

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Parts 228, 242, and 252**

[Docket DARS–2021–0024]

RIN 0750–AL13

Defense Federal Acquisition Regulation Supplement: Ground and Flight Risk (DFARS Case 2020–D027)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to revise the requirements related to the assumption of risk associated with aircraft under DoD contracts. Revisions are required due to numerous changes in aircraft contract situations and the emergence of contracts for small, unmanned aircraft.

DATES: Effective March 22, 2023.

FOR FURTHER INFORMATION CONTACT: David E. Johnson, telephone 202–913–5764.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD published a proposed rule in the *Federal Register* at 86 FR 67892 on November 30, 2021, to revise the DFARS requirements related to the assumption of risk associated with aircraft under DoD contracts. Three respondents submitted public comments in response to the proposed rule.

II. Discussion and Analysis

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments is provided, as follows:

A. Summary of Significant Changes From the Proposed Rule

The final rule includes, in response to the comments, definitions for “aircraft,” “covered aircraft,” “crewmember,” “flight,” and “workmanship error” at DFARS 228.370–1 and modified definitions at DFARS clause 252.228–7001, Ground and Flight Risk, for “covered aircraft,” “flight,” and “workmanship error” A change is made to the clause prescription concerning the exception for commercial derivative aircraft to clarify that the exception does not apply to contracts requiring flights by contractor crewmembers. Paragraph

(d)(7) is removed from clause 252.228–7001, which provided an exclusion for “exposure to unreasonable conditions”.

*B. Analysis of Public Comments***1. Ambiguity in Terminology**

Comment: Several respondents express concern about ambiguity. For example, one respondent states that the new definition of “Covered aircraft” in the proposed rule creates confusion regarding applicability of the Government’s assumption of risk and items associated with the aircraft. One respondent requests maintaining the existing definition. Another respondent suggests that the terms “aircraft” and “flight” be specifically defined for this rule.

Response: DoD partially concurs with the comments. DoD added a definition of “aircraft” and amended the terms “flight” and “covered aircraft” in the final rule. This rule changes the concept of aircraft “in the open” to “covered aircraft” to help clarify that the covered aircraft is under the Government’s assumption of risk. “Covered aircraft” describes those aircraft for which the Government has assumed the risk of loss.

Comment: Another respondent states that including an alternate meaning of the word “commercial” in proposed definitions conflicts with existing definitions in regulations and private-insurance industry terminology, and the terms appear to originate from different titles of the U.S. Code. Similarly, the respondent states that the proposed rule “incorporates terms from Title 49 of the U.S. Code, such as ‘commercial,’ ‘noncommercial purposes,’ and ‘public aircraft’ that are inconsistent and cannot be fully harmonized with the Title 41 terminology.”

Response: DoD does not concur with the comment. The final rule incorporates terms that are defined in the U.S. Code and that are necessary for this rule.

Comment: A respondent states clause 252.228–7001, as amended by this rule, includes a definition of “crewmember” that is too narrow.

Response: DoD does not concur with the comment. The final rule contains the flexibility to modify the definition via the contract Schedule. The definition provided in this final rule simply removes a list of positions included in the definition of “flight crew member” that was never all inclusive and refers to those positions identified in the flight manual.

2. Ambiguity in Clause Prescription

Comment: Several respondents comment on the prescription for clause

252.228–7001. One respondent states that the prescription appears to unnecessarily narrow the scope of the exception at 228.371(b)(1)(iv), relating to work performed by a certified Federal Aviation Administration (FAA) repair station.

Response: DoD partially concurs with the comment. The phrase “maintenance (ground operations only) for” was added at DFARS 228.371(b)(1)(iv) in the proposed rule to convey that flight operations by contractor personnel are not authorized, not to limit the contracts to maintenance only. The language in the final rule has been updated to clarify that it does not apply to contracts requiring flights by contractor crewmembers.

Comment: Another respondent states that the prescription at 228.371(b)(1) for clause 252.228–7001 creates ambiguity because “the acquisition, development and production of aircraft would apply only to the production of new aircraft, while the modification, maintenance, repair, flight, and overhaul would apply to existing Government-owned aircraft.”

Response: DoD does not concur with the comment. This rule applies both to production and to existing Government-owned aircraft.

Comment: Another respondent states that, in the proposed rule, the prescription at 228.371(c) appears ambiguous regarding proper selection of DFARS 252.228–70XX instead of DFARS 252.228–7001.

Response: DoD does not concur with the comment. The new clause is purposefully limited to certain, rather narrow contractual applications, circumstances, or conditions specifically listed. The list is inclusive and applies specifically to the actions described depending on whether the aircraft is new production aircraft or existing aircraft.

3. Unnecessary Language

Comment: A respondent states that the proposed rule includes language at DFARS 228.370–2(d), describing the purpose of clause 252.228–7001, that is “unwarranted” and unnecessary. The respondent suggests deleting this language.

Response: DoD does not concur with the comment. DoD will not delete this language but has revised the language in the final rule to describe the purpose of clause 252.228–7001.

4. Major Rule

Comment: Two respondents state that the rule might meet the definition of a “major” rule, as defined at 5 U.S.C. 804.

Response: This rule is not a major rule as defined in 5 U.S.C. 804, because it lacks elements of a major rule.

5. Preaward Survey of Aircraft

Comment: A respondent states that the proposed rule includes an “ill-defined and impractical” requirement at DFARS 228.370–2(a) for a preaward survey of potential subcontractors performing “any aircraft work.” The respondent suggests deleting the entire paragraph.

Response: DoD does not concur with the comment. This language reflects a long-standing policy that is necessary to assist both the Government and the prime contractor. This rule does not change this long-standing policy, but it does add clarifying language. FAR part 42 contemplates preaward surveys of a contractor’s or subcontractor’s facility at the discretion of the contracting officer. Finally, the preaward survey process only applies to subcontractors working on the aircraft itself, not to suppliers of aircraft parts.

6. Inconsistent With Defense Contract Management Agency (DCMA) Guidance

Comment: A respondent suggests deleting from the rule DFARS 228.370–2(e)(1), stating that the contracting officer shall make a liability determination after damage to Government aircraft has already occurred, because this is both possibly unfair to contractors and inconsistent with DCMA Instruction 8210–1.

Response: DoD does not concur with the comment. The final rule reflects that such determinations will be made under DFARS 228.370–2(g), not the combined instruction. This determination is necessarily made after an incident but also takes into account the exclusions listed at 252.228–7001(d).

7. Compliance With the Combined Regulation/Instruction

Comment: A respondent states that in accordance with clause 252.228–7001(b), compliance with the combined regulation/instruction is required from the time of contract award throughout the period of performance of the contract, regardless of the Government’s assumption of risk under the contract and is contradictory to requirements for creation and approval of the procedures, which require assignment of a Government flight representative (GFR) and subsequent approval.

Response: DoD does not concur with the comment. The applicability of the Combined Instruction accrues at time of award of the contract, and the contractor is bound by contract terms, which include the Combined Instruction

throughout contract performance. Coverage under the Combined Instruction is not triggered by assignment of a GFR or the Government’s assumption of the risk of loss. Any claim for Government-caused delay would be addressed separately.

8. Treatment of Government-Furnished Property

Comment: A respondent states that the “carve out” at clause 252.228–7001(d)(3) of Government-furnished property from coverage under the clause creates an “undue burden” on contractors.

Response: DoD does not concur with the comment. If the contract anticipates transportation by common carrier, and the aircraft leaves the contractor’s facility, then the risk of loss may be determined under other applicable terms and conditions of the contract.

9. Allowability of Costs for Insurance Costs and Premiums

Comment: A respondent states that while FAR part 31 addresses cost principles, clause 252.228–7001(d)(4) nonetheless addresses allowability of costs for insurance costs and premiums.

Response: DoD does not concur with the comment. Clause 252.228–7001(d)(4) relates to insurance generally, and it is an exclusion to coverage. Clause 252.228–7001(f) specifically makes the cost of insurance premiums for the aircraft expressly unallowable.

10. Exclusion for Exposure to Unreasonable Conditions

Comment: A respondent states that language at clause 252.228–7001(d)(7), which provides an exclusion for “exposure to unreasonable conditions,” is unjustified.

Response: DoD concurs with the comment. DoD removed the exclusion at 252.228–7001(d)(7) from the final rule. However, DFARS 228.370–2(h) describes factors for the contracting officer to consider in determining whether the contractor has failed to comply with the Combined Instruction, including exposure of covered aircraft to unreasonable conditions, which may result in revocation of the Government’s assumption of the risk of loss.

11. Use the Fifteen-Day “Cure Period”

Comment: A respondent states that the “cure period” reflected in clause 252.228–7001(e)(1) should specify a particular timeframe, and it suggests retaining the fifteen-day “cure period.”

Response: DoD partially concurs with the comment. The rule was revised to include the term “preliminary notice of

revocation,” which allows the contracting officer flexibility in specifying an appropriate time period. As a result, the contractor has the opportunity to respond to the preliminary notice by proposing a timeline for resolution or suggesting a solution. If the contracting officer finds that the contractor has failed to address the conditions, then the contracting officer may issue a formal notice of revocation. This is intended to afford the contractor sufficient time to take corrective action.

12. Request for Equitable Adjustment

Comment: A respondent objects to language in the proposed rule stating that the contractor may submit a request for equitable adjustment to the contracting officer, noting such language departs from existing language that a request for equitable adjustment shall be made in connection with clause 252.228–7001.

Response: DoD concurs with the comment. DoD revised the final rule accordingly.

13. Increase to Contractor’s Share of Loss

Comment: A respondent states that the proposed doubling of the contractor’s share of loss from \$100,000 to \$200,000, reflected at clause 252.228–7001(h), lacks a meaningful basis and represents an excessive transfer of risk to the contractor.

Response: DoD does not concur with the comment. The cost-share increase is not intended to track inflation; rather, this is a policy decision based on risk of loss and cost sharing and is determined by the Government as a fair and reasonable cost-share arrangement.

14. Flowdown Requirement

Comment: A respondent states that the requirement at clause 252.228–7001(k) to flow down this clause to commercial subcontractors is both inconsistent with acquisition policy and practically unworkable.

Response: DoD does not concur with the comment. The intent of the rule is to apply the clause at 252.228–7001 to all contract levels. However, there are exceptions provided in paragraph (k) of the clause. These exceptions did not exist prior to this rule. Therefore, this rule actually narrows the flowdown requirement.

C. Other Changes

This rule includes minor changes not associated with public comments. First, this rule adds a reference to PGI 228.370–2(e) at 228.370–2. Second, this rule adds the term “incorrectly

performed skill-based” to the definition of workmanship error and reorganizes the definition of “covered aircraft” for ease of reading at 228.370–1 and 252.228–7001(a). In addition, guidance to contracting officers, concerning contracting officer determinations of liability and exclusions from the Government’s assumption of risk located in the DFARS clause 252.228–7001 clause, is extrapolated from the clause and also included in the text at 228.370–2(g) along with other similar procedural subject matter. The text at 228.370–2(h), Notice of revocation of the Government’s assumption of risk, and DFARS clause 252.228–7001, paragraph (e), address the issuance of a preliminary notice of revocation. Paragraph (a) is added to 228.370–2 to provide a cross reference to procedures on assigning a Government flight representative. At DFARS 228.371, the clause prescription in paragraph (b)(2) included several factors for contracting officers to consider when using the clause at 252.228–7001 under certain circumstances. These factors have been relocated in new section 228.370–3, because they were not part of the actual clause prescription. Also at DFARS 228.371, the prescription for 252.228–7007, Public Aircraft and State Aircraft Operations—Liability, is moved to the end of the section.

In the clause at 252.228–7001, the definitions in paragraph (a) are arranged in alphabetical order. References to “commercial items” are replaced with “commercial products and commercial services” or “commercial products or commercial services” as appropriate for the context.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products, Including Commercially Available Off-the-Shelf (COTS) Items, and for Commercial Services

This rule creates a new clause: DFARS 252.228–7007, Public Aircraft and State Aircraft Operations—Liability. The clause DFARS 252.228–7007 is prescribed for use in solicitations and contracts that do not include the clause at 252.228–7001 but involve public aircraft operations or state aircraft operations. This rule also revises the clause at DFARS 252.228–7001, Ground and Flight Risk. DoD intends to apply both clauses to contracts at or below the simplified acquisition threshold. Application to contracts at or below the SAT will prevent contractors who have contracts valued below \$200,000 from being liable for the entirety of the loss or damages. This burden on these smaller purchases is not commensurate

with those of the larger dollar value contracts and, therefore, discourages the contractors with lower value contracts from working with the Government.

DoD does not intend to apply either clause to prime contracts for commercial services or commercial products, including commercially available off-the-shelf items, per DFARS 228.371. However, DFARS clause 252.228–7001 will apply to subcontracts for commercial products and commercial services, with an exception for work subcontracted to a Federal Aviation Administration (FAA) part 145 repair station performing work pursuant to their FAA license. DFARS clause 252.228–7001 provides for self-insurance to avoid reliance on commercial insurance for military aircraft. Application of DFARS 252.228–7001 to subcontracts, including those for commercial products and commercial services, provides a mechanism to require subcontractor compliance with the combined regulation/instruction, which provide the terms and conditions for the Government’s self-insurance.

IV. Expected Impact of the Rule

This rule is not expected to have a significant impact on the Government or industry. The rule updates and expands procedures and guidelines on use of DFARS clause 252.228–7001. The change in the calculation of the contractor’s share of loss is viewed as a positive incentive in reducing the magnitude of the risk of loss for contractors. Although the dollar amount for contractor liability is increased from \$100,000 to \$200,000 in this rule, the addition of reasonable alternatives that recognize the low cost of aircraft, such as drones, will mean that a contractor’s share of loss may be much lower. The rule also provides a new clause 252.228–7007, Public Aircraft and State Aircraft Operations—Liability, to use when conditions for use of 252.228–7001 are not met, but the acquisition involves public aircraft operations or state aircraft operations. It is expected that contract clause 252.228–7007 will be used very infrequently, fewer than 10 times annually.

V. 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.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801–808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs has determined that this rule is not a major rule as defined by 5 U.S.C. 804.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The FRFA is summarized as follows:

DoD is amending the Defense Federal Acquisition Regulation Supplement (DFARS) to update the ground and flight risk policy and associated clause at DFARS 252.228–7001. The language is outdated and needs revision to clarify applicability to numerous changes in aircraft contract situations and emergence of contracts for small, unmanned aircraft.

DoD received no comments in response to the initial regulatory flexibility analysis.

The rule will apply to all small entities that will be awarded contracts for the acquisition, development, production, modification, maintenance, repair, flight, or overhaul of aircraft. According to data from the Federal Procurement Data System for fiscal years 2017 through 2019, DoD made approximately 6,287 awards per year on average for these types of acquisitions for a total of 18,861 awards. Approximately 7,757 of these awards were made to 2,185 unique small businesses.

This rule does not include any new reporting, recordkeeping, or other compliance requirements for small entities.

There are no known, significant, alternative approaches that would accomplish the objectives of the rule.

VIII. Paperwork Reduction Act

This 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 228, 242, and 252

Government procurement.

Jennifer D. Johnson,

Editor/Publisher, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 228, 242, and 252 are amended as follows:

■ 1. The authority citation for 48 CFR parts 228, 242, and 252 continues to read as follows:

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

PART 228—BONDS AND INSURANCE

228.370 [Redesignated as 228.371]

■ 2. Redesignate section 228.370 as section 228.371.

■ 3. Add new section 228.370 and sections 228.370–1, 228.370–2, and 228.370–3 to read as follows:

228.370 Ground and flight risk.

228.370–1 Definitions.

As used in this section—

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

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

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

- (1) All, or substantially all, of the contractor's business;
- (2) All, or substantially all, of the contractor's operation at any one plant or separate location; or
- (3) A separate and complete major industrial operation.

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

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

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

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

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

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

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

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

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

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

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

(2) An aircraft owned by the Government and operated by any person

for purposes related to crew training, equipment development, or demonstration, except as provided in paragraph (7) of this definition.

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

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

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

(i) Is within the United States territorial airspace;

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

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

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

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

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

State aircraft means an aircraft operated by the Government for sovereign, noncommercial purposes such as military, customs, and police services. Military aircraft are afforded status as state aircraft. In very rare circumstances, DoD-contracted aircraft may be designated, in writing, by a

responsible Government official pursuant to DoD Directive 4500.54E, DoD Foreign Clearance Program, to be operated in state aircraft status, and States may choose to treat them as deemed state aircraft when they are operating under a Government contract.

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

228.370–2 General.

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

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

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

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

exception in this paragraph (d) underlies the military service certificate.

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

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

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

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

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

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

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

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

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

(iv) Is covered by insurance;

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

(vi) Is sustained due to workmanship errors.

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

(1) *Preliminary notice of revocation.*

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

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

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

(C) Systemic failure to comply with approved procedures.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(i) Replaced;

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

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

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

(i) Repaired; or

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

(5) The contracting officer shall make an equitable adjustment for

expenditures made in performing the obligations under paragraph (h) of the clause at 252.228–7001.

(j) *Contracting officer determination of the contractor’s share of loss.* (1) The contractor’s share of loss or damage to covered aircraft, except for loss or damage caused by negligence of Government personnel, is the least of—

(i) \$200,000;

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

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

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

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

(i) \$200,000;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

■ 4. Amend newly redesignated section 228.371 by revising paragraph (b) and adding paragraph (f) to read as follows:

228.371 Additional clauses.

* * * * *

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

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

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

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

(iii) For which a non-DoD customer (including an FMS customer per 225.7305) has decided to allow the use of commercial insurance or other self-insurance;

(iv) For commercial derivative aircraft with an FAA certificate of airworthiness maintained to FAA standards.

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

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

(vi) Under which the aircraft are classified as Group 1 or 2 unmanned aircraft systems per DoD Instruction (DoDI) 6055.07, Mishap Notification, Investigation, Reporting, and Record

Keeping, and the purchase price of the air vehicle, including installed Government-furnished equipment, is below the cost threshold for a Class C mishap per DoDI 6055.07; or

(2) Involving aircraft not owned by or to be delivered to the Government, only if the contracting officer decides that it is in the best interest of the Government. See 228.371-3.

* * * * *

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

PART 242—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 5. Amend section 242.302 by adding paragraph (a)(56) to read as follows:

242.302 Contract administration functions.

(a) * * *

(56) Within DoD, maintaining surveillance of aircraft flight and ground operations is accomplished by incorporating into the contract, task order, or delivery order the requirements of the applicable version of the combined regulation/instruction entitled “Contractor’s Flight and Ground Operations” (Air Force Instruction 10-220, Army Regulation 95-20, Naval Air Systems Command (NAVAIR) Instruction 3710.1 (Series), Coast Guard Instruction M13020.3 (Series), and Defense Contract Management Agency Instruction 8210-1 (Series)). See PGI 242.302(a)(56).

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 6. Amend section 252.228-7000—
■ a. By revising the section heading; and
■ b. In the introductory text by removing “228.370(a)” and adding “228.371(a)” in its place.

The revision reads as follows:

252.228-7000 Reimbursement for War-Hazard Losses.

* * * * *

■ 7. Revise section 252.228-7001 to read as follows:

252.228-7001 Ground and Flight Risk.

As prescribed in 228.371(b), use the following clause:

Ground and Flight Risk (Mar 2023)

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

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

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

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

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

(3) A separate and complete major industrial operation.

Contractor’s premises means those premises, including subcontractors’ premises, designated in the Schedule or in writing by the Contracting Officer, and any other place the aircraft is moved for safeguarding.

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

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

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

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

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

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

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

Crewmember means, unless otherwise provided in the Schedule, personnel required in the flight manual, assigned for the purpose of conducting any flight on behalf of the Contractor. It also includes any operator of an unmanned aerial vehicle.

Flight means any flight approved in writing by the Government flight representative, to include taxi test made in the performance of

this contract, or flight for the purpose of safeguarding the aircraft. All aircraft off the Contractor’s premises shall be considered to be in flight when on the ground or water for reasonable periods of time following emergency landings, landings made in performance of the contract, or landings approved in writing by the contracting officer.

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

(b) *Combined regulation/instruction.* The Contractor shall be bound by the operating procedures contained in the combined regulation/instruction entitled “Contractor’s Flight and Ground Operations” (Air Force Instruction 10-220, Army Regulation 95-20, NAVAIR Instruction 3710.1 (Series), Coast Guard Instruction M13020.3 (Series), and Defense Contract Management Agency Instruction 8210-1 (Series) in effect on the date of contract award. Compliance with the combined regulation/instruction is required from the time of contract award throughout the period of performance of the contract, regardless of the Government’s assumption of risk under the contract.

(c) *Government as self-insurer.* The Government self-insures and assumes the risk of damage to, or loss or destruction of, covered aircraft subject to the following conditions:

(1) The Contractor’s liability to the Government for damage, loss, or destruction of covered aircraft is limited to the Contractor’s share of loss as defined at paragraph (h) of this clause, except when one of the exclusions at paragraph (d) applies.

(2) The liability provisions of this clause take precedence over the liability provisions of Federal Acquisition Regulation (FAR) clause 52.245-1, Government Property, with respect to covered aircraft.

(3) The Contractor is not liable for loss, damage, or destruction of covered aircraft as the result of normal wear and tear, or intentional damage or destruction as required in the Schedule.

(4) Conditions for Government assumption of risk in flight are as follows:

(i) The Contractor’s crewmembers are approved in writing by the Government flight representative (GFR).

(ii) The flight is approved in writing by the GFR.

(d) *Exclusions from the Government’s assumption of risk.* The Government’s assumption of risk under this clause shall not extend to damage, loss, or destruction of covered aircraft which—

(1) Is the result of willful misconduct or lack of good faith on the part of the Contractor’s managerial personnel, including the Contractor’s oversight of subcontractors;

(2) Is sustained during flight if either the flight or the crewmembers have not been approved in advance and in writing by the GFR, who has been authorized in accordance with the combined regulation/instruction entitled “Contractor’s Flight and Ground Operations”;

(3) Occurs in the course of transportation by rail, or by conveyance on public streets,

highways, or waterways, unless the transportation is limited to the vicinity of the Contractor's premises, and incidental to work performed under the contract as described in the Schedule;

(4) Is covered by insurance;

(5) Occurs after the Contracting Officer has, in writing, revoked the Government's assumption of risk in accordance with paragraph (e)(3) of this clause; or

(6) Is sustained due to workmanship errors.

(e) *Revoking the Government's assumption of risk.*

(1) The Contracting Officer, when finding that the Contractor's managerial personnel have failed to comply with paragraph (b) of this clause, will issue a preliminary notice of revocation requiring the Contractor to comply with contract requirements within a timeframe specified by the Contracting Officer. In determining exposure to unreasonable conditions, the Contracting Officer will consider factors including, but not limited to, the following: lack of adequate hangar fire suppression or firefighting vehicles, failure to provide adequate procedures to the GFR, or systemic failure to comply with approved procedures.

(2) Upon receipt of the preliminary notice of revocation, the Contractor shall promptly correct the noncompliance or cited conditions, regardless of whether there is agreement that the conditions are unreasonable.

(3) If the Contracting Officer finds that the Contractor failed to correct the cited noncompliance or conditions within the specified timeframe, the Contracting Officer will issue a notice of revocation of the Government's assumption of risk for any covered aircraft.

(4) If the Contracting Officer issues a notice of revocation pursuant to the terms of this clause—

(i) The Contractor shall thereafter assume the entire risk for damage, loss, or destruction of the previously covered aircraft;

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

(iii) The liability provisions of the clause at FAR 52.245-1, Government Property, are not applicable to the aircraft impacted by the notice of revocation.

(5) The Contractor shall promptly notify the Contracting Officer when the noncompliance or cited conditions have been corrected. Within 3 days of receipt of the Contractor's notice of correction, the Contracting Officer will notify the Contractor whether the Government will resume risk of loss. The Contracting Officer will determine that the noncompliance or cited conditions have been corrected prior to resuming assumption of risk.

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

(7) Any disputes regarding the Contracting Officer's notice of revocation shall be subject to FAR clause 52.233-1, Disputes.

(f) *Contractor's exclusion of insurance costs.* The Contractor warrants that the contract price does not and will not include, except as may be authorized in this clause, any charge or contingency reserve for insurance (including the Contractor's share of loss) covering damage, loss, or destruction of covered aircraft when the risk has been assumed by the Government, even if the assumption may be terminated for covered aircraft.

(g) *Procedures in the event of damage, loss, or destruction.*

(1) In the event of damage, loss, or destruction of covered aircraft, the Contractor shall take all reasonable steps to protect the aircraft from further damage, to separate damaged and undamaged aircraft, and to put all aircraft in the best possible order. Except in cases covered by paragraph (h)(2) of this clause, the Contractor shall furnish to the Contracting Officer a statement of—

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

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

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

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

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

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

(i) Replaced;

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

(iii) Considered beyond economic repair.

The Contracting Officer will decide whether further actions are required under the contract.

(4) If a covered aircraft that has been furnished by the Government to the Contractor is damaged, lost, or destroyed while covered, the Contractor shall take action in accordance with the Contracting Officer's written direction that the aircraft shall be—

(i) Repaired; or

(ii) Considered beyond economic repair.

The Contracting Officer will decide further actions required under the contract.

(5) The Contracting Officer will make an equitable adjustment for expenditures made in performing the obligations under this paragraph (g).

(h) *Contractor's share of loss.*

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

(i) \$200,000;

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

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

(2) If the Government requires covered aircraft be replaced or repaired by the

Contractor, any resulting equitable adjustment shall not include reimbursement of the Contractor's share of loss.

(3) In the event the Government does not decide to replace or repair, the Contractor agrees to credit the contract price or pay the Government, as directed by the Contracting Officer, the least of—

(i) \$200,000;

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

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

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

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

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

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

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

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

(i) *Reimbursement from a third party.* In the event the Contractor is reimbursed or compensated by a third party for damage, loss, or destruction of covered aircraft and has also been compensated by the Government, the Contractor shall equitably reimburse the Government. The Contractor shall do nothing to prejudice the Government's right to recover against third parties for damage, loss, or destruction. Upon the request of the Contracting Officer or authorized representative, the Contractor shall at Government expense furnish to the Government all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment or subrogation) in obtaining recovery.

(j) *Liability to third parties.* Unless the flight and crewmembers have been approved in writing by the GFR, the Contractor shall not be reimbursed for liability to third parties for loss or damage to property or for death or bodily injury caused by covered aircraft during flight, even if the Government has accepted such liability under any other provisions of the contract.

(k) *Subcontracts.* The Contractor shall incorporate the requirements of this clause, including this paragraph (k), in subcontracts to include subcontracts for commercial products and commercial services, except—

(1) The Contractor shall not include paragraph (f) of this clause in subcontracts for commercial products or commercial services; and

(2) The Contractor shall not incorporate the requirements of this clause in subcontracts with Federal Aviation Administration (FAA) part 145 repair stations performing work pursuant to their FAA license.

(End of clause)

■ 8. Amend section 252.228-7003—

■ a. By revising the section heading; and

■ b. In the introductory text by removing "228.370(c)" and adding "228.371(c)" in its place.

The revision reads as follows:

252.228-7003 Capture and Detention.

* * * * *

- 9. Amend section 252.228-7005—
- a. By revising the section heading; and
- b. In the introductory text by removing “228.370(d)” and adding “228.371(d)” in its place.

The revision reads as follows:

252.228-7005 Mishap Reporting and Investigation Involving Aircraft, Missiles, and Space Launch Vehicles.

* * * * *

- 10. Amend section 252.228-7006—
- a. By revising the section heading; and
- b. In the introductory text by removing “228.370(e)” and adding “228.371(e)” in its place.

The revision reads as follows:

252.228-7006 Compliance with Spanish Laws and Insurance.

* * * * *

- 11. Add section 252.228-7007 to read as follows:

252.228-7007 Public Aircraft and State Aircraft Operations—Liability.

As prescribed in 228.371(f), use the following clause:

Public Aircraft and State Aircraft Operations—Liability (Mar 2023)

(a) *Definitions.* As used in this clause—
Civil aircraft means an aircraft other than a public aircraft or state aircraft.

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

- (1) An aircraft used only for the Government, except as provided in paragraphs (5) and (7) of this definition.
- (2) An aircraft owned by the Government and operated by any person for purposes related to crew training, equipment development, or demonstration, except as provided in paragraph (7) of this definition.
- (3) An aircraft owned and operated by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in paragraph (7) of this definition.
- (4) An aircraft exclusively leased for at least 90 continuous days by the government of a State, the District of Columbia, or a territory or possession of the United States or a political subdivision of one of these governments, except as provided in paragraph (7) of this definition.

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

- (i) Is within the United States territorial airspace;

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

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

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

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

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

State aircraft means an aircraft operated by the Government for sovereign, noncommercial purposes such as military, customs, and police services. Military aircraft are afforded status as state aircraft. In very rare circumstances, DoD-contracted aircraft may be designated, in writing, by a responsible Government official pursuant to DoD Directive 4500.54E, DoD Foreign Clearance Program, to be operated in state aircraft status, and such status cannot be deemed without a written designation by an authorized Government official.

(b) *Combined regulation/instruction.* Upon award, for contract performance to be conducted as a public aircraft operation, the Contractor shall be bound by the operating procedures contained in the combined regulation/instruction entitled “Contractor’s Flight and Ground Operations” (Air Force Instruction 10-220, Army Regulation 95-20, NAVAIR Instruction 3710.1 (Series), Coast Guard Instruction M13020.3 (Series), and Defense Contract Management Agency Instruction 8210-1 (Series)) in effect on the date of contract award.

(c) *Contractor liability for operations for contract performance conducted as public aircraft operations or state aircraft operations.*

(1) The Contractor assumes responsibility for all damage or injury to persons or property, including the Contractor’s employees and property, and Government personnel and property, occasioned through the use, maintenance, and operation of the Contractor’s aircraft or other equipment by, or the action of, the Contractor or the Contractor’s employees and agents.

(2) The Contractor, at the Contractor’s expense, shall maintain adequate public liability and property damage insurance, including hull insurance for the Contractor’s aircraft, during the duration of this contract, insuring the Contractor against all claims for injury or damage.

(3) The Contractor shall maintain workers’ compensation and other legally required

insurance with respect to the Contractor’s own employees and agents.

(4) The Government will in no event be liable or responsible for damage or injury to any person or property occasioned through the use, maintenance, or operation of any aircraft or other equipment by, or the action of, the Contractor or the Contractor’s employees and agents in performing under this contract, and the Government shall be indemnified and saved harmless against claims for damage or injury in such cases.

(End of clause)

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Part 242

[Docket DARS-2023-0007]

RIN 0750-AL69

Defense Federal Acquisition Regulation Supplement: Contract Administration Office Functions Relating to Direct Costs (DFARS Case 2022-D021)

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

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify when a contract administration office has authority to negotiate and settle direct costs questioned in incurred cost audits.

DATES: Effective March 22, 2023.

FOR FURTHER INFORMATION CONTACT: David E. Johnson, telephone 202-913-5764.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is issuing a final rule to amend the DFARS by adding to section 242.302(b) an additional contract administrative function delegable from a procuring contracting office to a contract administration office. DFARS 242.302(b) specifies functions performed by the contract administration office “only when and to the extent specifically authorized” by the procuring contracting office, as stated in Federal Acquisition Regulation (FAR) 42.302. Any administrative functions unspecified under FAR 42.302 or DFARS 242.302, and not otherwise delegated, remain the responsibility of the procuring contracting office. This