

estimated amount of additional funds that will be required for the timely performance of the item(s) funded pursuant to this clause, for a subsequent period as may be specified in the allotment schedule in paragraph (j) of this clause or otherwise agreed to by the parties. If after such notification additional funds are not allotted by the date identified in the Contractor's notification, or by an agreed substitute date, the Contracting Officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the clause of this contract entitled "Termination for Convenience of the Government."

(d) When additional funds are allotted for continued performance of the contract line item(s) identified in paragraph (a) of this clause, the parties will agree as to the period of contract performance which will be covered by the funds. The provisions of paragraphs (b) through (d) of this clause will apply in like manner to the additional allotted funds and agreed substitute date, and the contract will be modified accordingly.

(e) If, solely by reason of failure of the Government to allot additional funds, by the dates indicated below, in amounts sufficient for timely performance of the contract line item(s) identified in paragraph (a) of this clause, the Contractor incurs additional costs or is delayed in the performance of the work under this contract and if additional funds are allotted, an equitable adjustment will be made in the price or prices (including appropriate target, billing, and ceiling prices where applicable) of the item(s), or in the time of delivery, or both. Failure to agree to any such equitable adjustment hereunder will be a dispute concerning a question of fact within the meaning of the clause entitled "Disputes."

(f) The Government may at any time prior to termination allot additional funds for the performance of the contract line item(s) identified in paragraph (a) of this clause.

(g) The termination provisions of this clause do not limit the rights of the Government under the clause entitled "Default." The provisions of this clause are limited to the work and allotment of funds for the contract line item(s) set forth in paragraph (a) of this clause. This clause no longer applies once the contract is fully funded except with regard to the rights or obligations of the parties concerning equitable adjustments negotiated under paragraphs (d) and (e) of this clause.

(h) Nothing in this clause affects the right of the Government to terminate this contract pursuant to the clause of this contract entitled "Termination for Convenience of the Government."

(i) Nothing in this clause shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342.

(j) The parties contemplate that the Government will allot funds to this contract in accordance with the following schedule:

On execution of contract	\$ _____
(month) (day), (year)	\$ _____
(month) (day), (year)	\$ _____
(month) (day), (year)	\$ _____

(End of clause)

* To be inserted after negotiation.
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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 246 and 252

RIN 0750-AH95

Defense Federal Acquisition Regulation Supplement: Clauses With Alternates—Quality Assurance (DFARS Case 2013-D004)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to create an overarching prescription for each set of quality assurance-related provisions/clauses with one or more alternates. In addition, the proposed rule would include the full text of each provision and/or clause alternate.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before October 7, 2013, to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2013-D004, using any of the following methods:
○ *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS Case 2013-D004" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D004." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D004" on your attached document.

○ *Email:* dfars@osd.mil. Include DFARS Case 2013-D004 in the subject line of the message.

○ *Fax:* 571-372-6094.

○ *Mail:* Defense Acquisition Regulations System, Attn: Ms. Susan Williams, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after

submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Susan Williams, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6092; facsimile 571-372-6101.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to revise the DFARS to create an overarching prescription for the quality assurance clause with two alternates. The rule also proposes to add a separate prescription for the basic clause as well as each alternate. For clarity, the preface of each alternate will continue to explain what portions of that alternate are different from the basic clause.

Separate prescriptions for the basic and alternates of DFARS clauses will facilitate the use of automated contract writing systems. The proposed rule will not revise the prescriptions in any substantive way or change the applicability of the clauses or their alternates.

The inclusion of the full text of each clause alternate aims to make the terms of a clause alternate clearer to offerors and to DoD contracting officers. The current convention for alternates is to show only the changed paragraphs from the basic provision or clause. This proposed rule would include the full text of each clause and each alternate, which will assist in making solicitation and contract terms and conditions easier to read and understand. By placing alternates in full text, all paragraph substitutions from the basic clause will have already been made. Inapplicable paragraphs from the basic clause that are superseded by the alternate will not be included in the solicitation or contract in order to prevent confusion.

Although this rule proposes to include each alternate in full, it retains the language that precedes the clause or alternate, which includes the location of the alternate's prescription and a statement that identifies which paragraphs were changed from the basic clause. Further, alternates are proposed to have individual titles that tie them to the basic clause, e.g., "Warranty of Data—Alternate I" in lieu of "Alternate I."

II. Discussion

This proposed rule addresses only the single DFARS part 246 clause that has alternates. The remaining prescriptions

in part 246 are not proposed to be changed in any way by this rule. The affected clause is 252.246–7001, Warranty of Data, with two alternates. The naming convention results in proposed new clause titles, *e.g.*, Warranty of Data—Basic and Warranty of Data—Alternate I.

An umbrella prescription is proposed to be added for the elements common to the basic clause and both alternates. The specific prescription for the basic clause and each alternate would then address only the requirements for their use that enable the selection of the basic or one of the alternates. For example, the revised prescription for Warranty of Data—Alternate I would read as follows: “Use the clause at 252.246–7001, Warranty of Data—Alternate I, in fixed-price incentive solicitations and contracts.” The planned changes will increase the clarity and ease of use, but will not revise the applicability in any way. The text of the current DFARS 252.246–7001, Alternate I, would no longer consist solely of paragraph (d)(3), but would include the entire text of DFARS 252.246–7001 (basic clause) with the revised paragraph (d)(3) substituted for the corresponding paragraph of the basic clause. Inapplicable paragraphs from the basic version of the clause that are superseded by the alternate will not be included in the solicitation or contract in order to prevent confusion.

Further, this proposed rule would also revise the applicable preface, *i.e.*, the language in part 252 that precedes a provision, clause, or alternate. The proposed rule would replace the current preface language with a statement that identifies the specific changes from the basic version of the solicitations provision or clause.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because it merely revises the prescriptions for solicitation provisions and clauses with alternates to be unique, as well as includes the full text of each provision or clause in each alternate. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The purpose of this proposed rule is to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to create unique prescriptions for the basic version and each alternate of DFARS part 246 solicitations provisions and clauses, and to include the full text of each clause alternate.

The use of automated contract writing systems will be facilitated by having unique prescriptions for the basic version and each alternate of DFARS solicitations provisions and clauses. The current convention requires the prescription for the basic provision or clause to address all the possibilities covered by the alternates, and then the prescription for each alternate addresses only what is different for the use of that particular alternate. This rule will revise the prescriptions, so that the basic solicitation provision or clause and each alternate is unique and stands on its own. The prescriptions will not be revised in any way to change when they are applicable to offerors, contractors, or subcontractors.

Additionally, the inclusion of the full text of each provision or clause alternate aims to make the terms of a provision or clause alternate clearer to offerors, as well as to DoD contracting officers. Instead of the current convention for alternates to show only paragraphs changed from the basic version of the provision or clause, this rule proposes to include the full text of each version of the clause. This will assist in making the terms of the clause clearer, because all paragraph substitutions will have already been made. Inapplicable paragraphs from the basic version of the clause that are superseded by the alternate are not included in the solicitation or contract to prevent confusion.

Potential offerors, including small businesses, may be affected by this rule by seeing an unfamiliar format for clause alternates in solicitations and contracts issued by DoD contracting activities. An average of 12,618,521 new contracts was awarded in Fiscal Years 2011 and 2012, and an average of

1,557,852 of these actions (12.35%) was awarded to small businesses. It is unknown how many of these contracts were awarded that included an alternate to a DFARS provision or clause. Nothing substantive will change in solicitations or contracts for potential offerors, and only the appearance of how clause alternates are presented in the solicitations and contracts will be changed. This rule may result in potential offerors, including small businesses, expending more time to become familiar with and to understand the new format of the clause alternates in full text contained in contracts issued by any DoD contracting activity. The rule also anticipates saving contractors time by making all paragraph substitutions from the basic version of the clause, and not requiring the contractors to read inapplicable paragraphs contained in the basic version of the clause where alternates are also included in the solicitations and contracts. The overall burden caused by this rule is expected to be negligible and will not be any greater on small businesses than it is on large businesses.

This rule does not add any new information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules. No alternatives were identified that will accomplish the objectives of the rule.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013–D004), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 246 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 246 and 252 are proposed to be amended as follows:

- 1. The authority citation for parts 246 and 252 continue to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR Chapter 1.

PART 246—QUALITY ASSURANCE

■ 2. Revise section 246.710 to read as follows:

246.710 Contract clauses.

(a) Use a clause substantially the same as the basic or one of the alternates of the clause at 252.246–7001, Warranty of Data, in solicitations and contracts that include the clause at 252.227–7013, Rights in Technical Data and Computer Software, when there is a need for greater protection or period of liability than provided by the inspection and warranty clauses prescribed in FAR part 46.

(1) Use the clause at 252.246–7001, Warranty of Data—Basic, in solicitations and contracts that are not firm-fixed price or fixed-price incentive.

(2) Use the clause at 252.246–7001, Warranty of Data—Alternate I, in fixed-price-incentive solicitations and contracts.

(3) Use the clause at 252.246–7001, Warranty of Data—Alternate II, in firm-fixed-price solicitations and contracts.

(b) Use the clause at 252.246–7002, Warranty of Construction (Germany), instead of the clause at FAR 52.246–21, Warranty of Construction, in solicitations and contracts for construction when a fixed-price contract will be awarded and contract performance will be in Germany.

(c)(1) In addition to 252.211–7003, Item Identification and Valuation, which is prescribed in 211.274–6(a), use the following provision and clause in solicitations and contracts when it is anticipated that the resulting contract will include a warranty for serialized items:

(i) 252.246–7005, Notice of Warranty Tracking of Serialized Items (include only if offerors will be required to enter data with the offer); and

(ii) 252.246–7006, Warranty Tracking of Serialized Items.

(2) If the Government specifies a warranty, include in the solicitation the appropriate warranty attachment from DFARS 246.710–70. The contracting officer shall request the requiring activity to provide information to ensure that Attachment ____, Warranty Tracking Information, is populated with data specifying the Government's required warranty provision by contract line item number, subline item number, or exhibit line item number prior to solicitation. In such case do not include 252.246–7005 in the solicitation.

(3) If the Government does not specify a warranty, include 252.246–7005 in the solicitation, and the warranty

attachment from DFARS 246.710–70. The contractor may offer a warranty and shall then populate Attachment ____, Warranty Tracking Information, as appropriate, as part of its offer as required by 252.246–7005.

(4) All warranty tracking information that is indicated with a single asterisk (*) in Attachment ____, Warranty Tracking Information, shall be completed prior to award. Data indicated with two asterisks (**) may be completed at the time of award. Data indicated with three asterisks (***) may be completed at or after the time of award.

(5) The contractor shall provide warranty repair source instructions (as prescribed in the attachment) no later than the time of delivery.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 3. Revise section 252.246–7001 to read as follows:

252.246–7001 Warranty of Data.

As prescribed in 246.710(1), use one of the following clauses:

(a) *Warranty of Data—Basic.* For the specific prescription for use of the basic clause, see 246.710(1)(i).

WARRANTY OF DATA—BASIC (DATE)

(a) *Definition.* “Technical data” has the same meaning as given in the clause in this contract entitled, Rights in Technical Data and Computer Software.

(b) *Warranty.* Notwithstanding inspection and acceptance by the Government of technical data furnished under this contract, and notwithstanding any provision of this contract concerning the conclusiveness of acceptance, the Contractor warrants that all technical data delivered under this contract will at the time of delivery conform with the specifications and all other requirements of this contract. The warranty period shall extend for three years after completion of the delivery of the line item of data (as identified in DD Form 1423, Contract Data Requirements List) of which the data forms a part; or any longer period specified in the contract.

(c) *Contractor Notification.* The Contractor agrees to notify the Contracting Officer in writing immediately of any breach of the above warranty which the Contractor discovers within the warranty period.

(d) *Remedies.* The following remedies shall apply to all breaches of the warranty, whether the Contractor notifies the Contracting Officer in accordance with paragraph (c) of this clause or if the Government notifies the Contractor of the breach in writing within the warranty period:

(1) Within a reasonable time after such notification, the Contracting Officer may—

(i) By written notice, direct the Contractor to correct or replace at the Contractor's expense the nonconforming technical data promptly; or

(ii) If the Contracting Officer determines that the Government no longer has a requirement for correction or replacement of the data, or that the data can be more reasonably corrected by the Government, inform the Contractor by written notice that the Government elects a price or fee adjustment instead of correction or replacement.

(2) If the Contractor refuses or fails to comply with a direction under paragraph (d)(1)(i) of this clause, the Contracting Officer may, within a reasonable time of the refusal or failure—

(i) By contract or otherwise, correct or replace the nonconforming technical data and charge the cost to the Contractor; or

(ii) Elect a price or fee adjustment instead of correction or replacement.

(3) The remedies in this clause represent the only way to enforce the Government's rights under this clause.

(e) The provisions of this clause apply anew to that portion of any corrected or replaced technical data furnished to the Government under paragraph (d)(1)(i) of this clause.

(End of clause)

(b) *Warranty of Data—Alternate I.* For the specific prescription for use of Alternate I, see 246.710(1)(ii). Alternate I uses a different paragraph (d)(3) than the basic clause.

WARRANTY OF DATA—ALTERNATE I (DATE)

(a) *Definition.* “Technical data” has the same meaning as given in the clause in this contract entitled, Rights in Technical Data and Computer Software.

(b) *Warranty.* Notwithstanding inspection and acceptance by the Government of technical data furnished under this contract, and notwithstanding any provision of this contract concerning the conclusiveness of acceptance, the Contractor warrants that all technical data delivered under this contract will at the time of delivery conform with the specifications and all other requirements of this contract. The warranty period shall extend for three years after completion of the delivery of the line item of data (as identified in DD Form 1423, Contract Data Requirements List) of which the data forms a part; or any longer period specified in the contract.

(c) *Contractor Notification.* The Contractor agrees to notify the Contracting Officer in writing immediately of any breach of the above warranty which the Contractor discovers within the warranty period.

(d) *Remedies.* The following remedies shall apply to all breaches of the warranty, whether the Contractor notifies the Contracting Officer in accordance with paragraph (c) of this clause or if the Government notifies the Contractor of the breach in writing within the warranty period:

(1) Within a reasonable time after such notification, the Contracting Officer may—

(i) By written notice, direct the Contractor to correct or replace at the Contractor's expense the nonconforming technical data promptly; or

(ii) If the Contracting Officer determines that the Government no longer has a

requirement for correction or replacement of the data, or that the data can be more reasonably corrected by the Government, inform the Contractor by written notice that the Government elects a price or fee adjustment instead of correction or replacement.

(2) If the Contractor refuses or fails to comply with a direction under paragraph (d)(1)(i) of this clause, the Contracting Officer may, within a reasonable time of the refusal or failure—

(i) By contract or otherwise, correct or replace the nonconforming technical data and charge the cost to the Contractor; or

(ii) Elect a price or fee adjustment instead of correction or replacement.

(3) In addition to the remedies under paragraphs (d)(1) and (2) of this clause, the Contractor shall be liable to the Government for all damages to the Government as a result of the breach of warranty.

(i) The additional liability under paragraph (d)(3) of this clause shall not exceed 75 percent of the target profit.

(ii) If the breach of the warranty is with respect to the data supplied by an equipment subcontractor, the limit of the Contractor's liability shall be—

(A) Ten percent of the total subcontract price in a firm fixed price subcontract;

(B) Seventy-five percent of the total subcontract fee in a cost-plus-fixed-fee or cost-plus-award-fee subcontract; or

(C) Seventy-five percent of the total subcontract target profit or fee in a fixed-price or cost-plus-incentive-type contract.

(iii) Damages due the Government under the provisions of this warranty are not an allowable cost.

(iv) The additional liability in paragraph (d)(3) of this clause shall not apply—

(A) With respect to the requirements for product drawings and associated lists, special inspection equipment (SIE) drawings and associated lists, special tooling drawings and associated lists, SIE operating instructions, SIE descriptive documentation, and SIE calibration procedures under MIL-T-31000, General Specification for Technical Data Packages, Amendment 1, or MIL-T-47500, General Specification for Technical Data Packages, Supp 1, or drawings and associated lists under level 2 or level 3 of MIL-D-1000A, Engineering and Associated Data Drawings, or DoD-D-1000B, Engineering and Associated Lists Drawings (Inactive for New Design) Amendment 4, Notice 1; or drawings and associated lists under category E or I of MIL-D-1000, Engineering and Associated Lists Drawings, provided that the data furnished by the Contractor was current, accurate at time of submission, and did not involve a significant omission of data necessary to comply with the requirements; or

(B) To defects the Contractor discovers and gives written notice to the Government before the Government discovers the error.

(4) The provisions of this clause apply anew to that portion of any corrected or replaced technical data furnished to the Government under paragraph (d)(1)(i) of this clause.

(End of clause)

(c) *Warranty of Data—Alternate II.* For the specific prescription for use of Alternate II, see 246.710(1)(iii). Alternate II uses a different paragraph (d)(3) than the basic clause.

WARRANTY OF DATA—ALTERNATE II (DATE)

(a) *Definition.* “Technical data” has the same meaning as given in the clause in this contract entitled, Rights in Technical Data and Computer Software.

(b) *Warranty.* Notwithstanding inspection and acceptance by the Government of technical data furnished under this contract, and notwithstanding any provision of this contract concerning the conclusiveness of acceptance, the Contractor warrants that all technical data delivered under this contract will at the time of delivery conform with the specifications and all other requirements of this contract. The warranty period shall extend for three years after completion of the delivery of the line item of data (as identified in DD Form 1423, Contract Data Requirements List) of which the data forms a part; or any longer period specified in the contract.

(c) *Contractor Notification.* The Contractor agrees to notify the Contracting Officer in writing immediately of any breach of the above warranty which the Contractor discovers within the warranty period.

(d) *Remedies.* The following remedies shall apply to all breaches of the warranty, whether the Contractor notifies the Contracting Officer in accordance with paragraph (c) of this clause or if the Government notifies the Contractor of the breach in writing within the warranty period:

(1) Within a reasonable time after such notification, the Contracting Officer may—

(i) By written notice, direct the Contractor to correct or replace at the Contractor's expense the nonconforming technical data promptly; or

(ii) If the Contracting Officer determines that the Government no longer has a requirement for correction or replacement of the data, or that the data can be more reasonably corrected by the Government, inform the Contractor by written notice that the Government elects a price or fee adjustment instead of correction or replacement.

(2) If the Contractor refuses or fails to comply with a direction under paragraph (d)(1)(i) of this clause, the Contracting Officer may, within a reasonable time of the refusal or failure—

(i) By contract or otherwise, correct or replace the nonconforming technical data and charge the cost to the Contractor; or

(ii) Elect a price or fee adjustment instead of correction or replacement.

(3) In addition to the remedies under paragraphs (d)(1) and (2) of this clause, the Contractor shall be liable to the Government for all damages to the Government as a result of the breach of the warranty.

(i) The additional liability under paragraph (d)(3) of this clause shall not exceed ten percent of the total contract price.

(ii) If the breach of the warranty is with respect to the data supplied by an equipment

subcontractor, the limit of the Contractor's liability shall be—

(A) Ten percent of the total subcontract price in a firm fixed-price subcontract;

(B) Seventy-five percent of the total subcontract fee in a cost-plus-fixed-fee or cost-plus-award-fee subcontract; or

(C) Seventy-five percent of the total subcontract target profit or fee in a fixed-price or cost-plus-incentive-type contract.

(iii) The additional liability specified in paragraph (d)(3) of this clause shall not apply—

(A) With respect to the requirements for product drawings and associated lists, special inspection equipment (SIE) drawings and associated lists, special tooling drawings and associated lists, SIE operating instructions, SIE descriptive documentation, and SIE calibration procedures under MIL-T-31000, General Specification for Technical Data Packages, Amendment 1, or MIL-T-47500, General Specification for Technical Data Packages, Supp 1, or drawings and associated lists under level 2 or level 3 of MIL-D-1000A, Engineering and Associated Data Drawings, or DoD-D-1000B, Engineering and Associated Lists Drawings (Inactive for New Design) Amendment 4, Notice 1; or drawings and associated lists under category E or I of MIL-D-1000, Engineering and Associated Lists Drawings, provided that the data furnished by the Contractor was current, accurate at time of submission, and did not involve a significant omission of data necessary to comply with the requirements; or

(B) To defects the Contractor discovers and gives written notice to the Government before the Government discovers the error.

(4) The provisions of this clause apply anew to that portion of any corrected or replaced technical data furnished to the Government under paragraph (d)(1)(i) of this clause.

(End of clause)

252.246-7002 [Amended]

■ 4. Amend introductory text of section 252.246-7002 by removing “As prescribed in 246.710(4)” and adding “As prescribed in 246.710(2)” in its place.

252.246-7005 [Amended]

■ 5. Amend introductory text of section 252.246-7005 by removing “As prescribed in 246.710(5)(i)(A)” and adding “As prescribed in 246.710(3)(i)(A)” in its place.

252.246-7006 [Amended]

■ 6. Amend introductory text of section 252.246-7006 by removing “As prescribed in 246.710(5)(i)(B)” and adding “As prescribed in 246.710(3)(i)(B)” in its place.

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