in FAR 2.101) or subsystem thereof, if the contract is over \$25 million; or

(2) By the contracting officer for any development not covered by paragraph (b)(i)(C)(1) of this section.

(ii) Obtain USD (AT&L) approval of the Government's prenegotiation position before negotiations begin, and obtain USD (AT&L) approval of the negotiated agreement with the contractor before the agreement is executed, for any action that is—

(A) An increase of more than \$250 million in the price or ceiling price of a fixed-price type development contract, or a fixed-price type contract for the lead ship of a class;

(B) A reduction in the amount of work under a fixed-price type development contract or a fixed-price type

contract for the lead ship of a class, when the value of the work deleted is \$100 million or more; or

(C) A repricing of fixed-price type production options to a development contract, or a contract for the lead ship of a class, that increases the price or ceiling price by more than \$250 million for equivalent quantities.

(iii) Notify the USD (AT&L) of an intent not to exercise a fixed-price production option on a development contract for a major weapon system reasonably in advance of the expiration of the option exercise period.

[64 FR 18830, Apr. 16, 1999; 64 FR 48459, Sept. 3, 1999, as amended at 65 FR 39706, June 27, 2000]

235.006-70 Manufacturing Technology Program.

In accordance with 10 U.S.C. 2525(d), for acquisitions under the Manufacturing Technology Program—

(a) Award all contracts using competitive procedures; and

(b) Include in all solicitations an evaluation factor that addresses the extent to which offerors propose to share in the cost of the project (see FAR 15.304).

[65 FR 2058, Jan. 13, 2000]

235.007 Solicitations.

(g) To ensure that prospective offerors fully understand the details of the work, the contracting officer may include the Government's estimate of the man-year effort under a research contract.

235.010 Scientific and technical reports.

(b) The Defense Technical Information Center (DTIC) is responsible for collecting all scientific or technological observations, findings, recommendations, and results derived from DoD endeavors, including both in-house and contracted efforts. The DTIC has eligibility and registration requirements for use of its services. Requests for eligibility and registration information should be addressed to DTIC-BCS, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, VA 22060-0944.

[60 FR 29500, June 5, 1995, as amended at 62 FR 34126, June 24, 1997]

235.015 Contracts for research with educational institutions and non-profit organizations.

(b) *Basic agreements.*

(3) When using a basic agreement—

(i) Incorporate it by reference in section I of the contract; and

(ii) Incorporate any special clause requirements in section H.

[59 FR 27673, May 27, 1994]

235.015-70 Special use allowances for research facilities acquired by educational institutions.

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

(1) *Research facility* means—

(i) Real property, other than land; and

(ii) Includes structures, alterations, and improvements, acquired for the purpose of conducting scientific research under contracts with departments and agencies of the DoD.

(2) *Special use allowance* means a negotiated direct or indirect allowance—

(i) For construction or acquisition of buildings, structures, and real property, other than land; and

(ii) Where the allowance is computed at an annual rate exceeding the rate which normally would be allowed under FAR subpart 31.3.

(b) *Policy.* (1) Educational institutions are to furnish the facilities necessary to perform Defense contracts. FAR 31.3 governs how much the Government will reimburse the institution for the research programs. However, in extraordinary situations, the Government may give special use allowances to an educational institution when the institution is unable to provide the capital for new laboratories or expanded facilities needed for Defense contracts.

(2) Decisions to provide a special use allowance must be made on a case-by-case basis, using the criteria in paragraph (c) of this subsection.

(c) *Authorization for special use allowance.* The head of a contracting activity may approve special use allowances only when all of the following conditions are met—

(1) The research facility is essential to the performance of DoD contracts;

(2) Existing facilities, either Government or nongovernment, cannot meet

program requirements practically or effectively;

(3) The proposed agreement for special use allowances is a sound business arrangement;

(4) The Government's furnishing of Government-owned facilities is undesirable or impractical; and

(5) The proposed use of the research facility is to conduct essential Government research which requires the new or expanded facilities.

(d) *Application of the special use allowance.* (1) In negotiating a special use allowance—

(i) Compare the needs of DoD and of the institution for the research facility to determine the amount of the special use allowance;

(ii) Consider rental costs for similar space in the area where the research facility is or will be located to establish the annual special use allowance;

(iii) Do not include or allow—

(A) The costs of land; or

(B) Interest charges on capital;

(iv) Do not include maintenance, utilities, or other operational costs;

(v) The period of allowance generally will be—

(A) At least ten years; or

(B) A shorter period if the total amount to be allowed is less than the construction or acquisition cost for the research facility;

(vi) Generally, provide for allocation of the special use allowance equitably among the Government contracts using the research facility;

(vii) Special use allowances apply only in the years in which the Government has contracts in effect with the institution. However, if in any given year there is a reduced level of Government research effort which results in the special use allowance being excessive compared to the Government research funding, a separate special use allowance may be negotiated for that year;

(viii) Special use allowances may be adjusted for the period before construction is complete if the facility is partially occupied and used for Government research during that period.

(2) A special use allowance may be based on either total or partial cost of construction or acquisition of the research facility.

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(i) When based on total cost neither the normal use allowance nor depreciation will apply—

(A) During the special use allowance period; and

(B) After the educational institution has recovered the total construction or acquisition cost from the Government or other users.

(ii) When based on partial cost, normal use allowance and depreciation—

(A) Apply to the balance of costs during the special use allowance period to the extent negotiated in the special use allowance agreement; and

(B) Do not apply after the special use allowance period, except for normal use allowance applied to the balance.

(3) During the special use allowance period, the research facility—

(i) Shall be available for Government research use on a priority basis over nongovernment use; and

(ii) Cannot be put to any significant use other than that which justified the special use allowance, unless the head of the contracting activity, who approved the special use allowance, consents.

(4) The Government will pay only an allocable share of the special use allowance when the institution makes any substantial use of the research facility for parties other than the Government during the period when the special use allowance is in effect.

(5) In no event shall the institution be paid more than the acquisition costs.

[56 FR 36416, July 31, 1991, as amended at 60 FR 29500, June 5, 1995]

235.016 Broad agency announcement.

To help achieve the goals of Section 1207 of Public Law 99-661 (see part 226), contracting officers shall—

(1) Whenever practicable, reserve discrete or severable areas of research interest contained in broad agency announcements for exclusive competition among historically black colleges and universities and minority institutions;

(2) Indicate such reservation—

(i) In the broad agency announcement; and

(ii) In the announcement synopsis (see 205.207(d)(v)).

235.017 Federally Funded Research and Development Centers.

(a) *Policy.*

(2) No DoD fiscal year 1992 or later funds may be obligated or expended to finance activities of a DoD Federally Funded Research and Development Center (FFRDC) if a member of its board of directors or trustees simultaneously serves on the board of directors or trustees of a profit-making company under contract to DoD, unless the FFRDC has a DoD-approved conflict of interest policy for its members (section 8107 of Pub. L. 102-172 and similar sections in subsequent Defense appropriations acts).

[58 FR 28471, May 13, 1993]

235.017-1 Sponsoring agreements.

(c)(4) DoD-sponsoring FFRDCs that function primarily as research laboratories (C3I Laboratory operated by the Institute for Defense Analysis, Lincoln Laboratory operated by Massachusetts Institute of Technology, and Software Engineering Institute) may respond to solicitations and announcements for programs which promote research, development, demonstration, or transfer of technology (Section 217, Public Law 103-337).

[60 FR 61598, Nov. 30, 1995]

235.070 Indemnification against unusually hazardous risks.

235.070-1 Indemnification under research and development contracts.

(a) Under 10 U.S.C. 2354, and if authorized by the Secretary concerned, contracts for research and/or development may provide for indemnification of the contractor or subcontractors for—

(1) Claims by third persons (including employees) for death, bodily injury, or loss of or damage to property; and

(2) Loss of or damage to the contractor's property to the extent that the liability, loss, or damage—

(i) Results from a risk that the contract defines as “unusually hazardous;”

(ii) Arises from the direct performance of the contract; and

(iii) Is not compensated by insurance or other means.

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(b) Clearly define the specific unusually hazardous risks to be indemnified. Submit this definition for approval with the request for authorization to grant indemnification. Include the approved definition in the contract.

[56 FR 36416, July 31, 1991, as amended at 64 FR 51076, Sept. 21, 1999]

235.070-2 Indemnification under contracts involving both research and development and other work.

These contracts may provide for indemnification under the authority of both 10 U.S.C. 2354 and Public Law 85-804. Public Law 85-804 will apply only to work to which 10 U.S.C. 2354 does not apply. Actions under Public Law 85-804 must also comply with FAR subpart 50.4.

235.070-3 Contract clauses.

When the contractor is to be indemnified in accordance with 235.070-1, use either—

(a) The clause at 252.235-7000, Indemnification Under 10 U.S.C. 2354—Fixed Price; or

(b) The clause at 252.235-7001, Indemnification Under 10 U.S.C. 2354—Cost-Reimbursement, as appropriate.

235.071 Additional contract clauses.

(a) Use the clause at 252.235-7002, Animal Welfare, or one substantially the same, in solicitations and contracts awarded in the United States, its possessions, and Puerto Rico involving research on live vertebrate animals.

(b) Use the clause at 252.235-7003, Frequency Authorization, in solicitations and contracts for developing, producing, constructing, testing, or operating a device requiring a frequency authorization.

(c) Use the clause at 252.235-7010, Acknowledgement of Support and Disclaimer, in solicitations and contracts for research and development.

(d) Use the clause at 252.235-7011, Final Scientific or Technical Report, in solicitations and contracts for research and development.

[56 FR 36416, July 31, 1991, as amended at 60 FR 29500, June 5, 1995]

48 CFR Ch. 2 (10-1-02 Edition)

Subpart 235.70—Research and Development Streamlined Contracting Procedures

SOURCE: 63 FR 34605, June 25, 1998, unless otherwise noted.

235.7000 Scope.

This subpart prescribes streamlined procedures for acquiring research and development, using a standard solicitation and contract format and the capabilities of the World Wide Web.

235.7001 Definitions.

As used in this subpart—

(a) *Research and development streamlined contract (RDSC)* means—

(1) A contract that results from use of the research and development streamline solicitation; or

(2) Any other contract prepared in the standard format published at the RDSS/C website.

(b) *Research and development streamlined solicitation (RDSS)* means a solicitation issued in accordance with 235.7003.

(c) *RDSS/C website* means the site on the World Wide Web at “<http://www.rdss.osd.mil/>” where research and development streamlined solicitation and contracting information is published.

235.7002 Applicability.

(a) Except as provided in paragraph (b) of this section, consider using the procedures in this subpart for acquisitions that—

(1) Will result in the award of a cost-reimbursement contract; and

(2) Meet the criteria for research and development as defined in 235.001 and FAR 35.001.

(b) Do not use the procedures in this subpart for—

(1) Contracts to be performed outside the United States and Puerto Rico;

(2) Contracts denominated in other than U.S. dollars;

(3) Acquisitions using simplified acquisition procedures;

(4) Acquisition of engineering and manufacturing development, management support, or operational system development, as defined in 235.001; or

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(5) Acquisition of laboratory supplies and equipment, base support services, or other services identified in paragraphs (a) through (h) of the definition of “service contract” at FAR 37.101.

(c) Regardless of whether the RDSS is used, the RDSC may be used for any acquisition that meets the criteria in paragraph (a) of this section.

235.7003 Research and development streamlined solicitation and contract.

235.7003-1 General.

The procedures and standard format are published at the RDSS/C website. The RDSS/C Managing Committee is responsible for updating the website.

235.7003-2 RDSS process.

(a) *Synopsis*. The synopsis required by FAR 5.203 shall include—

(1) The information required by FAR 5.207; and

(2) A statement that the solicitation will be issued in the research and development streamlined solicitation format shown at the RDSS/C Web site.

(b) *Solicitation*.

(1) The solicitation, to be made available consistent with the requirements of FAR 5.102—

(i) Shall be in the format shown at the RDSS/C Web site;

(ii) Shall include the applicable version number of the RDSS standard format; and

(iii) Shall incorporate by reference the appropriate terms and conditions of the RDSS standard format.

(2) To encourage preparation of better cost proposals, consider allowing a delay between the due dates for technical and cost proposals.

[67 FR 20699, Apr. 26, 2002]

235.7003-3 Proposal evaluation and contract award.

(a) Evaluate proposals in accordance with the evaluation factors set forth in the RDSS.

(b) *RDSC*. (1) The RDSC shall include—

(i) Standard Form (SF) 33, Solicitation, Offer and Award, or SF 26, Award/Contract; and

(ii) Sections B through J of the RDSS or other solicitation, with applicable fill-in information inserted.

(2) When an RDSC is awarded to an educational or nonprofit institution—

(i) Remove provisions and clauses that do not apply to educational or nonprofit institutions; and

(ii) As necessary, insert appropriate replacement provisions and clauses.

235.7003-4 Additional provisions and clauses.

Use of FAR and DFRAS provisions and clauses, and nonstandard provisions and clauses approved for agency use, that are not in the RDSS/C standard format, shall be approved in accordance with agency procedures.

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

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Subpart 236.7—Standard and Optional Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition, or Removal of Improvements

236.701 Standard and optional forms for use in contracting for construction or dismantling, demolition, or removal of improvements.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36421, July 31, 1991, unless otherwise noted.

Subpart 236.1—General

236.102 Definitions.

(1) A-E means architect-engineer.

(2) *Construction activity* means an activity at any organizational level of the DoD that—

(i) Is responsible for the architectural, engineering, and other related technical aspects of the planning, design, and construction of facilities; and

(ii) Receives its technical guidance from the Army Office of the Chief of Engineers, Naval Facilities Engineering Command, or Air Force Directorate of Civil Engineering.

(3) *Marshallese firm* is defined in the provision at 252.236-7012, Military Construction on Kwajalein Atoll—Evaluation Preference.

(4) *Network analysis system* means recognized scheduling systems that show the duration, sequential relationship, and interdependence of various work activities, e.g., critical path method.

(5) *United States firm* is defined in the provisions at 252.236-7010, Overseas Military Construction-Preference for United States Firms, and 252.236-7011, Overseas Architect-Engineer Services-Restriction to United States firms.

[56 FR 36421, July 31, 1991, as amended at 62 FR 2857, Jan. 17, 1997; 63 FR 11538, Mar. 9, 1998]

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Subpart 236.2—Special Aspects of Contracting for Construction

236.201 Evaluation of contractor performance.

(a) *Preparation of performance evaluation reports.* Use DD Form 2626, Performance Evaluation (Construction), instead of SF 1420.

(c) *Distribution and use of performance reports.* (1) Send each contractor performance evaluation report to the central data base immediately upon its completion.

(A) The central data base—

(1) Is operated by—U.S. Army Corps of Engineers, Portland District, ATTN: CENWP-CT-I, PO Box 2946, Portland, OR 97208-2946, Telephone: (503) 808-4590.

(2) Keeps reports on file for six years.

(B) For computer access to the files, contact the Portland District for user log-on and procedures.

(2) Use performance records when making responsibility determinations under FAR 9.1.

(A) For each contract expected to exceed \$1,000,000, retrieve all performance records on file in the central data base for all prospective contractors that have a reasonable chance of being selected for award. The central data base will provide—

(1) Overall current performance ratings;

(2) Descriptions of contracts on which ratings are based (e.g., type of facility, contract value, applicable performance elements); and

(3) A telephone number to obtain transcripts and documentation of pertinent evaluation details.

(B) Consider using the performance records in the data base for lower value contracts and to assess a contractor's performance record for reasons other than an award decision, such as subcontractor approval and awards for excellence.

[56 FR 36421, July 31, 1991, as amended at 61 FR 7749, Feb. 29, 1996; 66 FR 49861, Oct. 1, 2001]

236.203 Government estimate of construction costs.

(c)(i) Designate the Government estimate as "For Official Use Only," unless the information is classified. If it is,

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handle the estimate in accordance with security regulations.

(ii) For sealed bid acquisitions—

(A) File a sealed copy of the Government estimate with the bids. (In the case of two-step acquisitions, this is done in the second step.)

(B) After the bids are read and recorded, remove the “For Official Use Only” designation and read and record the estimate as if it were a bid, in the same detail as the bids.

236.204 Disclosure of the magnitude of construction projects.

Additional price ranges are—

- (i) Between \$10,000,000 and \$25,000,000;
- (ii) Between \$25,000,000 and \$100,000,000;
- (iii) Between \$100,000,000 and \$250,000,000;
- (iv) Between \$250,000,000 and \$500,000,000; and
- (v) Over \$500,000,000.

[61 FR 7749, Feb. 29, 1996]

236.206 Liquidated damages.

See 211.503 for instructions on use of liquidated damages.

[56 FR 36421, July 31, 1991, as amended at 66 FR 49861, Oct. 1, 2001]

236.213 Special procedures for sealed bidding in construction contracting.

236.213-70 Additive or deductive items.

(a) If it appears that sufficient funds may not be available for all the desired construction features, consider using a bid schedule with—

(1) A first or base bid item covering the work generally as specified; and

(2) A list of priorities that contains one or more additive or deductive bid items that progressively add or omit specified features of the work in a stated order of priority. (Normally, do not mix additive and deductive bid items in the same solicitation.)

(b) Before opening the bids, record in the contract file the amount of funds available for the project.

(c) Determine the low bidder and the bid items to be awarded as follows:

(1) Use the recorded amount of available funds to determine the low bidder, which will be the bidder that—

(i) Is otherwise eligible for award; and

(ii) Offers the lowest aggregate amount for the first or base bid item, plus or minus (in order of listed priority), those additive or deductive bid items that provide the most features within the funds available.

(2) Evaluate all bids on the basis of the same additive or deductive bid items.

(i) If adding another item from the bid schedule list of priorities would make the award exceed the available funds, skip that item and go to the next item from the list of priorities.

(ii) Add the next item if an award can be made that includes the item and is still within the available funds.

(3) Use the list of priorities only to determine the low bidder. After determining the low bidder, an award may be made on any contribution if—

(i) It is in the best interests of the Government;

(ii) Funds are available at time of award; and

(iii) The low bidder's price for the combination is less than the price offered by any other responsive, responsible bidder.

[65 FR 39706, June 27, 2000]

236.270 Expediting construction contracts.

(a) 10 U.S.C. 2858 requires agency head approval to expedite the completion date of a contract funded by a Military Construction Appropriations Act, if additional costs are involved. This approval authority may not be re-delegated. The approval authority must—

(1) Certify that the additional expenditures are necessary to protect the National interest; and

(2) Establish a reasonable completion date for the project.

(b) The contracting officer may approve an expedited completion date if no additional costs are involved.

236.271 Cost-plus-fixed-fee contracts.

Annual military construction appropriations acts restrict the use of cost-plus-fixed-fee contracts (see 216.306(c)).

[61 FR 7749, Feb. 29, 1996]

236.272 Prequalification of sources.

(a) Prequalification procedures may be used when necessary to ensure timely and efficient performance of critical construction projects. Prequalification—

(1) Results in a list of sources determined to be qualified to perform a specific construction contract; and

(2) Limits offerors to those with proven competence to perform in the required manner.

(b) The head of the contracting activity must—

(1) Authorize the use of prequalification by determining, in writing, that a construction project is of an urgency or complexity that requires prequalification; and

(2) Approve the prequalification procedures.

(c) For small businesses, the prequalification procedures must require the qualifying authority to—

(1) Request a preliminary recommendation from the appropriate Small Business Administration regional office, if the qualifying authority believes a small business is not responsible;

(2) Permit the small business to submit a bid or proposal if the preliminary recommendation is that the small business is responsible; and

(3) Follow the procedures in FAR 19.6, if the small business is in line for award and is found nonresponsible.

236.273 Network analysis systems.

Use head of the contracting activity approved procedures for preparing and using network analysis systems, whether contractor prepared, or Government prepared.

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. 105-45 and similar sections in subsequent military construction appropriations acts, military construction contracts funded with military construction appropriations, that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf,

shall be awarded only to United States firms, unless—

(1) The lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent; or

(2) The contract is for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm.

(b) When a technical working agreement with a foreign government is required for a construction contract—

(1) Consider inviting the Army Office of the Chief of Engineers, or the Naval Facilities Engineering Command to participate in the negotiations.

(2) The agreement should, as feasible and where not otherwise provided for in other agreements, cover all elements necessary for the construction that are required by laws, regulations, and customs of the United States and the foreign government, including—

(i) Acquisition of all necessary rights;

(ii) Expeditious, duty-free importation of labor, material, and equipment;

(iii) Payment of taxes applicable to contractors, personnel, materials, and equipment;

(iv) Applicability of workers' compensation and other labor laws to citizens of the U.S., the host country, and other countries;

(v) Provision of utility services;

(vi) Disposition of surplus materials and equipment;

(vii) Handling of claims and litigation; and

(viii) Resolution of any foreseeable problems that can be appropriately included in the agreement.

[56 FR 36421, July 31, 1991, as amended at 62 FR 2856, Jan. 17, 1997; 62 FR 34127, June 24, 1997; 63 FR 11538, Mar. 9, 1998; 66 FR 49861, Oct. 1, 2001]

Subpart 236.5—Contract Clauses**236.570 Additional provisions and clauses.**

(a) Use the following clauses in all fixed-price construction solicitations and contracts—

(1) 252.236-7000, Modification Proposals-Price Breakdown; and

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(2) 252.236-7001, Contract Drawings and Specifications.

(b) Use the following provisions and clauses in fixed-price construction contracts and solicitations as applicable—

(1) 252.236-7002, Obstruction of Navigable Waterways, when the contract will involve work near or on navigable waterways.

(2) When the head of the contracting activity has approved use of a separate bid item for mobilization and preparatory work, use either—

(i) 252.236-7003, Payment for Mobilization and Preparatory Work. Use this clause for major construction contracts that require—

(A) Major or special items of plant and equipment; or

(B) Large stockpiles of material which are in excess of the type, kind, and quantity which would be normal for a contractor qualified to undertake the work; or

(ii) 252.236-7004, Payment for Mobilization and Demobilization. Use this clause for contracts involving major mobilization expense, or plant equipment and material (other than the situations covered in paragraph (b)(2)(i) of this section) made necessary by the location or nature of the work.

(A) Generally, allocate 60 percent of the lump sum price in paragraph (a) of the clause to the cost of mobilization.

(B) Vary this percentage to reflect the circumstances of the particular contract, but in no event should mobilization exceed 80 percent of the payment item.

(3) 252.236-7005, Airfield Safety Precautions, when construction will be performed on or near airfields.

(4) 252.236-7006, Cost Limitation, if the solicitation's bid schedule contains one or more items subject to statutory cost limitations, and if a waiver has not been granted (FAR 36.205).

(5) 252.236-7007, Additive or Deductive Items, if the procedures in 236.303-70 are being used.

(6) 252.236-7008, Contract Prices—Bidding Schedule, if the contract will contain only unit prices for some items.

(c) Use the following provisions in solicitations for military construction contracts that are funded with military construction appropriations and are estimated to exceed \$1,000,000:

(1) 252.236-7010, Overseas Military Construction—Preference for United States Firms, when contract performance will be in a United States territory or possession in the Pacific or in a country bordering the Arabian Gulf.

(2) 252.236-7012, Military Construction on Kwajalein Atoll—Evaluation Preference, when contract performance will be on Kwajalein Atoll.

(d) Also see 246.710(4) for an additional clause applicable to construction contracts to be performed in Germany.

[56 FR 36421, July 31, 1991, as amended at 57 FR 42632, Sept. 15, 1992; 62 FR 2856, Jan. 17, 1997; 62 FR 34127, June 24, 1997; 63 FR 11538, Mar. 9, 1998; 65 FR 63804, Oct. 25, 2000]

Subpart 236.6—Architect-Engineer Services

236.601 Policy.

(1) 10 U.S.C. 2807(b) requires notice to Congress 21 days before the initial obligation of funds if a contract is for—

(i) A-E services or construction design for military construction, military family housing, or restoration or replacement of damaged or destroyed facilities; and

(ii) An estimated total contract price of \$500,000 or more.

(2) During the 21 day period, synopsis of the proposed contract action and administrative actions leading to the award may be started.

[56 FR 36421, July 31, 1991, as amended at 63 FR 69008, Dec. 15, 1998]

236.602 Selection of firms for architect-engineer contracts.

236.602-1 Selection criteria.

(a)(i) Establish the evaluation criteria before making the public announcement required by FAR 5.205(c) and include the criteria and their relative order of importance in the announcement. The evaluation criteria should be project specific. Use the information in the DD Form 1391, FY____ Military Construction Project Data, when available, and other pertinent project data in preparing the evaluation criteria.

(4) Use performance evaluation data from the central data base identified in 236.201.

(6) The primary factor in A-E selection is the determination of the most highly qualified firm. Also consider secondary factors such as geographic proximity and equitable distribution of work, but do not attribute greater significance to the secondary factors than to qualifications and past performance. Do not reject the overall most highly qualified firm solely in the interest of equitable distribution of contracts.

(A) Consider the volume of work awarded by DoD during the previous 12 months. In considering equitable distribution of work among A-E firms, include small business concerns; historically black colleges and universities and minority institutions; firms that have not had prior DoD contracts; and small disadvantaged business concerns and joint ventures with small disadvantaged business participants if the North American Industry Classification System (NAICS) Industry Subsector of the acquisition is one in which use of a price evaluation adjustment is currently authorized (see FAR 19.201(b)).

(1) Use data extracted from the Defense Contract Action Data System (DCADS) compiled from DD Form 350, Individual Contracting Action Report. DCADS data may be obtained from the central data base identified in 236.201(c)(1).

(2) Do not consider awards to overseas offices for projects outside the United States, its territories and possessions. Do not consider awards to a subsidiary if the subsidiary is not normally subject to management decisions, bookkeeping, and policies of a holding or parent company or an incorporated subsidiary that operates under a firm name different from the parent company. This allows greater competition.

(B) Consider as appropriate superior performance evaluations on recently completed DoD contracts.

(C) Consider the extent to which potential contractors identify and commit to small business, to small disadvantaged business (SDB) if the NAICS Industry Subsector of the subcontracted effort is one in which use of an evaluation factor or subfactor for participation of SDB concerns is currently authorized (see FAR 19.201(b)),

and to historically black college or university and minority institution performance as subcontractors.

[56 FR 36421, July 31, 1991, as amended at 59 FR 27673, May 27, 1994; 63 FR 41974, Aug. 6, 1998; 63 FR 64430, Nov. 20, 1998; 65 FR 50149, Aug. 17, 2000]

236.602-2 Evaluation boards.

(a) Preselection boards may be used to identify to the section board the qualified firms that have a reasonable chance of being considered as most highly qualified by the selection board.

[63 FR 11538, Mar. 9, 1998]

236.602-4 Selection authority.

(a) The selection authority shall be at a level appropriate for the dollar value and nature of the proposed contract.

(c) A finding that some of the firms on the selection report are unqualified does not preclude approval of the report, provided that a minimum of three most highly qualified firms remains. The reasons for finding a firm or firms unqualified must be recorded.

[63 FR 11538, Mar. 9, 1998]

236.602-70 Restriction on award of overseas architect-engineer contracts to foreign firms.

In accordance with Section 111 of Public Law 104-32 and similar sections in subsequent military construction appropriations acts, A-E contracts funded by military construction appropriations that are estimated to exceed \$500,000 and are to be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms or to joint ventures of United States and host nation firms.

[62 FR 2858, Jan. 17, 1997]

236.604 Performance evaluation.

(a) *Preparation of performance reports.* Use DD Form 2631, Performance Evaluation (Architect-Engineer), instead of SF 1421.

(2) Prepare a separate performance evaluation after actual construction of the project. Ordinarily, the evaluating official should be the person most familiar with the A-E's performance.

(c) Distribution and use of performance reports.

(i) Forward each performance report to the central data base identified in 236.201(c) after completing the review. The procedures in 236.201 also apply to A-E contracts.

(ii) File and use the DD Form 2631, Performance Evaluation (Architect-Engineer), in a manner similar to the SF 254, Architect-Engineer and Related Services Questionnaire.

[56 FR 36421, July 31, 1991, as amended at 61 FR 7749, Feb. 29, 1996; 64 FR 51076, Sept. 21, 1999]

236.606 Negotiations.

236.606-70 Statutory fee limitation.

(a) 10 U.S.C. 4540, 7212, and 9540 limit the contract price (or fee) for A-E services for the preparation of designs, plans, drawings, and specifications to six percent of the project's estimated construction cost.

(b) The six percent limit also applies to contract modifications, including modifications involving—

(1) Work not initially included in the contract. Apply the six percent limit to the revised total estimated construction cost.

(2) Redesign. Apply the six percent limit as follows—

(i) Add the estimated construction cost of the redesign features to the original estimated construction cost;

(ii) Add the contract cost for the original design to the contract cost for redesign; and

(iii) Divide the total contract design cost by the total estimated construction cost. The resulting percentage may not exceed the six percent statutory limitation.

(c) The six percent limit applies only to that portion of the contract (or modification) price attributable to the preparation of designs, plans, drawings, and specifications. If a contract or modification also includes other services, the part of the price attributable to the other services is not subject to the six percent limit.

236.609 Contract clauses.

236.609-70 Additional provision and clause.

(a)(1) Use the clause at 252.236-7009, Option for Supervision and Inspection Services, in solicitations and contracts for A-E services when—

(i) The contract will be fixed price; and

(ii) Supervision and inspection services by the A-E may be required during construction.

(2) Include the scope of such services in appendix A of the contract.

(b) Use the provision at 252.236-7011, Overseas Architect-Engineer Services—Restriction to United States Firms, in solicitations for A-E contracts that are—

(1) Funded with military construction appropriations;

(2) Estimated to exceed \$500,000; and

(3) To be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf.

[56 FR 36421, July 31, 1991, as amended at 62 FR 2858, Jan. 17, 1997; 63 FR 11539, Mar. 9, 1998]

Subpart 236.7—Standard and Optional Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition, or Removal of Improvements

236.701 Standard and optional forms for use in contracting for construction or dismantling, demolition, or removal of improvements.

(c) Do not use Optional Form 347, Order for Supplies or Services (see 213.307).

[56 FR 36421, July 31, 1991, as amended at 65 FR 63804, Oct. 25, 2000]

PART 237—SERVICE CONTRACTING

Subpart 237.1—Service Contracts—General

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- 237.7400 Scope.
- 237.7401 Policy.
- 237.7402 Contract clause.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36424, July 31, 1991, unless otherwise noted.

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Subpart 237.1—Service Contracts—General

237.102-70 Prohibition on contracting for firefighting or security-guard functions.

(a) Under 10 U.S.C. 2465, the DoD is prohibited for entering into contracts for the performance of firefighting or security-guard functions at any military installation or facility unless—

(1) The contract is to be carried out at a location outside the United States (to include any U.S. commonwealth, territory, or possession) at which members of the armed forces would have to be used for the performance of firefighting or security-guard functions at the expense of unit readiness;

(2) The contract will be carried out on a Government-owned but privately operated installation; or

(3) The contract (or renewal of a contract) is for the performance of a function under contract on September 24, 1983.

(b) Under Section 2907 of Public Law 103-160, this prohibition does not apply to services at installations being closed (see subpart 237.74).

(c) Under Section 1010 of Public Law 107-56, this prohibition does not apply to any contract that'

(1) Is entered into during the period of time that United States armed forces are engaged in Operation Enduring Freedom or during the period 180 days thereafter;

(2) Is for the performance of security functions at any military installation or facility in the United States;

(3) Is awarded to a proximately located local or State government, or a combination of such governments, whether or not any such government is obligated to provide such services to the general public without compensation; and

(4) Prescribes standards for the training and other qualifications of local government law enforcement personnel who perform security functions under the contract in accordance with criteria established by the Secretary of the department concerned.

[60 FR 61599, Nov. 30, 1995, as amended at 67 FR 11439, Mar. 14, 2002]

237.104 Personal services contracts.

(b)(i) Authorization to acquire the personal services of experts and consultants is included in Public Law 101-165, section 9002. Personal service contracts for expert and consultant services must also be authorized by a determination and findings (D&F) in accordance with department/agency regulations.

(A) Generally, the D&F should authorize one contract at a time; however, an authorizing official may issue a blanket D&F for classes of contracts.

(B) Prepare each D&F in accordance with FAR 1.7 and include a determination that—

(1) The duties are of a temporary or intermittent nature;

(2) Acquisition of the services is advantageous to the national defense;

(3) DoD personnel with necessary skills are not available;

(4) Excepted appointment cannot be obtained;

(5) A nonpersonal services contract is not practicable;

(6) Statutory authority, 5 U.S.C. 3109 and other legislation, apply; and

(7) Any other determination required by statutes has been made.

(ii) Personal services contracts for health care are authorized by 10 U.S.C. 1091.

(A) This authority may be used to acquire—

(1) Direct health care services provided in medical treatment facilities; and

(2) Services of clinical counselors, family advocacy program staff, and victim's services representatives to members of the Armed Forces and covered beneficiaries who require such services, provided in medical treatment facilities or elsewhere. Persons with whom a personal services contract may be entered into under this authority include clinical social workers, psychologists, psychiatrists, and other comparable professionals who have advanced degrees in counseling or related academic disciplines and who meet all requirements for State licensure and board certification requirements, if any, within their fields of specialization.

(B) Sources for personal services contracts with individuals under the au-

thority of 10 U.S.C. 1091 shall be selected through the procedures in this section. These procedures do not apply to contracts awarded to business entities other than individuals. Selections made using the procedures in this section are exempt by statute from FAR part 6 competition requirements (see 206.001(b)).

(C) Approval requirements for—

(1) Direct health care personal service contracts (see 237.104(b)(ii)(A)(1)) and a pay cap are in DoDI 6025.5, Personal Services Contracts for Health Care Providers. Requests to enter into a personal service contract for direct health care services must be approved by the commander of the medical/dental treatment facility where the services will be performed.

(2) Services of clinical counselors, family advocacy program staff, and victim's services representatives (see 237.104(b)(ii)(A)(2)), shall be in accordance with agency procedures.

(D) The contracting officer must ensure that the requiring activity provides a copy of the approval with the purchase request.

(E) The contracting officer must provide adequate advance notice of contracting opportunities to individuals residing in the area of the facility. The notice must include the qualification criteria against which individuals responding will be evaluated. The contracting officer shall solicit applicants through at least one local publication which serves the area of the facility. Acquisitions under this section for personal service contracts are exempt from the posting and synopsis requirements of FAR part 5.

(F) The contracting officer shall provide the qualifications of individuals responding to the notice to the commander of the facility for evaluation and ranking in accordance with agency procedures. Individuals must be considered solely on the basis of the professional qualifications established for the particular personal services being acquired and the Government's estimate of reasonable rates, fees, or other costs. The commander of the facility shall provide the contracting officer with rationale for the ranking of individuals, consistent with the required qualifications.

(G) Upon receipt from the facility of the ranked listing of applicants, the contracting officer shall either—

(1) Enter into negotiations with the highest ranked applicant. If a mutually satisfactory contract cannot be negotiated, the contracting officer shall terminate negotiations with the highest ranked applicant and enter into negotiations with the next highest.

(2) Enter into negotiations with all qualified applicants and select on the basis of qualifications and rates, fees, or other costs.

(H) In the event only one individual responds to an advertised requirement, the contracting officer is authorized to negotiate the contract award. In this case, the individual must still meet the minimum qualifications of the requirement and the contracting officer must be able to make a determination that the price is fair and reasonable.

(I) If a fair and reasonable price cannot be obtained from a qualified individual, the requirement should be canceled and acquired using procedures other than those set forth in this section.

(f)(i) Payment to each expert or consultant for personal services under 5 U.S.C. 3109 shall not exceed the highest rate fixed by the Classification Act Schedules for grade GS–15 (see 5 CFR 304.105(a)).

(ii) The contract may provide for the same per diem and travel expenses authorized for a Government employee, including actual transportation and per diem in lieu of subsistence for travel between home or place of business and official duty station.

(iii) Coordinate with the civilian personnel office on benefits, taxes, personnel ceilings, and maintenance of records.

[56 FR 36424, July 31, 1991, as amended at 60 FR 2888, Jan. 12, 1995; 60 FR 61599, Nov. 30, 1995; 63 FR 11539, Mar. 9, 1998; 67 FR 61516, Oct. 1, 2002]

237.106 Funding and term of service contracts.

(1) Personal service contracts for expert or consultant services shall not exceed 1 year. The nature of the duties must be—

(i) Temporary (not more than 1 year); or

(ii) Intermittent (not cumulatively more than 130 days in 1 year).

(2) The contracting officer may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed 1 year (10 U.S.C. 2410a).

[64 FR 28110, May 25, 1999]

§ 237.109 Services of quasi-military armed forces.

See 237.102–70b for prohibition on contracting for firefighting or security-guard functions.

[60 FR 61599, Nov. 30, 1995]

Subpart 237.2—Advisory and Assistance Services

§ 237.201 Definition.

Advisory and assistance services, as used in this subpart, means services in the following three major categories when provided by nongovernmental sources (10 U.S.C. 2212):

(1) *Management and professional support services*. This category consists of services that—

(i) Provide engineering or technical support, assistance, advice, or training for the efficient and effective management and operation of organizations, activities, or systems;

(ii) Are closely related to the basic responsibilities and mission of the using organization; and

(iii) Include efforts that support or contribute to improved organization or program management, logistics management, project monitoring and reporting, data collection, budgeting, accounting, auditing, and administrative or technical support for conferences and training programs.

(2) *Studies, analyses, and evaluations*. This category consists of services that—

(i) Provide organized, analytic assessments to understand or evaluate complex issues to improve policy development, decision-making, management, or administration;

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(ii) Result in documents containing data or leading to conclusions or recommendations; and

(iii) May include databases, models, methodologies, and related software created in support of a study, analysis, or evaluation.

(3) *Engineering and technical services.* This category consists of services that take the form of advice, assistance, training, or hands-on training necessary to maintain and operate fielded weapon systems, equipment, and components (including software when applicable) at design or required levels of effectiveness.

[64 FR 39430, July 22, 1999, as amended at 66 FR 49861, Oct. 1, 2001]

237.203 Policy.

(1) Every contract for engineering and technical services, alone or as part of an end item, shall—

(i) Show those services as a separately priced line item;

(ii) Contain definitive specifications for the services; and

(iii) Show the work-months involved.

(2) Agency heads may authorize personal service contracts for engineering and technical services provided on site at Defense locations to meet an unusual essential mission need. The authorization will be for an interim period only.

[63 FR 11539, Mar. 9, 1998, as amended at 64 FR 39431, July 22, 1999]

237.270 Acquisition of audit services.

(a) *General policy.* (1) Departments and agencies shall not contract for audit services unless the cognizant DoD audit organization determines that expertise required to perform the audit is not available within the DoD audit organization, or temporary audit assistance is required to meet audit reporting requirements mandated by law or DoD regulation.

(2) DoDD 7600.2, Audit Policies, provides DoD audit policies.

(3) DoDI 7600.6, Audit of Non-appropriated Fund Instrumentalities and Related Activities, provides guidance to audit organizations for audits of nonappropriated fund organizations.

(4) DoD 7600.7-M, Internal Audit Manual, chapter 20, provides policy and

guidance to DoD audit organizations for the monitoring of audit services provided by non-Federal auditors.

(b) *Contract period.* Except in unusual circumstances, contracts for recurring audit services shall be awarded for a 1-year period with at least 2 option years.

(c) *Approvals.* Contracting officers shall not issue a solicitation for audit services unless the requiring activity provides evidence that the cognizant DoD audit organization has approved the statement of work. The requiring agency shall obtain the same evidence of approval for subsequent material changes to the statement of work.

(d) *Solicitation provisions and contract clauses.* (1) Use the provision of 252.237-7000, Notice of Special Standards of Responsibility, in solicitations for audit services.

(2) Use the clause at 252.237-7001, Compliance with Audit Standards, in solicitations and contracts for audit services.

[56 FR 36424, July 31, 1991, as amended at 57 FR 42632, Sept. 15, 1992. Redesignated and amended at 63 FR 11539, Mar. 9, 1998]

§ 237.271 Management controls.

DoD procedures are in DoDD 4205.2, Acquiring and Managing Contracted Advisory and Assistance Services (CAAS).

[64 FR 39431, July 22, 1999]

237.272 Requesting activity responsibilities.

(b) On acquisitions for studies, the purchase request package must contain a signed statement from the technical officer responsible for the study stating that the Defense Technical Information Center (DTIC) and other information sources have been queried, that evidence of those queries are on file, and no existing scientific or technical report could fulfill the requirement.

(c) The authority, without redelegation authority (see DoDD 4205.2), to approve the use of advisory and assistance services in contracts over \$50,000 is—

(i) An SES manager;

(ii) A general or flag officer;

(iii) An officer in O-6 grade filling a general or flag officer level position; or

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(iv) An officer in O-6 grade who has subordinate SES personnel.

[56 FR 36424, July 31, 1991. Redesignated at 63 FR 11539, Mar. 9, 1998]

Subpart 237.6—Performance-Based Contracting

237.601 General.

See 212.102 for the use of FAR part 12 procedures with performance-based contracting.

[66 FR 63336, Dec. 6, 2001]

Subpart 237.70—Mortuary Services

237.7000 Scope.

This subpart contains acquisition procedures for contracts for mortuary services (the care of remains) for military personnel within the U.S. Departments/agencies may use these procedures as guidance in areas outside the U.S. for both deceased military and civilian personnel.

237.7001 Method of acquisition.

(a) *Requirements type contract.* By agreement among the military activities, one activity in each geographical area will contract for the estimated requirements for the care of remains for all military activities in the area. Use a requirements type contract (see FAR 16.503) when the estimated annual requirements for the activities in the area are ten or more.

(b) *Purchase order.* Where no contract exists, use DD Form 1155, Order for Supplies and Services/Request for Quotations, to obtain mortuary services.

237.7002 Area of performance.

Determine and define the geographical area to be covered by the contract using the following general guidelines—

(a) Use political boundaries, streets, or other features as demarcation lines.

(b) The size should be roughly equivalent to the contiguous metropolitan or municipal area enlarged to include the activities served.

(c) If the area of performance best suited to the needs of a particular contract is not large enough to include a

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carrier terminal commonly used by people within such area, the contract area of performance shall specifically state that it includes such terminal as a pickup or delivery point.

237.7003 Distribution of contracts.

In addition to normal contract distribution, send three copies of each contract to each activity authorized to use the contract, and two copies to each of the following—

(a) HQDA (TAPC-PEC-D), Alexandria, VA 22331.

(b) Commander, Naval Medical Command, Department of the Navy (MED 3141), 23rd and E Streets, NW, Washington, DC 20372.

(c) Headquarters, AFMPC-MPCCM, Randolph AFB, TX 78150.

237.7004 Solicitation provisions and contract clauses.

(a) Use the provision at 252.237-7002, Award to Single Offeror, in all sealed bid solicitations for mortuary services. Use the basic provision with its Alternate I in all negotiated solicitations for mortuary services.

(b) Use the following clauses in all mortuary service solicitations and contracts, except do not use the clauses at 252.237-7004, Area of Performance, and 252.237-7010, Facility Requirements, in solicitations or contracts that include port of entry requirements—

(1) 252.237-7003, Requirements, (insert activities authorized to place orders in paragraph (e) of the clause);

(2) 252.237-7004, Area of Performance;

(3) 252.237-7005, Performance and Delivery;

(4) 252.237-7006, Subcontracting;

(5) 252.237-7007, Termination for Default;

(6) 252.237-7008, Group Interment;

(7) 252.237-7009, Permits;

(8) 252.237-7010, Facility Requirements; and

(9) 252.237-7011, Preparation History.

(c) Use the clause at FAR 52.245-4, Government-Furnished Property (Short Form), in solicitations and contracts that include port of entry requirements.

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Subpart 237.71—Laundry and Dry Cleaning Services

237.7100 Scope.

This subpart contains acquisition procedures for laundry and dry cleaning services within the United States. It may be used as guidance in all other locations.

237.7101 General.

(a) Except for hospital requirements, acquire laundry and dry cleaning services on a count-of-articles basis.

(b) Laundry services in support of hospitals may be acquired on the basis of a count-of-articles or by bulk weight.

(1) Acquisitions by weight may be on either a presorted (bag type) or unsorted (simple bulk weight) basis.

(2) In selecting the basis, consider such factors as price, administrative costs, aseptic requirements, risk of contamination or cross-contamination, and volume and nature of articles to be serviced.

237.7102 Solicitation provisions and contract clauses.

(a) Use the provision at 252.237-7012, Instruction to Offerors (Count-of-Articles), in solicitations for laundry and dry cleaning services to be provided on a count-of-articles basis.

(b) Use the provision at 252.237-7013, Instruction to Offerors (Bulk Weight), in solicitations for laundry services to be provided on a bulk weight basis.

(c) Use the clause at 252.237-7014, Loss or Damage (Count-of-Articles), in solicitations and contracts for laundry and dry cleaning services to be provided on a count-of-articles basis.

(d) Use the clause at 252.237-7015, Loss or Damage (Weight of Articles), in solicitations and contracts for laundry and dry cleaning services to be provided on a bulk weight basis.

(1) Insert a reasonable per pound price in paragraph (b) of the clause, based on the average per pound value. When the contract requires laundry services on a bag type basis, insert reasonable per pound prices by bag type.

(2) Insert an appropriate percentage in paragraph (e) of the clause, not to exceed eight percent.

(e) Use the clause at 252.237-7016, Delivery Tickets, in all solicitations and contracts for laundry and dry cleaning services.

(1) Use the clause with its Alternate I when services are for bag type laundry to be provided on a bulk weight basis.

(2) Use the clause with its Alternate II when services are unsorted laundry to be provided on a bulk weight basis.

(f) Use the clause at 252.237-7017, Individual Laundry, in solicitations and contracts for laundry and dry cleaning services to be provided to individual personnel.

(1) Insert the number of pieces of outer garments in paragraphs (d) (1) and (2) of the clause.

(2) The number of pieces and composition of a bundle in paragraphs (d) (1) and (2) of the clause may be modified to meet local conditions.

(g) Use the clause at 252.237-7018, Special Definitions of Government Property, in all solicitations and contracts for laundry and dry cleaning services.

[56 FR 36424, July 31, 1991, as amended at 62 FR 34127, June 24, 1997]

Subpart 237.72—Educational Service Agreements

237.7200 Scope.

(a) This subpart prescribes acquisition procedures for educational services from schools, colleges, universities, or other educational institutions. This subpart does not include tuition assistance agreements, i.e., payment by the Government of partial tuition under the off-duty educational program.

(b) As used in the subpart—

(1) “*Facilities*” do not include the institution’s dining rooms or dormitories; and

(2) “*Fees*” does not include charges for meals or lodging.

237.7201 Educational service agreement.

(a) An educational service agreement is not a contract, but is an ordering agreement under which the Government may order educational services.

(b) Educational service agreements provide for ordering educational services when—

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(1) The Government pays normal tuition and fees for educational services provided to a student by the institution under its normal schedule of tuition and fees applicable to all students generally; and

(2) Enrollment is at the institution under the institution's normal rules and in courses and curricula which the institution offers to all students meeting admission requirements.

237.7202 Limitations.

(a) Make no agreement under this subpart which will result in payment of Government funds for tuition or other expenses for training in any legal profession, except in connection with the detailing of commissioned officers to law schools under 10 U.S.C. 2004.

(b) Educational service agreements are not used to provide special courses or special fees for Government students.

237.7203 Duration.

(a) Educational service agreements are for an indefinite duration and remain in effect until terminated.

(b) The issuing activity must establish procedures to review each educational service agreement at least once each year. Review dates should consider the institution's academic calendar and occur at least 30 days before the beginning of a term. The purpose of the review is to incorporate changes to reflect requirements of any statute, Executive Order, FAR, or DFARS.

(c) If the contracting officer and the institution do not agree on required changes, terminate the agreement.

237.7204 Format and clauses for educational service agreements.

Educational service agreements under this subpart shall be in the following format. Add to the schedule any other provisions necessary to describe the requirements, if they are consistent with the following provisions and the policy of acquiring educational services in the form of standard course offerings at the prevailing rates of the institution.

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EDUCATIONAL SERVICE AGREEMENT

Agreement No. _____

1. This agreement entered into on the _____ day of _____ 19____, is between the Government, represented by the Contracting Officer, and the Contractor, (name of institution), an educational institution located in _____ (city), _____ (state).

2. This agreement is for educational services to be provided by the Contractor to Government personnel at the Contractor's institution. The Contractor shall provide instruction with standard offerings of courses available to the public.

3. The Government shall pay for services under the Contractor's normal schedule of tuition and fees applicable to the public and in effect at the time the services are performed.

4. The Government will review this agreement annually before the anniversary of its effective date for the purpose of incorporating changes required by statutes, executive orders, the Federal Acquisition Regulation, or the Defense Federal Acquisition Regulation Supplement. Changes required to be made by modification to this agreement or by issuance of a superseding agreement. If mutual agreement on the changes cannot be reached, the Government will terminate this agreement.

5. The parties may amend this agreement only by mutual consent.

6. This agreement shall start on the date in paragraph 1 and shall continue until terminated.

7. The estimated annual cost of this agreement is \$ _____. This estimate is for administrative purposes only and does not impose any obligation on the Government to request any services or make any payment.

8. Advance payments are authorized by 10 U.S.C. 2396(a)(3).

9. Submit invoices to: _____ (name and address of activity).

SCHEDULE PROVISIONS

1. *Ordering procedures and services to be provided.* (a) The Contractor shall promptly deliver to the Contracting Officer one copy of each catalog applicable to this agreement, and one copy of any subsequent revision.

(b) The Government will request educational services under this agreement by a (insert type of request, such as, delivery order, official Government order, or other written communication). The (insert type of request, such as, delivery order, official Government order, or other written communication) will contain the number of this agreement and will designate as students at the Contractor's institution one or more Government-selected persons who have already been accepted for admission under the Contractor's usual admission standards.

(c) All students under this agreement shall register in the same manner, be subject to the same academic regulations, and have the same privileges, including the use of all facilities and equipment as any other students enrolled in the institution.

(d) Upon enrolling each student under this agreement, the Contractor shall, where the resident or nonresident status involves a difference in tuition or fees—

(i) Determine the resident or nonresident status of the student;

(ii) Notify the student and the Contracting Officer of the determination. If there is an appeal of the determination;

(iii) If there is an appeal of the determination, process the appeal under the Contractor's standard procedures;

(iv) Notify the student and Contracting Officer of the result; and

(v) Make the determination a part of the student's permanent record.

(e) The Contractor shall not furnish any instruction or other services to any student under this agreement before the effective date of a request for services in the form specified in paragraph (b) of this schedule.

2. *Change in curriculum.* The Contracting Officer may vary the curriculum for any student enrolled under this agreement but shall not require or make any change in any course without the Contractor's consent.

3. *Payment.* (a) The Government shall pay the Contractor the normal tuition and fees which the Contractor charges any students pursuing the same or similar curricula, except for any tuition and fees which this agreement excludes. The Contractor may change any tuition and fees, provided—

(1) The Contractor publishes the revisions in a catalog or otherwise publicly announces the revisions;

(2) Applies the revisions uniformly to all students studying the same or similar curricula;

(3) Provides the Contracting Officer notice of changes before their effective date.

(b) The Contractor shall not establish any tuition or fees which apply solely to students under this agreement.

(c) If the Contractor regularly charges higher tuition and fees for nonresident students, the Contractor may charge the Government the normal nonresident tuition and fees for students under this agreement who are nonresidents. The Government shall not claim resident tuition and fees for any student solely on the basis of the student residing in the State as a consequence of enrollment under this agreement.

(d) The Contractor shall charge the Government only the tuition and fees which relate directly to enrollment as a student. Tuition and fees may include—

(i) Penalty fees for late registration or change of course caused by the Government;

(ii) Mandatory health fees and health insurance charges; and

(iii) Any flat rate charge applicable to all students registered for research that appears in the Contractor's publicly announced fee schedule.

(e) The Contractor shall not charge the Government for—

(i) Permit charges, such as vehicle registration or parking fees, unless specifically authorized in the request for service; and

(ii) Any equipment, refundable deposits, or any items or services (such as computer time) related to student research.

(f) Normally, the Contractor shall not directly charge individual students for application fees or any other fee chargeable to this agreement. However, if the Contractor's standard procedures require payment of any fee before the student is enrolled under this agreement, the Contractor may charge the student. When the Contractor receives payment from the Government, the Contractor shall fully reimburse the student.

(g) For each term the Contractor enrolls students under this agreement, the Contractor shall submit _____ copies of an invoice listing charges for each student separately. The Contractor shall submit invoices within _____ days after the start of the term and shall include—

(i) Agreement number and inclusive dates of the term;

(ii) Name of each student;

(iii) A list showing each course for each student if the school charges by credit hour;

(iv) The resident or nonresident status of each student (if applicable to the Contractor's school); and

(v) A breakdown of charges for each student, including credit hours, tuition, application fee, and other fees. Provide a total for each student and a grand total for all students listed on the invoice.

(h) If unforeseen events require additional charges that are otherwise payable under the Contractor's normal tuition and fee schedule, the Contractor may submit a supplemental invoice or make the adjustment on the next regular invoice under this agreement. The Contractor shall clearly identify and explain the supplemental invoice or the adjustment.

(i) The Contractor shall apply any credits resulting from withdrawal of students, or from any other cause under its standard procedures, to subsequent invoices submitted under this agreement. Credits should appear on the first invoice submitted after the action resulting in the credits. If no subsequent invoice is submitted, the Contractor shall deliver to the Contracting Officer a check drawn to the order of the office designated for contract administration. The Contractor shall identify the reason for the credit and the applicable term dates in all cases.

4. *Withdrawal of students.* (a) The Government may, at its option and at any time, withdraw financial support for any student by issuing official orders. The Government will furnish _____ copies of the orders to the Contractor within a reasonable time after publication.

(b) The Contractor may request withdrawal by the Government of any student for academic or disciplinary reasons.

(c) If withdrawal occurs before the end of a term, the Government will pay any tuition and fees due for the current term. The Contractor shall credit the Government with any charges eligible for refund under the Contractor's standard procedures for any students in effect on the date of withdrawal.

(d) Withdrawal of students by the Government will not be the basis for any special charge or claim by the Contractor other than charges under the Contractor's standard procedures.

5. *Transcripts.* Within a reasonable time after withdrawal of a student for any reason, or after graduation, the Contractor shall send to the Contracting Officer (or to an address supplied by the Contracting Officer) one copy of an official transcript showing all work by the student at the institution until such withdrawal or graduation.

6. *Student teaching.* The Government does not anticipate the Contractor awarding fellowships and assistantships to students attending school under this agreement. However, for graduate students, should both the student and the Contractor decide it to be in the student's best interests to assist in the institution's teaching program, the Contractor may provide nominal compensation for part-time service. Base the compensation on the Contractor's practices and procedures for other students of similar accomplishment in that department or field. The Contractor shall apply the compensation as a credit against any invoices presented for payment for any period in which the student performed the part-time teaching service.

7. *Termination of agreement.* (a) Either party may terminate this agreement by giving 30 days advance written notice of the effective date of termination. In the event of termination, the Government shall have the right, at its option, to continue to receive educational services for those students already enrolled in the contractor's institution under this agreement until such time that the students complete their courses or curricula or the Government withdraws them from the Contractor's institution. The terms and conditions of this agreement in effect on the effective date of the termination shall continue to apply to such students remaining in the Contractor's institution.

(b) Withdrawal of students under Schedule provision 4 shall not be considered a termination within the meaning of this provision 7.

(c) Termination by either party shall not be the basis for any special charge or claim by the Contractor, other than as provided by the Contractor's standard procedures.

GENERAL PROVISIONS

Use the following clauses in educational service agreements:

1. FAR 52.202-1, Definitions, and add the following paragraphs (h) through (m).

(h) "Term" means the period of time into which the Contractor divides the academic year for purposes of instruction. This includes "semester," "trimester," "quarter," or any similar word the Contractor may use.

(i) "Course" means a series of lectures or instructions, and laboratory periods, relating to one specific representation of subject matter, such as Elementary College Algebra, German 401, or Surveying. Normally, a student completes a course in one term and receives a certain number of semester hours credit (or equivalent) upon successful completion.

(j) "Curriculum" means a series of courses having a unified purpose and belonging primarily to one major academic field. It will usually include certain required courses and elective courses within established criteria. Examples include Business Administration, Civil Engineering, Fine and Applied Arts, and Physics. A curriculum normally covers more than one term and leads to a degree or diploma upon successful completion.

(k) "Catalog" means any medium by which the Contractor publicly announces terms and conditions for enrollment in the Contractor's institution, including tuition and fees to be charged. This includes "bulletin," "announcement," or any other similar word the Contractor may use.

(l) "Tuition" means the amount of money charged by an educational institution for instruction, not including fees.

(m) "Fees" means those applicable charges directly related to enrollment in the Contractor's institution. Unless specifically allowed in the request for services, fees shall not include—

(1) Any permit charge, such as parking and vehicle registration; or

(2) Charges for services of a personal nature, such as food, housing, and laundry.

2. FAR 52.203-3, Gratuities.

3. FAR 52.203-5, Covenant Against Contingent Fees.

4. FAR 52.204-1, Approval of Contract, if required by department/agency procedures.

5. FAR 52.215-2, Audit and Records—Negotiation.

6. FAR 52.215-8, Order of Precedence—Uniform Contract Format.

7. Conflicts Between Agreement and Catalog. Insert the following clause:

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CONFLICTS BETWEEN AGREEMENT AND CATALOG

If there is any inconsistency between this agreement and any catalog or other document incorporated in this agreement by reference or any of the Contractor's rules and regulations, the provisions of this agreement shall govern.

8. FAR 52.222-3, Convict Labor.

9. Under FAR 22.802, FAR 22.807, and FAR 22.810, use the appropriate clause from FAR 52.222-26, Equal Opportunity.

10. FAR 52.233-1, Disputes.

11. Assignment of Claims. Insert the following clause:

ASSIGNMENT OF CLAIMS

No claim under this agreement shall be assigned.

12. FAR 52.252-4, Alterations in Contract, if required by department/agency procedures.

SIGNATURE PAGE

Agreement No. _____

Date _____

The United States of America

By: _____

(Contracting Officer)

Activity _____

Location _____

(Name of Contractor)

By: _____

(Title) _____

[56 FR 36424, July 31, 1991, as amended at 60 FR 61599, Nov. 30, 1995; 63 FR 55052, Oct. 14, 1998; 64 FR 49684, Sept. 14, 1999; 64 FR 53447, Oct. 1, 1999]

Subpart 237.73—Services of Students at Research and Development Laboratories

237.7300 Scope.

This subpart prescribes procedures for acquisition of temporary or intermittent services of students at institutions of higher learning for the purpose of providing technical support at Defense research and development laboratories (10 U.S.C. 2360).

237.7301 Definitions.

As used in this subpart—

(a) *Institution of higher learning* means any public or private post-secondary school, junior college, college, university, or other degree granting educational institution that—

(1) Is located in the United States, its possessions, and Puerto Rico;

(2) Has an accredited education program approved by an appropriate accrediting body; and

(3) Offers a program of study at any level beyond high school.

(b) *Nonprofit organization* means any organization described by section 501(c)(3) of title 26 of the U.S.C. which is exempt from taxation under section 501(a) of title 26.

(c) *Student* means an individual enrolled (or accepted for enrollment) at an institution of higher learning before the term of the student technical support contract. The individual shall remain in good standing in a curriculum designed to lead to the granting of a recognized degree, during the term of the contract.

(d) *Technical support* means any scientific or engineering work in support of the mission of the DoD laboratory involved. It does not include administrative or clerical services.

237.7302 General.

Generally, agencies will acquire services of students at institutions of higher learning by contract between a nonprofit organization employing the student and the Government. When it is in the best interest of the Government, contracts may be made directly with students. These services are not subject to the requirements of FAR part 19, FAR 13.003(b)(1), or DFARS part 219. Award authority for these contracts is 10 U.S.C. 2304(a)(1) and 10 U.S.C. 2360.

[56 FR 36424, July 31, 1991, as amended at 60 FR 29500, June 5, 1995; 64 FR 2598, Jan. 15, 1999]

237.7303 Contract clauses.

Contracts made directly with students are nonpersonal service contracts but shall include the clauses at FAR 52.232-3, Payments Under Personal Services Contracts, and FAR 52.249-12, Termination (Personal Services).

Subpart 237.74—Services at Installations Being Closed

SOURCE: 59 FR 36089, July 15, 1994, unless otherwise noted.

237.7400

237.7400 Scope.

This subpart prescribes procedures for contracting, through use of other than full and open competition, with local governments for police, fire protection, airfield operation, or other community services at military installations to be closed under the Defense Authorization Amendments and Base Closure and Realignment Act (Pub. L. 100-526), as amended, and the Defense Base Closure and Realignment Act of 1990 (Pub. L. 101-510), as amended.

[59 FR 36089, July 15, 1994, as amended at 60 FR 29500, June 5, 1995]

237.7401 Policy.

The authority in 206.302-5(b)(ii) to contract with local governments—

(a) May be exercised without regard to the provisions of 10 U.S.C. Chapter 146, Contracting for Performance of Civilian Commercial or Industrial Type Functions;

(b) May not be exercised earlier than 180 days before the date the installation is scheduled to be closed;

(c) Requires a determination by the head of the contracting activity that the services being acquired under contract with the local government are in the best interests of the Department of Defense.

(d) Includes the requirement of subpart 222.71, Right of First Refusal of Employment, unless it conflicts with the local government's civil service selection procedures.

[59 FR 36089, July 15, 1994, as amended at 60 FR 29500, June 5, 1995]

237.7402 Contract clause.

Use the clause at 252.237-7022, Services at Installations Being Closed, in solicitations and contracts based upon the authority of this subpart.

[59 FR 36089, July 15, 1994, as amended at 60 FR 29500, June 5, 1995]

PART 239—ACQUISITION OF INFORMATION TECHNOLOGY

Subpart 239.70—Exchange or Sale of Information Technology (IT)

Sec.

- 239.7000 Scope of subpart.
- 239.7001 Policy.

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- 239.7002 Conditions for using exchange/sale.
- 239.7003 Procedures.

Subpart 239.71—Security and Privacy for Computer Systems

- 239.7100 Scope of subpart.
- 239.7101 General.
- 239.7102 Security against compromising emanations.
 - 239.7102-1 General.
 - 239.7102-2 Validation of TEMPEST compliance.
 - 239.7102-3 Contract clause.

Subpart 239.72—Standards

- 239.7200 Scope of subpart.
- 239.7201 [Reserved]
- 239.7202 Waivers.

Subpart 239.73—Acquisition of Automatic Data Processing Equipment by DoD Contractors

- 239.7300 Scope of subpart.
- 239.7301 Applicability.
- 239.7302 Approvals and screening.
- 239.7303 Contractor documentation.

Subpart 239.74—Telecommunications Services

- 239.7400 Scope.
- 239.7401 Definitions.
- 239.7402 Policy.
- 239.7403 Regulatory bodies.
- 239.7404 Foreign carriers.
- 239.7405 Multiyear contracting authority for telecommunications resources.
- 239.7406 Cost or pricing data and information other than cost or pricing data.
 - 239.7407-1 General.
 - 239.7407-2 Communication service authorizations (CSAs).
- 239.7408 Special construction.
 - 239.7408-1 General.
 - 239.7408-2 Applicability of construction labor standards for special construction.
- 239.7409 Special assembly.
- 239.7410 Cancellation and termination.
- 239.7411 Contract clauses.

Subpart 239.75—Appropriations Act Restrictions

- 239.7500 Scope of subpart.
- 239.7501 Major automated information systems restriction.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36429, July 31, 1991, unless otherwise noted.

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Subpart 239.70 Exchange or Sale of Information Technology (IT)

SOURCE: 62 FR 1059, Jan. 8, 1997, unless otherwise noted.

239.7000 Scope of subpart.

This subpart contains unique DoD procedures for the exchange or sale of information technology using the exchange authority of the General Services Administration (GSA). This subpart only applies to items with an original acquisition cost of \$1,000,000 or more.

239.7001 Policy.

Agencies should consider exchange/sale when replacing Government-owned information technology. Exchange/sale is a method of—

(a) Transferring the equipment to be replaced to—

(1) Another Government agency, with reimbursement (sale); or

(2) The supplier of the replacement information technology for a trade-in allowance (exchange).

(b) Applying the proceeds of sale or the exchange allowance toward the purchase of replacement information technology.

239.7002 Conditions for using exchange/sale.

(a) The requiring activity must make a written determination that—

(1) The trade-in allowance of the exchange or the proceeds of the sale will be applied to acquire the replacement information technology; and

(2) The exchange/sale transaction will foster the economic and efficient accomplishment of a continuing requirement.

(b) The replacement equipment must be information technology—

(1) Similar to the resource being sold or exchanged;

(2) Which will satisfy the continuing requirement currently met by the resource being replaced.

239.7003 Procedures.

(a) Comply with—

(1) This subpart;

(2) Subpart 217.70; and

(3) The Defense Automation Resources Management Manual.

(b) Solicit offers both on an exchange (trade-in for allowance) or no exchange (no trade-in) basis.

(c) Retain the option to exercise any exchange offer at the time of award.

(d) List and describe the information technology to be exchanged in the solicitation. At a minimum include—

(1) A brief description of each item;

(2) Name of manufacturer;

(3) Equipment type;

(4) Model number; and

(5) The condition code and explanation of the code.

(e) Allow sufficient time in the contracting schedule to permit screening within the Government of the information technology to be exchanged prior to contract award.

(f) Immediately upon receipt of offers, determine the highest exchange offer (if any) and use it to initiate screening under the Defense Automation Resources Management Manual.

(1) Send an SF 120, Report of Excess Personal Property, to the Defense Information Systems Agency, Chief Information Officer, Defense Automation Resources Management Program Division, Attn: D03D, 701 South Courthouse Road, Arlington, VA 22204-2199. Prominently display the following note on the original and five copies of the SF 120:

Exchange/"Sale" Property

A written administrative determination has been (will be) made to apply the exchange allowance or proceeds of "sale" to the acquisition of similar items.

(2) Include the following additional information with the SF 120:

(i) The identity of the offeror of the exchange;

(ii) The type of replacement equipment;

(iii) The acquisition method for the replacement equipment;

(iv) The anticipated purchase price for the replacement equipment; and

(v) The name and telephone number of the contracting officer.

(g) Evaluate offers using the solicitation criteria, including consideration of any exchange allowance offers. Award can be made whether or not the replaced information technology is exchanged.

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(h) Before a contract is awarded, consider the results of the screening. Do not make an exchange if another Government agency wants to acquire the replaced equipment.

(1) If another agency is going to acquire the replaced equipment, do not include the exchange allowance in the contract price.

(2) The actual sale price to the agency acquiring the replaced equipment will be the exchange allowance (if any) of the successful offeror.

(i) If no Government agency wants to acquire the replaced equipment, the contract price shall include the exchange allowance, if any.

(j) If no exchange allowance was offered by the successful contractor, see the Defense Automation Resources Management Manual for disposal instructions.

[62 FR 1059, Jan. 8, 1997, as amended at 62 FR 34127, June 24, 1997; 62 FR 49305, Sept. 19, 1997]

Subpart 239.71—Security and Privacy for Computer Systems

239.7100 Scope of subpart.

This subpart applies to all acquisitions for computer systems. It covers both security and Privacy Act considerations.

239.7101 General.

Security requirements are in addition to provisions concerning protection of privacy of individuals (see FAR subpart 24.1).

239.7102 Security against compromising emanations.

239.7102-1 General.

(a) The National Security or Atomic Energy Acts, as amended, may require protection of information that is—

- (1) Processed;
- (2) Transmitted;
- (3) Stored;
- (4) Retrieved; or
- (5) Displayed.

(b) When acquiring computer equipment to be used to process classified information, the contracting officer shall obtain from the requiring activity—

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(1) A determination as to whether the equipment must provide protection against compromising emanations; and

(2) Identification of an established National TEMPEST standard (e.g., NACSEM 5100, NACSIM 5100A) or a standard used by other authority.

(c) When contracts will require the use of FIP resources involving classified data, programs, etc., the contracting officer shall obtain from the requiring activity—

(1) Advice to whether to require contractors performing these services to use equipment meeting the requirements in paragraph (a) of this subsection (as prescribed in the clause at 252.239-7000, Protection Against Compromising Emanations;

(2) Information concerning any requirement for marking of TEMPEST-certified equipment (especially if to be reused); and

(3) Information on how to validate TEMPEST equipment compliance with required standards.

239.7102-2 Validation of TEMPEST compliance.

Include requirements for validation of TEMPEST compliance in section E (Inspection and Acceptance) of the contract.

239.7102-3 Contract clause.

When contracting for computer equipment or systems that are to be used to process classified information, use the clause at 252.239-7000, Protection Against Compromising Emanations.

[62 FR 34127, June 24, 1997]

Subpart 239.72—Standards

239.7200 Scope of subpart.

This subpart contains guidance for implementing—

- (a) Federal Information Processing Standards (FIPS); and
- (b) Federal Telecommunications Standards (FED-STD).

239.7201 [Reserved]

239.7202 Waivers.

(a) The Secretary of Commerce has delegated to the Secretary of Defense the authority to waive FIP standards,

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in accordance with procedures established by the Secretary of Commerce. The Secretary of Defense redelegated that waiver authority to the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASD(C3I)). The ASD(C3I) has redelegated to the senior information technology official of each military department the authority to approve waivers to FIP standards that are applicable to military department requirements. Waivers to FIP standards that are applicable to the requirements of DoD components outside the military departments must be approved by the ASD(C3I).

(b) Contracting officers shall ensure that all applicable FIP standards are incorporated into solicitations, except for those FIP standards for which the requiring activity has obtained a waiver from the appropriate military department or DoD senior information technology official.

(c) As part of the Commerce Business Daily synopsis of a solicitation, contracting officers shall publish a notice of any determinations to waive any FIP standards that are applicable to the solicitation. If the waiver determination is made after the notice of the solicitation is published, the contracting officer shall amend the notice to announce the waiver determination.

[56 FR 36429, July 31, 1991, as amended at 62 FR 1060, Jan. 8, 1997]

Subpart 239.73—Acquisition of Automatic Data Processing Equipment by DoD Contractors

239.7300 Scope of subpart.

This subpart prescribes approval requirements for automatic data processing equipment (ADPE) purchased by contractors for use in performing DoD contracts.

[62 FR 9376, Mar. 3, 1997]

239.7301 Applicability.

(a) This subpart applies when the contractor purchases ADPE and title will pass to the Government.

(b) This subpart does not apply to ADPE acquired as a component of an end item.

[56 FR 36429, July 31, 1991, as amended at 62 FR 9376, Mar. 3, 1997]

239.7302 Approvals and screening.

(a) The requirements of this section highlight the redistribution requirements of the Defense Automation Resources Management Manual, and are in addition to those at FAR 45.302.

(b) If the contractor proposes acquiring ADPE subject to 239.7301, and the unit acquisition cost is \$50,000 or more—

(1) The contracting officer shall require the contractor to submit, through the administrative contracting officer, the documentation in 239.7303.

(2) The administrative contracting officer—

(i) Submits a request for screening the requirement against the pool of Government-owned ADPE to determine if available excess equipment could satisfy the contractor's needs. The request should include the contractor's supporting documentation. The request is sent to—

Defense Information Systems Agency, Chief Information Officer, Defense Automation Resources Management Program Division, Attn: D03D, 701 South Courthouse Road, Arlington, VA 22204-2199; or

(ii) Uses the Automation Resources Management System (ARMS) to screen on-line. System access may be requested from the Defense Information Systems Agency, Chief Information Officer, Defense Automation Resources Management Program (DARMP) Division. Customers may apply for an ARMS Account Number by calling the DARMP Help Desk at (703) 696-1904; DSN 426-1904, FAX (703) 696-1908; E-mail DARMP@NCR.DISA.MIL.

(iii) Documents the result of the System query.

(iv) Upon receipt of and based on screening results from DARMP, advises the contractor that excess ADPE—

(A) Is available pursuant to the Defense Automation Resources Management Manual; or

(B) Is not available and the contractor may proceed with acquisition of the equipment.

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- (3) The contracting officer—
 - (i) Reviews the contractor's documentation;
 - (ii) Decides whether to authorize the acquisition; and
 - (iii) Advises—
 - (A) The contractor if authorization is not granted; and
 - (B) The administrative contracting officer if authorization is granted.

[56 FR 36429, July 31, 1991, as amended at 62 FR 1060, Jan. 8, 1997; 62 FR 9376, Mar. 3, 1997; 62 FR 34127, June 24, 1997]

239.7303 Contractor documentation.

Contracting officers may tailor the documentation requirements in paragraphs (a) through (d) of this section.

(a) *List of existing ADPE and an analysis of its use.* (1) List of each component identified by manufacturer, type, model number, location, date of installation, and how acquired (lease, purchase, Government-furnished). Identify those acquired specifically to perform a Government contract.

(2) Reliability and usage data on each component for the past 12 months.

(3) Identification of users supported by each component, including how much time each user requires the component and the related contract or task involved.

(b) *List of new ADPE needed and reasons why it is needed.* (1) Estimates of the new equipment's useful life.

(2) List of tasks the new equipment is needed for and why, including estimated monthly usage for each major task or project.

(3) Anticipated software and telecommunications requirements.

(c) *Selection of computer equipment.* (1) If the acquisition is competitive—

(i) List sources solicited and proposals received;

(ii) Show how the evaluation was performed; and

(iii) Provide an explanation if the selected offer is not the lowest evaluated offer.

(2) If the acquisition is not competitive, state why.

(d) *Cost.* State the ADPE cost.

[62 FR 9376, Mar. 3, 1997]

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Subpart 239.74— Telecommunications Services

239.7400 Scope.

This subpart prescribes policy and procedures for acquisition of telecommunications services and maintenance of telecommunications security. Telecommunications services may also meet the definition of information technology.

[62 FR 1060, Jan. 8, 1997]

239.7401 Definitions.

As used in this subpart—

(a) *Common carrier* means any entity engaged in the business of providing telecommunications services which are regulated by the Federal Communications Commission or other governmental body.

(b) *Foreign carrier* means any person, partnership, association, joint-stock company, trust, governmental body, or corporation not subject to regulation by a U.S. governmental regulatory body and not doing business as a citizen of the United States, providing telecommunications services outside the territorial limits of the United States.

(c) *Governmental regulatory body* means the Federal Communications Commission, any statewide regulatory body, or any body with less than statewide jurisdiction when operating under the State authority. The following are not "governmental regulatory bodies"—

(1) Regulatory bodies whose decisions are not subject to judicial appeal; and

(2) Regulatory bodies which regulate a company owned by the same entity which creates the regulatory body.

(d) *Noncommon carrier* means any entity other than a common carrier offering telecommunications facilities, services, or equipment for lease.

(e) *Security, sensitive information, and telecommunications systems* have the meaning given in the clause at 252.239-7016, Telecommunications Security Equipment, Devices, Techniques, and Services.

(f) *Telecommunications* means the transmission, emission, or reception of signals, signs, writing, images, sounds, or intelligence of any nature, by wire,

cable, satellite, fiber optics, laser, radio, or any other electronic, electric, electromagnetic, or acoustically coupled means.

(g) *Telecommunications services* means the services acquired, whether by lease or contract, to meet the Government's telecommunications needs. The term includes the telecommunications facilities and equipment necessary to provide such services.

239.7402 Policy.

(a) *Acquisition.* (1) DoD policy is to acquire telecommunications services from common and noncommon telecommunications carriers—

(i) On a competitive basis, except when acquisition using other than full and open competition is justified.

(ii) Recognizing the regulations, practices, and decisions of the Federal Communications Commission (FCC) and other governmental regulatory bodies on rates, cost principles, and accounting practices;

(iii) Making provision in telecommunications services contracts for adoption of—

(A) FCC approved practices; or

(B) The generally accepted practices of the industry on those issues concerning common carrier services where—

(1) The governmental regulatory body has not expressed itself;

(2) The governmental regulatory body has declined jurisdiction; or

(3) There is no governmental regulatory body to decide.

(2) DoD's unique consumer needs in both volume and technology require DoD to participate actively in the rule making process of cognizant governmental regulatory bodies. DoD also must work with the government regulatory bodies and common carriers to be sure that in those areas in which the FCC cannot or will not rule, sound regulatory practices are followed. DoD should make every effort to avoid the time and expense of litigation by full and fair disclosure of both the carrier's and the DoD's position in advance.

(3) If actions do not produce reasonable or lawful rates, or when there is a refusal to provide required services or file appropriate tariffs, DoD should litigate. All contracts with the regu-

latory bodies should be through counsel under department/agency and Defense Information Systems Agency procedures.

(b) *Security.* (1) The contracting officer shall ensure, in accordance with agency procedures, that purchase requests identify—

(i) The nature and extent of information requiring security during telecommunications;

(ii) The requirement for the contractor to secure telecommunications systems;

(iii) The telecommunications security equipment, devices, techniques, or services with which the contractor's telecommunications security equipment, devices, techniques, or services must be interoperable; and

(iv) The approved telecommunications security equipment, devices, techniques, or services, such as found in the National Security Agency's Information Systems Security Products and Services Catalogue.

(2) Contractors and subcontractors shall provide all telecommunications security techniques or services required for performance of Government contracts.

(3) Except as provided in paragraph (b)(4) of this subsection, contractors and subcontractors shall normally provide all required telecommunications security equipment or devices as plant equipment in accordance with FAR part 45. In some cases, such as for communications security (COMSEC) equipment designated as controlled cryptographic item (CCI), contractors or subcontractors must also meet ownership eligibility conditions.

(4) When the contractor or subcontractor does not meet ownership eligibility conditions, the head of the agency may authorize provision of the necessary facilities as Government-furnished property or acquisition as contractor-acquired property, as long as conditions of FAR 45.303 are met.

[56 FR 36429, July 31, 1991, as amended at 56 FR 67220, Dec. 30, 1991; 62 FR 1060, Jan. 8, 1997]

239.7403 Regulatory bodies.

The FCC and other governmental regulatory bodies publish rules and

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regulations on the operations of common carriers and prescribe accounting principles to use to establish rates.

239.7404 Foreign carriers.

(a) Frequently, foreign carriers are owned by the government of the country in which they operate. The foreign governments often prescribe the methods of doing business. In many countries, an international agreement with the host country sets guidelines for acquiring communication services. In some countries, a corporate subsidiary of a carrier not indigenous to the country (often a U.S. parent) is the sole source for telecommunications services.

(b) Contracts for telecommunications services in foreign countries should describe rates and practices in as much detail as possible. It is DoD policy not to pay discriminatory rates. DoD should pay a reasonable rate for telecommunications services or the rate charged the military of that country, whichever is less.

(c) Refer special problems with telecommunications acquisition in foreign countries to higher headquarters for resolution with appropriate State Department representatives.

239.7405 Multiyear contracting authority for telecommunications resources.

(a) The General Services Administration (GSA) has exclusive multiyear contracting authority for telecommunications resources. However, GSA may delegate this authority in certain instances (see Federal Property Management Regulations (FPMR) 101-35.6).

(b) In accordance with FPMR 101-35.6, executive agencies may enter into multiyear contracts for telecommunications resources if—

(1) The agency notifies GSA prior to using GSA's multiyear contracting authority;

(2) The contract life, including options, does not exceed 10 years; and

(3) The agency complies with OMB budget and accounting procedures relating to appropriated funds.

[63 FR 11539, Mar. 9, 1998]

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239.7406 Cost or pricing data and information other than cost or pricing data.

(a) Common carriers are not required to submit cost or pricing data before award of contracts for tariffed services. Rates or preliminary estimates quoted by a common carrier for tariffed telecommunications services are considered to be prices set by regulation within the provisions of 10 U.S.C. 2306a. This is true even if the tariff is set after execution of the contract.

(b) Rates or preliminary estimates quoted by a common carrier for nontariffed telecommunications services or by a noncommon carrier for any telecommunications service are not considered prices set by law or regulation.

(c) Contracting officers shall obtain sufficient information to determine that the prices are reasonable. For example, cost or pricing data, if required in accordance with FAR 15.403-4, or information other than cost or pricing data, if required in accordance with FAR 15.403-3, may be necessary to support the reasonableness of—

(1) Nontariffed services;

(2) Special rates and charges not included in a tariff, whether filed or to be filed;

(3) Special assembly rates and charges;

(4) Special construction and equipment charges;

(5) Contingent liabilities that are fixed at the outset of the service;

(6) Proposed cancellation and termination charges under the clause at 252.239-7007, Cancellation or Termination of Orders—Common Carriers, and reuse arrangements under the clause at 252.239-7008, Reuse Arrangements;

(7) Rates contained in voluntary tariffs filed by nondominant common carriers; or

(8) A tariff, whether filed or to be filed, for new services installed or developed primarily for Government use.

[62 FR 40473, July 29, 1997, as amended at 63 FR 11539, Mar. 9, 1998]

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239.7407-1 General.

In addition to acquisition methods described in the FAR, the method described in this section may be used to acquire telecommunications services.

239.7407-2 Communication service authorizations (CSAs).

Basic agreements (see FAR 16.702) are used widely in conjunction with communication service authorizations to facilitate award of telecommunications services.

(a) Use DD Form 428, Communication Service Authorization (CSA), or an electronic data processing substitute to award, modify, cancel, or terminate telecommunications services. The CSA shall—

- (1) Refer to the basic agreement;
 - (2) Specify the types and quantities and equipment to be provided as well as the tariff (or other price if a tariff is not available) of those services and equipment;
 - (3) Specify the premises involved;
 - (4) Cite the address for billing;
 - (5) Identify the disbursing office; and
 - (6) Provide funding information.
- (b) Before awarding a CSA, comply with the requirements in FAR and DFARS, e.g., for competition, reviews, approvals, and determinations and findings.
- (c) Include an expiration date in each CSA.
- (d) Modify CSAs to reflect any price increases.

239.7408 Special construction.

239.7408-1 General.

(a) Special construction normally involves a common carrier giving a special service or facility related to the performance of the basic telecommunications service requirements.

This may include—

- (1) Moving or relocating equipment;
 - (2) Providing temporary facilities;
 - (3) Expediting provision of facilities;
- or
- (4) Providing specially constructed channel facilities to meet Government requirements.
- (b) Use this subpart instead of FAR part 36 for acquisition of “special construction.”

(c) Special construction costs may be—

(1) A contingent liability for using telecommunications services for a shorter time than the minimum to reimburse the contractor for unamortized nonrecoverable costs. These costs are usually expressed in terms of a termination liability, as provided in the contract or by tariff;

(2) A onetime special construction charge;

(3) Recurring charges for constructed facilities;

(4) A minimum service charge;

(5) An expediting charge; or

(6) A move or relocation charge.

(d) When a common carrier submits a proposal or quotation which has special construction requirements, the contracting officer shall require a detailed special construction proposal. Analyze all special construction proposals to—

(1) Determine the adequacy of the proposed construction;

(2) Disclose excessive or duplicative construction; and

(3) When different forms of charge are possible, provide for the form of charge most advantageous to the Government.

(e) When possible, analyze and approve special construction charges before receiving the service. Impose a ceiling on the special construction costs before authorizing the contractor to proceed, if prior approval is not possible. Do not make final payment for special construction charges unless the charges are approved by the contracting officer.

239.7408-2 Applicability of construction labor standards for special construction.

(a) The construction labor standards in FAR 22.4 ordinarily do not apply to special construction. However, if the special construction includes construction (as defined in FAR 36.102) of a public building or public work, the construction labor standards may apply. Determine applicability under FAR 22.402.

(b) Each CSA or other type contract which is subject to construction labor standards under FAR 22.402 shall cite that fact.

239.7409 Special assembly.

(a) Special assembly is the designing, manufacturing, arranging, assembling, or wiring of equipment to provide telecommunications services that cannot be provided with general use equipment.

(b) Special assembly rates and charges shall be based on estimated costs. The contracting officer shall negotiate special assembly rates and charges before starting service whenever possible. When it is not possible to negotiate in advance, use provisional rates and charges subject to adjustment, until final rates and charges are negotiated. The CSAs authorizing the special assembly shall be modified to reflect negotiated final rates and charges.

239.7410 Cancellation and termination.

(a)(1) Cancellation is stopping a requirement after placing of an order but before service starts.

(2) Termination is stopping a requirement after placing an order and after service starts.

(b) Determine cancellation or termination charges under the provisions of the applicable tariff or agreement/contract.

239.7411 Contract clauses.

(a) In addition to other appropriate FAR and DFARS clauses, use the following clauses in solicitations, contracts, and basic agreements for telecommunications services. Modify the clauses only if necessary to meet the requirements of a governmental regulatory agency—

- (1) 252.239-7002, Access;
- (2) 252.239-7003, Facilities and Services to be Furnished—Common Carriers;
- (3) 252.239-7004, Orders for Facilities and Services—Common Carriers;
- (4) 252.239-7005, Rates, Charges, and Services—Common Carriers;
- (5) 252.239-7006, Tariff Information;
- (6) 252.239-7007, Cancellation or Termination of Orders—Common Carriers;
- (7) 252.239-7008, Reuse Arrangements.

(b) Use the following clauses in solicitations, contracts, and basic agreements for telecommunications services when the acquisition includes or may include special construction. Modify

the clauses only if necessary to meet the requirements of a governmental regulatory agency—

- (1) 252.239-7011, Special Construction and Equipment Charges; and
- (2) 252.239-7012, Title to Telecommunication Facilities and Equipment.

(c) Use the following clauses in basic agreements for telecommunications services—

- (1) 252.239-7013, Obligation of the Government;
- (2) 252.239-7014, Term of Agreement, and insert the effective date of the agreement in paragraph (a) of the clause; and
- (3) 252.239-7015, Continuation of Communication Service Authorizations, as appropriate, and insert in paragraph (a) of the clause, the name of the contracting office and the basic agreement or contract number which is being superseded.

(d) Use the clause at 252.239-7016, Telecommunications Security Equipment, Devices, Techniques, and Services, in solicitations and contracts when performance of a contract requires a securing telecommunications.

[56 FR 36429, July 31, 1991, as amended at 57 FR 42632, Sept. 15, 1992; 62 FR 40473, July 29, 1997]

Subpart 239.75—Appropriations Act Restrictions

SOURCE: 57 FR 14995, Apr. 23, 1992, unless otherwise noted.

239.7500 Scope of subpart.

This subpart contains restrictions on the acquisition of information technology, imposed by Defense appropriations acts.

[57 FR 14995, Apr. 23, 1992, as amended at 62 FR 34127, June 24, 1997]

239.7501 Major automated information systems restriction.

Section 8028 of the FY 1992 Defense Appropriations Act (Pub. L. 102-172) and similar sections of the FY 1993, FY 1994, and FY 1995 Defense appropriations acts prohibit use of DoD appropriations for acquisition of major automated information systems, unless the systems have successfully completed

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oversight reviews required by DoD regulations.

[62 FR 1060, Jan. 8, 1997]

PART 241—ACQUISITION OF UTILITY SERVICES

Subpart 241.1—General

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AUTHORITY: 48 U.S.C. 421 and 48 CFR Chapter 1.

SOURCE: 63 FR 11539, Mar. 9, 1998, unless otherwise noted.

Subpart 241.1—General

241.101 Definitions.

As used in this part—

Definite term contract means a contract for utility services for a definite period of not less than one nor more than ten years.

Dual service area means a geographical area in which two or more utility suppliers are authorized under State law to provide services.

Indefinite term contract means a month-to-month contract for utility services which may be terminated by the Government upon proper notice.

Independent regulatory body means the Federal Energy Regulatory Commission, a state-wide agency, or an agency with less than state-wide jurisdiction when operating pursuant to state authority. The body has the power to fix, establish, or control the rates and services of utility suppliers.

Nonindependent regulatory body means a body that regulates a utility supplier which is owned or operated by the

same entity that created the regulatory body, e.g., a municipal utility.

Regulated utility supplier means a utility supplier regulated by an independent regulatory body.

Service power procurement officer means for the—

Army, the Chief of Engineers;

Navy, the Commander, Naval Facilities Engineering Command;

Air Force, the head of a contracting activity; and

Defense Logistics Agency, the Executive Director of Contracting.

241.102 Applicability.

(a) This part applies to purchase of utility services from nonregulated and regulated utility suppliers. It includes the acquisition of liquefied petroleum gas as a utility service when purchased from regulated utility suppliers.

(b)(7) This part does not apply to third party financed projects. However, it may be used for any purchased utility services directly resulting from such projects, including those authorized by—

(A) 10 U.S.C. 2394 for energy, fuels, and energy production facilities for periods not to exceed 30 years;

(B) 10 U.S.C. 2394a for renewable energy for periods not to exceed 25 years;

(C) 10 U.S.C. 2689 for geothermal resources that result in energy production facilities;

(D) 10 U.S.C. 2809 for potable and waste water treatment plants for periods not to exceed 32 years; and

(E) 10 U.S.C. 2812 for lease/purchase of energy production facilities for periods not to exceed 32 years.

241.103 Statutory and delegated authority.

The contracting officer may enter into a utility service contract related to the conveyance of a utility system for a period not to exceed 50 years (10 U.S.C. 2688(c)(3)).

[65 FR 2059, Jan. 13, 2000; 65 FR 19818, Apr. 12, 2000]

Subpart 241.2—Acquiring Utility Services

241.201 Policy.

(1) Except as provided in FAR 41.201, DoD, as a matter of comity, will comply with the current regulations, practices and decisions of independent regulatory bodies which are subject to judicial appeal. This policy does not extend to regulatory bodies whose decisions are not subject to appeal nor does it extend to nonindependent regulatory bodies.

(2) Purchases of utility services outside the United States may use—

(i) Formats and technical provisions consistent with local practice; and

(ii) Dual language forms and contracts.

(3) Rates established by an independent regulatory body are considered “prices set by law or regulation” and do not require submission of cost or pricing data (see FAR Subpart 15.4).

241.202 Procedures.

(a)(i) *Competitive proposals.* When a new major utility service load develops or a new military installation is established, the contracting officer shall—

(A) Determine whether more than one supplier can provide the required utility services.

(1) Competition may be possible where dual franchises exist or where no franchise exists.

(2) Competition should also be considered when an installation is served by one supplier and other potential suppliers exist even though one supplier has entered into a General Services Administration area-wide contract.

(B) Where competition exists, solicit competitive proposals from all potential suppliers.

(ii) *Periodic reviews for competition.* Conduct periodic review of ongoing contracts to determine the availability of competition. If available, evaluate the need to rewrite the contract considering—

(A) The possible loss of rights vested in the Government under the existing contract;

(B) The age and quality of the contract; and

(C) The number of contract modifications and the ease of administration with the existing contract documents.

(iii) *Connection and service charges.* The Government may pay a connection charge when required to cover the cost of the necessary connecting facilities. A connection charge based on the estimated labor cost of installing and removing the facility shall not include salvage cost. A lump-sum connection charge shall be no more than the agreed cost of the connecting facilities less net salvage. The order of precedence for contractual treatment of connection and service charges is—

(A) *No connection charge.*

(B) *Termination liability.* Use when an obligation is necessary to secure the required services. The obligation must be not more than the agreed connection charge, less any net salvage material costs. Use of a termination liability instead of a connection charge requires the approval of the service power procurement officer or designee.

(C) *Connection charge, refundable.* Use a refundable connection charge when the supplier refuses to provide the facilities based on lack of capital or published rules which prohibit providing up-front funding. The contract should provide for refund of the connection charge within five years unless a longer period or omission of the refund requirement is authorized by the service power procurement officer or designee.

(D) *Connection and service charges, nonrefundable.* The Government may pay certain nonrefundable, non-recurring charges including service initiation charges, a contribution in aid of construction, membership fees, and charges required by the supplier's rules and regulations to be paid by the customer. If possible, consider sharing with other than Government users the use of (and costs for) facilities when large nonrefundable charges are required.

(iv) *Construction and labor requirements.* (A) Do not use the connection charge provisions for the installation of Government-owned distribution lines and facilities. The acquisition of such facilities must be authorized by legislation and accomplished in accordance with FAR Part 36. Also, do not

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use the connection charge provisions for the installation of new facilities related to the supplier's production and general "backbone" system unless authorized by legislation.

(B) Construction labor standards ordinarily do not apply to construction accomplished under the connection charge provisions of this part. However, if installation includes construction of a public building or public work as defined in FAR 36.102, construction labor standards may apply.

241.203 GSA assistance.

The General Services Administration (GSA) has delegated to DoD the authority to enter into utility service contracts (see FAR 41.103); therefore, contracting officers need not seek assistance or approval from GSA.

241.205 Separate contracts.

(a)(i) Requests for proposals shall state the anticipated service period in terms of months or years. Where the period extends beyond the current fiscal year, evaluate offers of incentives for a definite term contract.

(ii) The solicitation may permit offerors the choice of proposing on the basis of—

(A) A definite term not to exceed the anticipated service period; or

(B) An indefinite term contract.

(iii) Where the expected service period is less than the current fiscal year,

the solicitation shall be on the basis of an indefinite term contract.

(iv) Contracts for utility services for leased premises shall identify the lease document on the face of the contract.

(d) Use an indefinite term utility service contract when it is considered to be in the Government's best interest to—

(i) Have the right to terminate on a 30-day (or longer) notice. A notice of up to one year may be granted by an installation if needed to obtain a more favorable rate, more advantageous conditions, or for other valid reasons; or

(ii) Grant the supplier the right to terminate the contract when of benefit to the Government in the form of lower rates, larger discounts or more favorable terms and conditions.

241.270 Preaward contract review.

Departments/agencies shall conduct their owned preaward contract reviews.

Subpart 241.5—Solicitation Provision and Contract Clauses

241.501-70 Additional clauses.

(a) If the Government must execute a superseding contract and capital credits, connection charge credits, or termination liability exist, use the clause at 252.241-7000, Superseding Contract.

(b) Use the clause at 252.241-70001, Government Access, when the clause at FAR 52.241-5, Contractor's Facilities, is used.