

**DEPARTMENT OF EDUCATION****48 CFR Chapter 34****[Docket ID ED–2023–OFO–0002]****RIN 1890–AA20****Department of Education Acquisition Regulation****AGENCY:** Office of Finance and Operations, Department of Education.**ACTION:** Final regulations.

**SUMMARY:** The Secretary modifies the Department of Education Acquisition Regulation (EDAR) to revise aspects of those regulations that are out-of-date or redundant with other U.S. Department of Education (Department) policies and procedures and to accurately implement the current Federal Acquisition Regulation (FAR) and Department policies.

**DATES:** These regulations are effective October 1, 2023.

**FOR FURTHER INFORMATION CONTACT:**

April Bolton-Smith, U.S. Department of Education, 400 Maryland Avenue SW, Room 2C277, Washington, DC 20202–4331. Telephone: (202) 453–6317. Email: [April.Bolton-Smith@ed.gov](mailto:April.Bolton-Smith@ed.gov).

If you are deaf, hard of hearing, or have a speech disability and wish to access telecommunications relay services, please dial 7–1–1.

**SUPPLEMENTARY INFORMATION:** On February 16, 2023, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register** (88 FR 10218) to modify the EDAR. In the preamble to the NPRM, on pages 10218 through 10224, the Secretary discussed how the proposed regulations would update and revise aspects of the EDAR regulations that are out-of-date or redundant with other U.S. Department of Education (Department) policies and procedures and would accurately implement the current Federal Acquisition Regulation (FAR) and Department policies.

**Public Comment:** In response to the Secretary's invitation in the NPRM, the Department did not receive any comments within the scope of the rule; however, as a result of our further review of the proposed regulations since publication of the NPRM, we have made changes as follows. Generally, we do not address technical and other minor changes.

**Analysis of Comments and Changes**

*Comment:* None.

*Discussion:* The NPRM proposed that, under section 3416.505, the Deputy Director of Contracts and Acquisition Management (CAM) would serve as the

agency head designee for purposes of FAR 16.505(b)(8). In further reviewing section 3416.505, the Department decided that, because there are two contracting activities at the Department (CAM and Federal Student Aid Acquisitions), it would not be appropriate to designate only one of them for this purpose.

*Changes:* As a result of our further review, we have updated section 3416.505 to indicate that the task order and delivery-order contract ombudsman is the competition advocate within each of the two contracting activities.

*Comment:* None.

*Discussion:* The NPRM proposed that the Senior Procurement Executive be the agency head for purposes of FAR 17.104(b). Upon further review, the Department decided that, to provide each contracting activity with the flexibility to modify multi-year contract requirements to fit its unique needs, the appropriate official for making determinations under FAR 17.104(b) should be the Head of the Contracting Activity (HCA), not the Senior Procurement Executive.

*Changes:* As a result of our further review, we have revised section 3417.104 to identify the HCA as the agency head for purposes of FAR 17.104(b).

*Comment:* None.

*Discussion:* Upon further review of proposed sections 3404.710, 3417.207, and 3452.204–70, the Department decided that the contractor, not the requiring activity, would be best positioned to initially identify the types of Federal records that it would receive, create, work with, or otherwise handle during the course of contract performance, because the contractor would know what records it would plan to receive, create, work with, or otherwise handle as part of its proposal. Given the importance of knowing what records the contractor will receive, create, and work with during the course of contract performance, the Department determined that this information is needed as close to start of contract performance as possible, and that the requiring activity must still ensure the accuracy and completeness of the records inventory and, if necessary, make unilateral changes to ensure that all records are identified and captured by the records inventory.

*Changes:* As a result of our further review, the Department has revised section 3404.710 to remove paragraph (a), which required the contracting officer to obtain a records inventory from the requiring activity. The Department also removed paragraph (c) of section 3417.207, which prohibited a

contracting officer from exercising an option until receiving a current records inventory from the requiring activity. Finally, the Department revised part C.4.(a)–(c) of the records management contract clause in section 3452.204–70. These revisions reflect that the contractor is required to provide the records inventory as a contract deliverable 60 business days after award, and the Department will accept or reject the records inventory within 60 business days after receipt. Additionally, the contractor must provide a revised records inventory to the Department within 5 business days after receiving, creating, or maintaining a record series or system that is not currently included in the inventory. The Department will have 60 business days to accept or reject the revised the records inventory. Finally, the revisions permit the Department to review and update the records inventory as needed and to provide a revised inventory to the contractor.

*Comment:* None.

*Discussion:* The NPRM proposed in section 3452.239–71 that the contractor “at all times, maintain compliance with the most current version of the Department security requirements” set forth in a separate document titled “Department Information Security and Privacy Requirements.” Upon further review of this section, the Department decided to include a notice requirement to ensure that a contractor is aware of changes to the security requirements. Additionally, because changes in requirements could impact costs and schedules, the Department decided to include a formal process with timelines for a contractor to request an equitable adjustment to the contract price or delivery schedule.

*Changes:* As a result of our further review, the Department has revised section 3452.239–71 to include a requirement that the Department notify the contractor when the “Department Information Security and Privacy Requirements” document has been updated. Additionally, the Department revised section 3452.239–71 to require the contractor to submit a request for an equitable adjustment to the contract price or delivery schedule within 30 days from the date of receiving notice of the change to the “Department Information Security and Privacy Requirements” document, if any such change causes a material increase or decrease in the cost of, or the time required for, performance of any part of the work under a contract.

**Executive Orders 12866, 13563, and 14094****Regulatory Impact Analysis**

Under Executive Order 12866, the Secretary must determine whether this regulatory action is “significant” and, therefore, subject to the requirements of the Executive order and subject to review by the Office of Management and Budget (OMB). Section 3(f) of Executive Order 12866, as amended by Executive Order 14094, defines a “significant regulatory action” as an action likely to result in a rule that may—

(1) Have an annual effect on the economy of \$200 million or more (adjusted every 3 years by the Administrator of Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product); or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impacts of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles stated in the Executive Order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

This final regulatory action is not a significant regulatory action subject to review by OMB under section 3(f) of Executive Order 12866 (as amended by Executive Order 14094).

We have also reviewed these regulations under Executive Order 13563, which supplements and explicitly reaffirms the principles, structures, and definitions governing regulatory review established in Executive Order 12866. To the extent permitted by law, Executive Order 13563 requires that an agency—

(1) Propose or adopt regulations only on a reasoned determination that their benefits justify their costs (recognizing that some benefits and costs are difficult to quantify);

(2) Tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives and taking into account—among other things and to the extent practicable—the costs of cumulative regulations;

(3) In choosing among alternative regulatory approaches, select those approaches that maximize net benefits

(including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity);

(4) To the extent feasible, specify performance objectives, rather than the behavior or manner of compliance a regulated entity must adopt; and

(5) Identify and assess available alternatives to direct regulation, including economic incentives—such as user fees or marketable permits—to encourage the desired behavior, or provide information that enables the public to make choices.

Executive Order 13563 also requires an agency “to use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible.” The Office of Information and Regulatory Affairs of OMB has emphasized that these techniques may include “identifying changing future compliance costs that might result from technological innovation or anticipated behavioral changes.”

We issue these final regulations only on a reasoned determination that their benefits justify their costs. In choosing among alternative regulatory approaches, we selected those approaches that maximize net benefits. Based on an analysis of anticipated costs and benefits, we believe that these final regulations are consistent with the principles in Executive Order 13563.

We also have determined that this regulatory action does not unduly interfere with State, local, territorial, and Tribal governments in the exercise of their governmental functions.

In accordance with these Executive orders, the Department has assessed the potential costs and benefits, both quantitative and qualitative, of this regulatory action. The potential costs associated with this regulatory action are those resulting from statutory requirements and those we have determined as necessary for administering the Department’s programs and activities.

**Regulatory Flexibility Act Certification**

Under the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*, as amended by the Small Business Regulatory Flexibility Act of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effect of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions), unless the agency certifies that the rule will not have a significant economic

impact on a substantial number of small entities. The Regulatory Flexibility Act requires Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant impact on a substantial number of small entities. Pursuant to the Regulatory Flexibility Act, the Secretary certifies that this rule will not have a significant economic impact on a substantial number of small entities.

The rule updates the EDAR; it does not directly regulate any small entities. As a result, a regulatory flexibility analysis is not required.

**Paperwork Reduction Act of 1995**

These regulations do not contain any information collection requirements.

**Intergovernmental Review**

The EDAR is not subject to Executive Order 12372 and the regulations in 34 CFR part 79.

**Assessment of Educational Impact**

Based on the response to the NPRM and on our review, we have determined that these final regulations do not require transmission of information that any other agency or authority of the United States gathers or makes available.

**Accessible Format:** On request to the program contact person listed under **FOR FURTHER INFORMATION CONTACT**, individuals with disabilities can obtain this document in an accessible format. The Department will provide the requestor with an accessible format that may include Rich Text Format (RTF) or text format (txt), a thumb drive, an MP3 file, braille, large print, audiotape, or compact disc, or other accessible format.

**Electronic Access to This Document:** The official version of this document is the document published in the **Federal Register**. You may access the official edition of the **Federal Register** and the Code of Federal Regulations at [www.govinfo.gov](http://www.govinfo.gov). At this site, you can view this document, as well as all other documents of the Department published in the **Federal Register**, in text or PDF. To use PDF, you must have Adobe Acrobat Reader, which is available free at the site.

You may also access documents of the Department published in the **Federal Register** by using the article search feature at [www.federalregister.gov](http://www.federalregister.gov). Specifically, through the advanced search feature at this site, you can limit your search to documents published by the Department.

**List of Subjects**

48 CFR Parts 3401, 3402, 3404, 3405, 3406, 3407, 3408, 3409, 3412, 3413, 3414, 3415, 3416, 3417, 3422, 3424, 3425, 3427, 3428, 3430, 3431, 3437, 3439, 3445, 3447, and 3452

Government procurement.

48 CFR Part 3403

Antitrust, Conflict of interest, Government procurement.

48 CFR Part 3419

Government procurement, Small businesses.

48 CFR Parts 3432, 3442, and 3443

Accounting, Government procurement.

48 CFR Part 3433

Administrative practice and procedure, Government procurement.

Dated: August 3, 2023.

Miguel A. Cardona,  
Secretary of Education.

■ For the reasons discussed in the preamble, the Secretary amends title 48 of the Code of Federal Regulations by revising chapter 34 to read as follows:

**CHAPTER 34—DEPARTMENT OF EDUCATION ACQUISITION REGULATION**

**SUBCHAPTER A—GENERAL**

PART 3401 ED ACQUISITION REGULATION SYSTEM  
PART 3402 DEFINITIONS OF WORDS AND TERMS  
PART 3403 IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST  
PART 3404 ADMINISTRATIVE AND INFORMATION MATTERS

**SUBCHAPTER B—ACQUISITION PLANNING**

PART 3405 PUBLICIZING CONTRACT ACTIONS  
PART 3406 COMPETITION REQUIREMENTS  
PART 3407 ACQUISITION PLANNING  
PART 3408 REQUIRED SOURCES OF SUPPLIES AND SERVICES.  
PART 3409 CONTRACTOR QUALIFICATIONS  
PART 3412 ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES

**SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES**

PART 3413 SIMPLIFIED ACQUISITION PROCEDURES  
PART 3414 SEALED BIDDING  
PART 3415 CONTRACTING BY NEGOTIATION  
PART 3416 TYPES OF CONTRACTS  
PART 3417 SPECIAL CONTRACTING METHODS

**SUBCHAPTER D—SOCIOECONOMIC PROGRAMS**

PART 3419 SMALL BUSINESS PROGRAMS  
PART 3422 APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS  
PART 3424 PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION.  
PART 3425 FOREIGN ACQUISITION

**SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS**

PART 3427 PATENTS, DATA, AND COPYRIGHTS  
PART 3428 BONDS AND INSURANCE  
PART 3430 COST ACCOUNTING STANDARDS ADMINISTRATION  
PART 3431 CONTRACT COST PRINCIPLES AND PROCEDURES  
PART 3432 CONTRACT FINANCING  
PART 3433 PROTESTS, DISPUTES, AND APPEALS

**SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING**

PART 3437 SERVICE CONTRACTING  
PART 3439 ACQUISITION OF INFORMATION TECHNOLOGY

**SUBCHAPTER G—CONTRACT MANAGEMENT**

PART 3442 CONTRACT ADMINISTRATION AND AUDIT SERVICES  
PART 3443 CONTRACT MODIFICATIONS  
PART 3445 GOVERNMENT PROPERTY  
PART 3447 TRANSPORTATION

**SUBCHAPTER H—CLAUSES AND FORMS**  
PART 3452 SOLICITATION PROVISIONS AND CONTRACT CLAUSES

**SUBCHAPTER A—GENERAL**

**PART 3401—ED ACQUISITION REGULATION SYSTEM**

Sec.

3401.000 Scope of part.

**Subpart 3401.1—Purpose, Authority, Issuance**

3401.104 Applicability.

**Subpart 3401.3—Agency Acquisition Regulations**

3401.303 Publication and codification.

**Subpart 3401.4—Deviations**

3401.403 Individual deviations.  
3401.404 Class deviations.

**Subpart 3401.6—Career Development, Contracting Authority, and Responsibilities**

3401.601 General.  
3401.602–3 Ratification of unauthorized commitments.  
3401.604–70 Contract clause.

**Authority:** 5 U.S.C. 301 and 20 U.S.C. 1018a.

**3401.000 Scope of part.**

This part establishes a system of Department of Education (Department) acquisition regulations, referred to as the Education Acquisition Regulation

(EDAR), for the codification and publication of policies and procedures of the Department that implement and supplement the Federal Acquisition Regulation (FAR).

**Subpart 3401.1—Purpose, Authority, Issuance**

**3401.104 Applicability.**

(a) The FAR and the EDAR apply to all Department contracts, as defined in FAR part 2, except where expressly excluded. The EDAR implements or supplements the FAR and incorporates, together with the FAR, Department policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process or otherwise control the relationship between the Agency, including its sub-organizations, and contractors or prospective contractors.

(b) The statute at 20 U.S.C. 1018a provides the Performance-Based Organization (PBO) with procurement authority and flexibility associated with sections (a) through (l) of the statute.

**Subpart 3401.3—Agency Acquisition Regulations**

**3401.303 Publication and codification.**

(a) The EDAR is issued as chapter 34 of title 48 of the CFR.

(1) The FAR numbering illustrations at FAR 1.105–2 apply to the EDAR.

(2) The EDAR numbering system corresponds with the FAR numbering system. An EDAR citation will include the prefix “34” prior to its corresponding FAR part citation; *e.g.*, FAR 25.108–2 would have corresponding EDAR text numbered as EDAR 3425.108–2.

(3) Supplementary material for which there is no counterpart in the FAR will be codified with a suffix beginning with “70” or, in cases of successive sections and subsections, will be numbered in the 70 series (*i.e.*, 71–79). These supplementing sections and subsections will appear to the closest corresponding FAR citation; *e.g.*, FAR subpart 16.4 may be augmented in the EDAR by citing EDAR 3416.470 and FAR 16.403 may be augmented in the EDAR by citing EDAR 3416.403–70. (*Note:* These citations are for illustrative purposes only and may not actually appear in the published EDAR). For example:

TABLE 1 TO PARAGRAPH (a)(3)

| FAR        | Is implemented as | Is augmented as |
|------------|-------------------|-----------------|
| 15 .....   | 3415 .....        | 3415.70         |
| 15.1 ..... | 3415.1 .....      | 3415.170        |

TABLE 1 TO PARAGRAPH (a)(3)—  
Continued

| FAR          | Is implemented as | Is augmented as |
|--------------|-------------------|-----------------|
| 15.101 ..... | 3415.101 .....    | 3415.101–70     |
| 15.101–1 ..  | 3415.101–1 ....   | 3415.101–170    |

(c) Guidance that is unique to an organization with Head of the Contracting Activity (HCA) authority contains that activity's acronym directly preceding the cite. The following activity acronyms apply: FSA—Federal Student Aid.

#### Subpart 3401.4—Deviations

##### 3401.403 Individual deviations.

An individual deviation from the FAR or the EDAR must be approved by the Senior Procurement Executive (SPE).

##### 3401.404 Class deviations.

A class deviation from the FAR or the EDAR must be approved by the Chief Acquisition Officer (CAO).

#### Subpart 3401.6—Career Development, Contracting Authority, and Responsibilities

##### 3401.601 General.

(a) Contracting authority is vested in the Secretary. The Secretary has delegated this authority to the CAO. The Secretary has also delegated contracting authority to the SPE, giving the SPE broad authority to perform functions dealing with the management direction of the entire Department's procurement system, including implementation of its unique procurement policies, regulations, and standards. Limitations to the extent of this authority and successive delegations are set forth in the respective memorandums of delegations.

##### 3401.602–3 Ratification of unauthorized commitments.

(a) *Definitions.* As used in this subpart, *commitment* includes issuance of letters of intent and arrangements for free vendor services or use of equipment with the promise or the appearance of commitment that a contract, modification, or order will, or may, be awarded.

(b) *Policy.* (1) The Government is not bound by agreements with, or contractual commitments made to, prospective contractors by individuals who do not have delegated contracting authority or by contracting officers acting in excess of the limits of their delegated authority. Unauthorized commitments do not follow the appropriate process for the expenditure

of Government funds. Consequently, the Government may not be able to ratify certain actions, putting a contractor at risk for taking direction from a Federal official other than the contracting officer. See FAR 1.602–1. Government employees responsible for unauthorized commitments are subject to disciplinary action.

(2) The HCA must review and sign or reject all ratification requests, with the exception that the Chief of the Contracting Office is authorized to review and sign or reject ratification requests for unauthorized commitments up to \$25,000.

##### 3401.604–70 Contract clause.

Contracting officers must insert a clause substantially the same as the clause at 3452.201–70 (Contracting Officer's Representative (COR)), in all solicitations and contracts for which a COR will be (or is) appointed.

#### PART 3402—DEFINITIONS OF WORDS AND TERMS

##### Subpart 3402.1—Definitions

Sec.

3402.101 Definitions.

##### Subpart 3402.2—Definitions Clause

3402.201 Contract clause.

**Authority:** 5 U.S.C. 301 and 20 U.S.C. 1018a.

##### Subpart 3402.1—Definitions

##### 3402.101 Definitions.

As used in this chapter—

*Chief of the Contracting Office* or *COCO* means an official serving in the contracting activity (Contracts and Acquisition Management (CAM) or FSA Acquisitions) as the manager of a group that awards and administers contracts for a principal office of the Department. See also definition of *Head of the Contracting Activity* or *HCA* in this section.

*Department* or *ED* means the United States Department of Education.

*Head of the Contracting Activity* or *HCA* means those officials within the Department who have responsibility for and manage an acquisition organization and usually hold unlimited procurement authority. The Executive Director, Federal Student Aid Acquisitions, is the HCA for FSA. The Director, Contracts and Acquisitions Management (CAM), is the HCA for all other Departmental program offices and all boards, commissions, and councils under the management control of the Department.

*Performance-Based Organization* or *PBO* is the office within the Department that is mandated by Public Law 105–244

to carry out Federal student assistance or aid programs and report to Congress on an annual basis. It may also be referred to as “Federal Student Aid.”

*Requiring activity* means the principal office charged with meeting or supporting a mission and delivering requirements. The requiring activity is responsible for obtaining funding or developing the program objectives. The requiring activity may also be the organizational unit that submits a written requirement or statement of need for services required by a contract.

*Senior Procurement Executive* or *SPE* means the single agency official appointed as such by the head of the agency and delegated broad responsibility for acquisition functions, including issuing agency acquisition policy and reporting on acquisitions agency-wide. The SPE also acts as the official one level above the contracting officer when the HCA is acting as a contracting officer.

#### Subpart 3402.2—Definitions Clause

##### 3402.201 Contract clause.

The contracting officer must insert the clause at 3452.202–1 (Definitions—Department of Education) in all solicitations and contracts in which the clause at FAR 52.202–1 is required.

#### PART 3403—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

##### Subpart 3403.1—Safeguards

Sec.

3403.104 Procurement integrity.  
3403.104–7 Violations or possible violations.

##### Subpart 3403.2—Contractor Gratuities to Government Personnel

3403.203 Reporting suspected violations of the Gratuities clause.  
3403.204 Treatment of violations.

##### Subpart 3403.3—Reports of Suspected Antitrust Violations

3403.301 General.

##### Subpart 3403.4—Contingent Fees

3403.405 Misrepresentation or violations of the covenant against contingent fees.

##### Subpart 3403.6—Contracts with Government Employees or Organizations Owned or Controlled by Them

3403.602 Exceptions.

##### Subpart 3403.7—Voiding and Rescinding Contracts

3403.704 Policy.  
3403.705 Procedures.

##### Subpart 3403.9—Whistleblower Protections for Contractor Employees

3403.905 Procedures for investigating complaints.

3403.906 Remedies.

Authority: 5 U.S.C. 301.

### Subpart 3403.1—Safeguards

3403.104 Procurement integrity.

#### 3403.104–7 Violations or possible violations.

(d)(2)(ii)(B) The Senior Procurement Executive (SPE) is the agency head for the purposes of FAR 3.104–7(d)(2)(ii)(B).

### Subpart 3403.2—Contractor Gratuities to Government Personnel

#### 3403.203 Reporting suspected violations of the Gratuities clause.

(a) Suspected violations of the Gratuities clause at FAR 52.203–3 must be reported to the HCA in writing detailing the circumstances.

(b) The HCA evaluates the report with the assistance of the Designated Agency Ethics Officer. If the HCA determines that a violation may have occurred, the HCA refers the report to the SPE for disposition.

### Subpart 3403.3—Reports of Suspected Antitrust Violations

#### 3403.204 Treatment of violations.

(a) The SPE is the agency head's designee for purposes of FAR 3.204.

### Subpart 3403.3—Reports of Suspected Antitrust Violations

#### 3403.301 General.

(b) Any Departmental personnel who have evidence of a suspected antitrust violation in an acquisition must—

(1) Report that evidence through the HCA to the Office of the General Counsel for referral to the Attorney General; and

(2) Provide a copy of that evidence to the SPE.

### Subpart 3403.4—Contingent Fees

#### 3403.405 Misrepresentation or violations of the covenant against contingent fees.

Any Departmental personnel who suspect or have evidence of attempted or actual exercise of improper influence, misrepresentation of a contingent fee arrangement, or other violation of the Covenant Against Contingent Fees, must report the matter promptly in accordance with the procedures in 3403.203.

### Subpart 3403.6—Contracts With Government Employees or Organizations Owned or Controlled by Them

#### 3403.602 Exceptions.

The SPE is the agency head's designee for purposes of FAR 3.602.

### Subpart 3403.7—Voiding or Rescinding Contracts

#### 3403.704 Policy.

(a) The Senior Procurement Executive (SPE) is the agency head's designee for the purpose of FAR 3.704.

#### 3403.705 Procedures.

(a) *Reporting.* The SPE is the agency's head designed for the purposes of FAR 3.705.

### Subpart 3403.9—Whistleblower Protections for Contractor Employees

#### 3403.905 Procedures for investigating complaints.

(c) The Senior Procurement Executive (SPE) is the agency head's designee for purposes of FAR 3.905.

#### 3403.906 Remedies.

(a) The SPE is the agency head's designee for the purposes of FAR 3.906.

## PART 3404—ADMINISTRATIVE AND INFORMATION MATTERS

Sec.

3404.000 Scope of part.

3404.001 Definitions.

### Subpart 3404.4—Safeguarding Classified Information Within Industry

3404.470 Contractor security vetting requirements.

3404.470–1 Contract clause.

### Subpart 3404.7—Contractor Records Retention

3404.710 Contracting officer records management responsibilities.

3404.770 Contract clause.

### Subpart 3404.8—Government Contract Files

3404.804 Closeout of contract files.

3404.804–5 Procedures for closing out contract files.

Authority: 5 U.S.C. 301; 40 U.S.C. 12(c); and 41 U.S.C. 3102.

#### 3404.000 Scope of part.

#### 3404.001 Definitions.

*Federal record*, as defined in 44 U.S.C. 3301, includes all recorded information, regardless of form or characteristics, made or received by the Department under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by the Department or its legitimate successor

as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the U.S. Government or because of the informational value of data in them.

*Records inventory* means a descriptive listing of each Federal record series or system that a contractor creates, receives, or maintains in performance of the contract, together with an indication of its location, retention, custodian, volume, and other pertinent data.

### Subpart 3404.4—Safeguarding Classified Information Within Industry

#### 3404.470 Contractor security vetting requirements.

#### 3404.470–1 Contract clause.

The contracting officer must include the clause at 3452.204–71 (Contractor security vetting requirements) in solicitations and contracts when it is anticipated that contractor employees will have access to proprietary or sensitive Department information including *Controlled Unclassified Information* as defined in 32 CFR 2002.4(h), Department Information Technology (IT) systems, contractor systems operated with Department data or interfacing with Department systems, Department facilities/space, and/or perform duties in a school or in a location where children are present.

### Subpart 3404.7—Contractor Records Retention

#### 3404.710 Contracting officer records management responsibilities.

Upon notification from the contractor of any unlawful or accidental removal, defacing, alteration, or destruction of Federal records, including all forms of mutilation, the contracting officer must notify the requiring activity, the Department Records Officer, and the HCA within one business day.

#### 3404.770 Contract clause.

The contracting officer must insert the clause at 3452.204–70 (Records management) in all solicitations and contracts where the contractor will receive, create, work with, or otherwise handle Federal records, as defined in 44 U.S.C. 3301(a), regardless of the medium in which the record exists.

### Subpart 3404.8—Government Contract Files

#### 3404.804 Closeout of contract files.

#### 3404.804–5 Procedures for closing out contract files.

(a)(16) The contractor has provided written affirmation that the contractor

has transferred all Federal records that the contractor created, received, or maintained in performance of the contract to the Federal Government, and the contractor has not retained a copy of any Federal record that contains information covered by 32 CFR part 2002 or that is generally protected from public disclosure by an exemption under the Freedom of Information Act (FOIA) with the exception, for the purposes of FOIA, of information that exclusively implicates the exemption 4 interests of the contractor.

## SUBCHAPTER B—ACQUISITION PLANNING

### PART 3405—PUBLICIZING CONTRACT ACTIONS

#### Subpart 3405.2—Synopsis of Proposed Contract Actions

Sec.

- 3405.202 Exceptions.
- 3405.203 Publicizing and response time.
- 3405.205 Special situations.
- 3405.207 Preparation and transmittal of synopses.
- 3405.270 Notices to perform market surveys.

#### Subpart 3405.5—Paid Advertisements

3405.502 Authority.

**Authority:** 5 U.S.C. 301 and 20 U.S.C. 1018a.

#### Subpart 3405.2—Synopsis of Proposed Contract Actions

##### 3405.202 Exceptions.

(a)(15) FSA—Issuance of a synopsis is not required when the firm to be solicited has previously provided a module for the system under a contract that contained cost, schedule, and performance goals and the contractor met those goals.

##### 3405.203 Publicizing and response time.

(c) FSA—Notwithstanding other provisions of the FAR, a bid or proposal due date of less than 30 days is permitted after issuance of a synopsis for acquisitions for noncommercial items. However, if time permits, a bid or proposal due date that affords potential offerors reasonable time to respond and fosters quality submissions should be established.

##### 3405.205 Special situations.

(g) FSA—*Module of a previously awarded system.* Federal Student Aid must satisfy the publication requirements for sole source and competitive awards for a module of a previously awarded system by publishing a notice of intent on the governmentwide point of entry, not less than 30 days before issuing a solicitation. This notice is not required

if a contractor who is to be solicited to submit an offer previously provided a module for the system under a contract that contained cost, schedule, and performance goals, and the contractor met those goals.

#### 3405.207 Preparation and transmittal of synopses.

(c) *General format for “Description”.* FSA—In phase one of a two-phase source selection as described in 3415.302–70, the contracting officer must publish a notice in accordance with FAR subpart 5.2, except that the notice must include only the following:

(1) Notification that the procurement will be conducted using the specific procedures included in 3415.302–70.

(2) A general notice of the scope or purpose of the procurement that provides sufficient information for sources to make informed business decisions regarding whether to participate in the procurement.

(3) A description of the basis on which potential sources are to be selected to submit offers in the second phase.

(4) A description of the information that is to be required to be submitted if the request for information is made separate from the notice.

(5) Any other information that the contracting officer deems is appropriate.

(g) *Modular contracting.* FSA—When modular contracting authority is being utilized, the notice must invite comments and support if it is believed that modular contracting is not suited for the requirement being procured.

#### 3405.270 Notices to perform market surveys.

(a) If a sole source contract is anticipated, the issuance of a notice of a proposed contract action that is detailed enough to permit the submission of meaningful responses and the subsequent evaluation of the responses by the Federal Government constitutes an acceptable market survey.

(b) The notice must include—

(1) A clear statement of the supplies or services to be procured;

(2) Any capabilities or experience required of a contractor and any other factor relevant to those requirements;

(3) A statement that all responsible sources submitting a proposal, bid, or quotation must be considered;

(4) Name, business address, and phone number of the Contracting Officer; and

(5) Justification for a sole source and the identity of that source.

### Subpart 3405.5—Paid Advertisements

#### 3405.502 Authority.

Authority to approve publication of paid advertisements in newspapers is delegated to the HCA.

### PART 3406—COMPETITION REQUIREMENTS

Sec.

3406.001 Applicability.

#### Subpart 3406.3—Other Than Full and Open Competition

3406.302–2 Unusual and compelling urgency.

3406.302–5 Authorized or required by statute.

#### Subpart 3406.5—Advocates for Competition

3406.501 Requirement.

**Authority:** 5 U.S.C. 301; 41 U.S.C. 418(a) and (b); and 20 U.S.C. 1018a.

#### 3406.001 Applicability.

(b) FSA—This part does not apply to proposed contracts and contracts awarded based on other than full and open competition when the conditions for successive systems modules set forth in 3417.70 are utilized.

#### Subpart 3406.3—Other than Full and Open Competition

3406.302–2 Unusual and compelling urgency.

(d)(1)(ii) The SPE is the agency head's designee for the purposes of FAR 6.302–2(d)(1)(ii).

(d)(2)(ii) The SPE is the agency head's designee for the purposes of FAR 6.302–2(d)(2)(ii).

3406.302–5 Authorized or required by statute.

(a) *Authority.* (1) Citations: 20 U.S.C. 1018a.

(2) Noncompetitive awards of successive modules for systems are permitted when the conditions set forth in 3417.70 are met.

#### Subpart 3406.5—Advocates for Competition

3406.501 Requirement.

The Competition Advocate for the Department is the Deputy Director, Contracts and Acquisitions Management.

### PART 3407—ACQUISITION PLANNING

#### Subpart 3407.1—Acquisition Plans

Sec.

3407.103 Agency-head responsibilities.

**Authority:** 5 U.S.C. 301.

**Subpart 3407.1—Acquisition Plans****3407.103 Agency-head responsibilities.**

The SPE is the agency head's designee for the purposes of FAR 7.103.

**PART 3408—REQUIRED SOURCES OF SUPPLIES AND SERVICES****Subpart 3408.8—Acquisition of Printing and Related Supplies**

Sec.

3408.871 Paperwork reduction.

**Authority:** 5 U.S.C. 301, unless otherwise noted.

**Subpart 3408.8—Acquisition of Printing and Related Supplies****3408.871 Paperwork reduction.**

The contracting officer must insert the clause at 3452.208–72 (Paperwork Reduction Act) in all solicitations and contracts in which the contractor will develop forms or documents for public use.

**PART 3409—CONTRACTOR QUALIFICATIONS****Subpart 3409.4—Debarment, Suspension, and Ineligibility**

Sec.

3409.400 Scope of subpart.

3409.401 Applicability.

3409.403 Definitions.

3409.406 Debarment.

3409.406–3 Procedures.

3409.407 Suspension.

3409.407–3 Procedures.

**Subpart 3409.5—Organizational and Consultant Conflicts of Interest**

3409.502 Applicability.

3409.503 Waiver.

3409.506 Procedures.

3409.507 Solicitation provision and contract clause.

3409.507–1 Solicitation provision.

3409.507–2 Contract clause.

**Authority:** 5 U.S.C. 301.

**Subpart 3409.4—Debarment, Suspension, and Ineligibility****3409.400 Scope of subpart.**

This subpart implements FAR subpart 9.4 by detailing policies and procedures governing the debarment and suspension of organizations and individuals from participating in ED contracts and subcontracts.

**3409.401 Applicability.**

This subpart applies to all procurement debarment and suspension actions initiated by ED. This subpart does not apply to nonprocurement debarment and suspension.

**3409.403 Definitions.**

The SPE is designated as the *debarment official* and *suspending*

*official* as defined in FAR 9.403 and is designated as the agency official authorized to make the decisions required in FAR 9.406 and 9.407.

**3409.406 Debarment.****3409.406–3 Procedures.**

(b) *Decisionmaking process.* (1) Contractors proposed for debarment may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment. The contractor must submit additional information within 30 days of receipt of the notice of proposal to debar, as described in FAR 9.406–3(c).

(2) In actions not based upon a conviction or civil judgment, if the contractor's submission in opposition raises a genuine dispute over facts material to the proposed debarment, the contractor may request a fact-finding conference. If the Debarring Official determines that there is a genuine dispute of material fact, the Debarring Official will conduct fact-finding and base the decision in accordance with FAR 9.406–3(b)(2) and (d) through (f).

**3409.407 Suspension.****3409.407–3 Procedures.**

(b) *Decisionmaking process.* (1) Contractors suspended in accordance with FAR 9.407 may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension. The contractor must submit this information and argument within 30 days of receipt of the notice of suspension, as described in FAR 9.407–3(c).

(2) In actions not based upon an indictment, if the contractor's submission in opposition raises a genuine dispute over facts material to the suspension and if no determination has been made, on the basis of Department of Justice advice, that substantial interests of the Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced, the contractor may request a fact-finding conference. The Suspending Official will conduct fact-finding and base the decision in accordance with FAR 9.407–3(b)(2) and (d) and (e).

**Subpart 3409.5—Organizational and Consultant Conflicts of Interest****3409.502 Applicability.**

This subpart applies to all ED contracts except contracts with other Federal agencies. However, this subpart applies to contracts with the Small

Business Administration (SBA) under the 8(a) program.

**3409.503 Waiver.**

The HCA is designated as the official who may waive any general rule or procedure of FAR subpart 9.5 or of this subpart.

**3409.506 Procedures.**

(a) If the effects of a potential or actual conflict of interest cannot be avoided, neutralized, or mitigated before award, the prospective contractor is not eligible for that award. If a potential or actual conflict of interest is identified after award and the effects cannot be avoided, neutralized, or mitigated, ED will terminate the contract unless the HCA deems continued performance to be in the best interest of the Federal Government.

(b) The HCA is designated as the official to conduct reviews and make final decisions under FAR 9.506(b) and (c).

**3409.507 Solicitation provision and contract clause.****3409.507–1 Solicitation provision.**

The contracting officer must insert the provision in 3452.209–70 (Conflict of interest certification) in all solicitations for services above the simplified acquisition threshold.

**3409.507–2 Contract clause.**

The contracting officer must insert the clause at 3452.209–71 (Conflict of interest) in all contracts for services above the simplified acquisition threshold.

**PART 3412—ACQUISITION OF COMMERCIAL PRODUCTS AND COMMERCIAL SERVICES****Subpart 3412.2—Special Requirements for the Acquisition of Commercial Products and Commercial Services**

Sec.

3412.203 Procedures for solicitation, evaluation, and award.

**Subpart 3412.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Products and Commercial Services**

3412.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.

3412.302 Tailoring of provisions and clauses for the acquisition of commercial products and commercial services.

**Authority:** 5 U.S.C. 301 and 20 U.S.C. 1018a.



**Subpart 3412.2—Special Requirements for the Acquisition of Commercial Products and Commercial Services****3412.203 Procedures for solicitation, evaluation, and award.**

As specified in 3413.003, simplified acquisition procedures for commercial products and commercial services may be used without regard to any dollar or timeframe limitations described in FAR subpart 13.5 when acquired by the FSA and used for its purposes.

**Subpart 3412.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Products and Commercial Services****3412.301 Solicitation provisions and contract clauses for the acquisition of commercial products and commercial services.**

(f)(1) The clause at 3452.224–70 has been authorized for inclusion in acquisitions of commercial products and commercial services. Refer to 3424.70 for provisions related to the use of this clause.

(2) [Reserved]

**3412.302 Tailoring of provisions and clauses for the acquisition of commercial products and commercial services.**

The HCA is authorized to approve waivers in accordance with FAR 12.302(c). The approved waiver may be either for an individual contract or for a class of contracts for the specific item. The approved waiver and supporting documentation must be incorporated into the contract file.

**SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES****PART 3413—SIMPLIFIED ACQUISITION PROCEDURES**

Sec.

3413.000 Scope of part.

3413.003 Policy.

**Subpart 3413.3—Simplified Acquisition Methods**

3413.303 Blanket purchase agreements (BPAs).

3413.303–5 Purchases under BPAs.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

**3413.000 Scope of part.**

**3413.003 Policy.**

(c)(1)(iii) FSA may use simplified acquisition procedures for commercial items without regard to any dollar or time frame limitations described in FAR subpart 13.5.

(iv) FSA may use simplified acquisition procedures for non-commercial items up to \$1,000,000

when the acquisition is set aside for small businesses, pursuant to 3419.502.

**Subpart 3413.3—Simplified Acquisition Methods****3413.303 Blanket purchase agreements (BPAs).****3413.303–5 Purchases under BPAs.**

(b) Individual purchases under blanket purchase agreements for commercial items may exceed the simplified acquisition threshold but shall not exceed the threshold for the test program for certain commercial items in FAR 13.500(a).

**PART 3414—SEALED BIDDING****Subpart 3414.4—Opening of Bids and Award of Contract**

Sec.

3414.407 Mistakes in bids.

3414.407–3 Other mistakes disclosed before award.

Authority: 5 U.S.C. 301.

**Subpart 3414.4—Opening of Bids and Award of Contract**

**3414.407 Mistakes in bids.**

**3414.407–3 Other mistakes disclosed before award.**

Authority is delegated to the HCA to make determinations under FAR 14.407–3(a) through (d).

**PART 3415—CONTRACTING BY NEGOTIATION****Subpart 3415.2—Solicitation and Receipt of Proposals and Information**

Sec.

3415.209 Solicitation provisions and contract clauses.

**Subpart 3415.3—Source Selection**

3415.302 Source selection objective.

3415.302–70 Two-phase source selection.

**Subpart 3415.6—Unsolicited Proposals**

3415.605 Content of unsolicited proposals.

3415.606 Agency procedures.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

**Subpart 3415.2—Solicitation and Receipt of Proposals and Information****3415.209 Solicitation provisions and contract clauses.**

(a) The Freedom of Information Act (FOIA), 5 U.S.C. 552, may require ED to release data contained in an offeror's proposal even if the offeror has identified the data as restricted in accordance with the provision in FAR 52.215–1(e). The solicitation provision in 3452.215–70 (Release of restricted data) informs offerors that ED is required to consider release of restricted

data under FOIA and Executive Order 12600.

(b) The contracting officer must insert the provision in 3452.215–70, in all solicitations that include a reference to FAR 52.215–1 (Instructions to Offerors—Competitive Acquisitions).

**Subpart 3415.3—Source Selection****3415.302 Source selection objective.****3415.302–70 Two-phase source selection.**

(a) *Use.* FSA may utilize a two-phase process to solicit offers and select a source for award. The contracting officer can choose to use this optional method of solicitation when deemed beneficial to the FSA in meeting its needs as a PBO.

(b) *Phase one—(1) Publicizing.* The contracting officer must publish a notice in accordance with FAR subpart 5.2, except that the notice must include limited information as specified in 3405.207.

(2) *Information submitted by offerors.* Each offeror must submit basic information such as the offeror's qualifications, the proposed conceptual approach, costs likely to be associated with the approach, and past performance data, together with any additional information requested by the contracting officer.

(3) *Selection for participating in second phase.* The contracting officer must select the offerors that are eligible to participate in the second phase of the process. The contracting officer must limit the number of the selected offerors to the number of sources that the contracting officer determines is appropriate and in the best interests of the Federal Government.

(c) *Phase two.* (1) The contracting officer must conduct the second phase of the source selection consistent with FAR subparts 15.2 and 15.3, except as provided by 3405.207.

(2) Only sources selected in the first phase will be eligible to participate in the second phase.

**Subpart 3415.6—Unsolicited Proposals****3415.605 Content of unsolicited proposals.**

(d) Each unsolicited proposal must contain the following certification:

UNSOLICITED PROPOSAL CERTIFICATION  
BY OFFEROR

This is to certify, to the best of my knowledge and belief, that—

a. This proposal has not been prepared under Federal government supervision;

b. The methods and approaches stated in the proposal were developed by this offeror;

c. Any contact with employees of the Department of Education has been within the



limits of appropriate advance guidance set forth in FAR 15.604; and

d. No prior commitments were received from Departmental employees regarding acceptance of this proposal.

Date:

Organization:

Name:

Title:

(This certification must be signed by a responsible person authorized to enter into contracts on behalf of the organization.)

#### **3415.606 Agency procedures.**

(b)(1) The HCA or designee is the contact point to coordinate the receipt, control, and handling of unsolicited proposals.

(2) Offerors must direct unsolicited proposals to the HCA.

### **PART 3416—TYPES OF CONTRACTS**

#### **Subpart 3416.3—Cost-Reimbursement Contracts**

Sec.

3416.303 Cost-sharing contracts.

3416.307 Contract clauses.

#### **Subpart 3416.4—Incentive Contracts**

3416.402 Application of predetermined, formula-type incentives.

3416.402–2 Performance incentives.

3416.470 Award-term contracting.

#### **Subpart 3416.5—Indefinite-Delivery Contracts**

3416.505 Ordering.

#### **Subpart 3416.6—Time-and-Materials, Labor-Hour, and Letter Contracts**

3416.603 Letter contracts.

3416.603–3 Limitations.

**Authority:** 5 U.S.C. 301 and 20 U.S.C. 1018a.

#### **Subpart 3416.3—Cost-Reimbursement Contracts**

##### **3416.303 Cost-sharing contracts.**

(b) *Application.* Costs that are not reimbursed under a cost-sharing contract may not be charged to the Federal Government under any other grant, contract, cooperative agreement, or other arrangement.

##### **3416.307 Contract clauses.**

(a) If the clause at FAR 52.216–7 (Allowable Cost and Payment) is used in a contract with a hospital, the contracting officer must modify the clause by deleting the words “Federal Acquisition Regulation (FAR) subpart 31.2” from paragraph (a)(1) and substituting “45 CFR part 75, appendix IX.”

(b) The contracting officer must insert the clause at 3452.216–70 (Additional

cost principles) in all solicitations of and resultant cost-reimbursement contracts with nonprofit organizations other than educational institutions, hospitals, or organizations listed in 2 CFR part 200, subpart E.

#### **Subpart 3416.4—Incentive Contracts**

##### **3416.402 Application of predetermined, formula-type incentives.**

##### **3416.402–2 Performance incentives.**

(b) Award-term contracting may be used for performance-based contracts or task orders. See 3416.470 for the definition of *award-term contracting* and implementation guidelines.

##### **3416.470 Award-term contracting.**

(a) *Definition.* Award-term contracting is a method, based upon a predetermined plan in the contract, to extend the contract term for superior performance and to reduce the contract term for substandard or poor performance.

(b) *Applicability.* A Contracting Officer may authorize use of an award-term incentive contract for acquisitions where the quality of contractor performance is of a critical or highly important nature. The basic contract term may be extended on the basis of the Federal Government’s determination of the excellence of the contractor’s performance. Additional periods of performance, which are referred to in this section as “award terms,” are available for possible award to the contractor. As award term(s) are awarded, each additional period of performance will immediately follow the period of performance for which the award term was granted. The contract may end at the base period of performance if the Federal Government determines that the contractor’s performance does not reflect a level of performance as described in the award-term plan. Award-term periods may only be earned based on the evaluated quality of the performance of the contractor. Meeting the terms of the contract is not justification to award an award-term period. The use of an award-term plan does not exempt the contract from the requirements of FAR 17.207, with respect to performing due diligence prior to extending a contract term.

(c) *Approvals.* The Contracting Officer must justify the use of an award-term incentive contract in writing. The award-term plan approving official will be appointed by the HCA.

(d) *Disputes.* The Federal Government unilaterally makes all decisions regarding award-term evaluations, points, methodology used to calculate

points, and the degree of the contractor’s success.

(e) *Award-term limitations.* (1) Award periods may be earned during the base period of performance and each option period, except the last option period. Award-term periods may not be earned during the final option year of any contract.

(2) Award-term periods may not exceed twelve months.

(3) The potential award-term periods will be priced, evaluated, and considered in the initial contract selection process.

(f) *Implementation of extensions or reduced contract terms.* (1) An award term is contingent upon a continuing need for the supplies or services and the availability of funds. Award terms may be cancelled prior to the start of the period of performance at no cost to the Federal Government if there is not a continued need or available funding.

(2) The extension or reduction of the contract term is affected by a bilateral contract modification.

(3) Award-term periods occur after the period for which the award term was granted. Award-term periods effectively move option periods to later contract performance periods.

(4) Contractors have the right to decline the award of an award-term period. A contractor loses its ability to earn additional award terms if an earned Award-Term Period is declined.

(5) Changes to the contract award-term plan must be mutually agreed upon.

(g) *Clause.* Insert a clause substantially the same as the clause at 3452.216–71 (Award-term) in all solicitations and resulting contracts where an award-term incentive contract is anticipated.

#### **Subpart 3416.5—Indefinite-Delivery Contracts**

##### **3416.505 Ordering.**

(b)(8) *Task order and delivery-order ombudsman.* The competition advocate at each contracting activity shall act as the task order and delivery-order contract ombudsman for purposes of FAR 16.505(b)(8).

#### **Subpart 3416.6—Time-and-Materials, Labor-Hour, and Letter Contracts**

##### **3416.603 Letter contracts.**

##### **3416.603–3 Limitations.**

If the HCA is to sign a letter contract as the contracting officer, the SPE signs the written determination under FAR 16.603–3.

**PART 3417—SPECIAL CONTRACTING METHODS****Subpart 3417.1—Multiyear Contracting**

Sec.

3417.104 General.

**Subpart 3417.2—Options**

3417.204 Contracts.

3417.207 Exercise of options.

**Subpart 3417.5—Interagency Acquisitions**

3417.501 General.

**Subpart 3417.70—Modular Contracting**

3417.700 Modular contracting.

**Authority:** 31 U.S.C. 1535 and 20 U.S.C. 1018a.

**Subpart 3417.1—Multiyear Contracting****3417.104 General.**

(b) The Head of the Contracting Activity (HCA) is the agency head for the purposes of FAR 17.104(b).

**Subpart 3417.2—Options****3417.204 Contracts.**

(e) Except as otherwise provided by law, contract periods that exceed the five-year limitation specified in FAR 17.204(e) must be approved by—

(1) The HCA for individual contracts; or

(2) The SPE for classes of contracts.

**3417.207 Exercise of options.**

(f)(2) The Federal Government may accept price reductions offered by contractors at any time during contract performance. Acceptance of price reductions offered by contractors will not be considered renegotiations as identified in this subpart if they were not initiated or requested by the Federal Government.

(h) If a contract provision allows an option to be exercised within a specified time frame after funds become available, it must also specify that the date on which funds “become available” is the actual date funds become available to the contracting officer for obligation.

**Subpart 3417.5—Interagency Acquisitions****3417.501 General.**

No other Federal department or agency may purchase property or services under contracts established or administered by FSA unless the purchase is approved by SPE for the requesting Federal department or agency.

**Subpart 3417.70—Modular Contracting****3417.700 Modular contracting.**

(a) FSA may incrementally conduct successive procurements of modules of

overall systems. Each module must be useful in its own right or useful in combination with the earlier procurement modules. Successive modules may be procured on a sole source basis under the following circumstances:

(1) Competitive procedures are used for awarding the contract for the first system module; and

(2) The solicitation for the first module included the following:

(i) A general description of the entire system that was sufficient to provide potential offerors with reasonable notice of the general scope of future modules;

(ii) Other sufficient information to enable offerors to make informed business decisions to submit offers for the first module; and

(iii) A statement that procedures, *i.e.*, the sole source awarding of follow-on modules, could be used for the subsequent awards.

(b) [Reserved]

**SUBCHAPTER D—SOCIOECONOMIC PROGRAMS****PART 3419—SMALL BUSINESS PROGRAMS****Subpart 3419.2—Policies**

Sec.

3419.201 General policy.

3419.201–70 Office of Small and Disadvantaged Business Utilization (OSDBU).

**Subpart 3419.5—Small Business Total Set-Asides, Partial Set-Asides, and Reserves**

3419.502 Setting aside acquisitions.

3419.502–8 Rejecting Small Business Administrative recommendations.

3419.502–70 Methods of conducting set-asides.

**Subpart 3419.8—Contracting With the Small Business Administration (the 8(a) Program)**

3419.810 SBA appeals.

3419.812 Contract administration.

**Authority:** 5 U.S.C. 301 and 20 U.S.C. 1018a.

**Subpart 3419.2—Policies****3419.201 General policy.****3419.201–70 Office of Small and Disadvantaged Business Utilization (OSDBU).**

The Office of Small and Disadvantaged Business Utilization (OSDBU) is responsible for facilitating the implementation of the Small Business Act, as described in FAR 19.201. The OSDBU develops rules, policy, procedures, and guidelines for the effective administration of ED’s small business program.

**Subpart 3419.5—Small Business Total Set-Asides, Partial Set-Asides, and Reserves****3419.502 Setting aside acquisitions.****3419.502–8 Rejecting Small Business Administration recommendations.**

(d) The SPE is the agency head for the purposes of FAR 19.502–8.

**3419.502–70 Methods of conducting set-asides.**

(a) Simplified acquisition procedures as described in FAR part 13 for the procurement of noncommercial services for FSA requirements may be used under the following circumstances:

(1) The procurement does not exceed \$1,000,000;

(2) The procurement is conducted as a small business set-aside pursuant to section 15(a) of the Small Business Act;

(3) The price charged for supplies associated with the services are expected to be less than 20 percent of the total contract price;

(4) The procurement is competitive; and

(5) The procurement is not for construction.

(b) [Reserved]

**Subpart 3419.8—Contracting With the Small Business Administration (the 8(a) Program)****3419.810 SBA appeals.**

(a) The SPE is the agency head for the purposes of FAR 19.810.

**3419.812 Contract administration.**

(d) The HCA is the agency head for the purposes of FAR 19.812(d).

**PART 3422—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS****Subpart 3422.10—Service Contract Labor Standards**

Sec.

3422.1002 Statutory and Executive order requirements.

3422.1002–1 General.

**Authority:** 5 U.S.C. 301.

**Subpart 3422.10—Service Contract Labor Standards****3422.1002 Statutory and Executive order requirements.****3422.1002–1 General.**

Consistent with 29 CFR 4.145, the five-year limitation set forth in the Service Contract Act of 1965, as amended (Service Contract Act), applies to each period of the contract individually, not the cumulative period of base and option periods. Accordingly, no contract subject to the Service

Contract Act issued by the Department of Education will have a base period or option period that exceeds five years.

## **PART 3424—PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION**

### **Subpart 3424.1—Protection of Individual Privacy**

Sec.

3424.103 Procedures.

3424.170 Protection of human subjects.

### **Subpart 3424.2—Freedom of Information Act**

3424.201 Authority.

3424.203 Policy.

### **Subpart 3424.7—The Family Educational Rights and Privacy Act**

3424.701 Authority.

3424.702 Policy.

3424.703 Procedures.

3424.704 Contract clause.

Authority: 5 U.S.C. 301.

### **Subpart 3424.1—Protection of Individual Privacy**

#### **3424.103 Procedures.**

(a) If the Privacy Act of 1974 (Privacy Act) applies to a contract, the contracting officer must specify in the contract the disposition to be made of the system or systems of records upon completion of performance. For example, the contract may require the contractor to completely destroy the records, to remove personal identifiers, to turn the records over to ED, or to keep the records but take certain measures to keep the records confidential and protect the individual's privacy.

(b) If a notice of the system of records has not been published in the **Federal Register**, the contracting officer may proceed with the acquisition but must not award the contract until the notice is published, unless the contracting officer determines, in writing, that portions of the contract may proceed without maintaining information subject to the Privacy Act. In this case, the contracting officer may—

(1) Award the contract, authorizing performance only of those portions not subject to the Privacy Act; and

(2) After the notice is published and effective, authorize performance of the remainder of the contract.

#### **3424.170 Protection of human subjects.**

In this section, *research* means a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. (34 CFR 97.102(d)) Research is considered to involve human subjects when a researcher obtains information

about a living individual through intervention or interaction with the individual or obtains personally identifiable private information about an individual. Some categories of research are exempt in accordance with 34 CFR part 97.

(a) The contracting officer must insert the provision in 3452.224–71 (Notice about research activities involving human subjects) in any solicitation where a resultant contract will include, or is likely to include, research activities involving human subjects covered under 34 CFR part 97.

(b) The contracting officer must insert the clause at 3452.224–72 (Research activities involving human subjects) in any solicitation that includes the provision in 3452.224–71 (Notice about research activities involving human subjects) and in any resultant contract.

### **Subpart 3424.2—Freedom of Information Act**

#### **3424.201 Authority.**

The Department's regulations implementing the Freedom of Information Act, 5 U.S.C. 552, are in 34 CFR part 5.

#### **3424.203 Policy.**

(b) The Department's policy is to release all information incorporated into a contract and documents that result from the performance of a contract to the public under the Freedom of Information Act. The release or withholding of documents requested will be made on a case-by-case basis. Contracting officers must advise offerors and prospective contractors of the possibility that their submissions may be released under the Freedom of Information Act, notwithstanding any restrictions that are included at the time of proposal submission. A clause substantially the same as the clause at 3452.224–70 (Release of information under the Freedom of Information Act) must be included in all solicitations and contracts.

### **Subpart 3424.7—The Family Educational Rights and Privacy Act**

#### **3424.701 Authority.**

This subpart implements the Family Educational Rights and Privacy Act (FERPA or the Act), 20 U.S.C. 1232g. Additional FERPA-implementing regulations are found at 34 CFR part 99.

#### **3424.702 Policy.**

It is the Department's policy to designate as its authorized representative, for purposes of compliance with FERPA, any contractor that will collect or receive access to

personally identifiable information (PII) from student education records in connection with the conduct of an audit, evaluation, study, compliance review, or other Federal law enforcement activity. The Department will notify such contractors, or prospective contractors, prior to award or during contract performance of their obligations to protect student privacy in compliance with FERPA. Further, the Department will incorporate into all relevant solicitations and contracts the provisions and clauses needed to implement FERPA requirements. The aforementioned policies do not apply to Federal Student Aid (FSA) contracts for the origination, servicing, or collection of student financial aid, provided such contracts do not include tasks relating to the conduct of an audit, evaluation, study, compliance review, or other enforcement activity.

#### **3424.703 Procedures.**

During acquisition planning, the requiring activity, in consultation with the Department's Senior Agency Official for Privacy (SAOP) and Director of the Student Privacy Policy Office (SPPO Director), must review requirements to determine whether the contract will require the Department to share PII from students' education records with its contractor or authorize its contractor to collect such PII from students' education records for the purposes of conducting a study, evaluation, or audit of a federally supported education program, or the enforcement of Federal legal requirements that relate to such education programs. The requiring activity must notify the contracting officer of the determination.

#### **3424.704 Contract clause.**

The contracting officer must insert the clause at 3452.224–73 in all solicitations and contracts, including those for the acquisition of commercial products or commercial services, when a requiring activity has provided notification that a contractor will collect or receive access to PII from student education records in connection with carrying out an audit, evaluation, study, compliance review, or other Federal law enforcement activity on behalf of the Department. The contracting officer must fill out paragraph (b) of the clause at 3452.224–73 with the type(s) of PII to be collected or accessed by contractor.

## **PART 3425—FOREIGN ACQUISITION**

### **Subpart 3425.1—Buy American—Supplies**

Sec.

3425.103 Exceptions.

Authority: 5 U.S.C. 301.

**Subpart 3425.1—Buy American—Supplies****3425.103 Exceptions.**

The HCA approves determinations under FAR 25.103(b)(2)(i).

**SUBCHAPTER E—GENERAL CONTRACTING REQUIREMENTS****PART 3427—PATENTS, DATA, AND COPYRIGHTS****Subpart 3427.4—Rights in Data and Copyrights**

Sec.

3427.409 Solicitation provisions and contract clauses.

Authority: 5 U.S.C. 301.

**Subpart 3427.4—Rights in Data and Copyrights****3427.409 Solicitation provisions and contract clauses.**

(a) The contracting officer must insert the clause at 3452.227–70 (Publication and publicity) in all solicitations and contracts other than purchase orders.

(b) The contracting officer must insert the clause at 3452.227–71 (Advertising of awards) in all solicitations and contracts other than purchase orders.

(c) The contracting officer must insert the clause at 3452.227–72 (Use and non-disclosure agreement) in all contracts over the simplified acquisition threshold, and in contracts under the simplified acquisition threshold, as appropriate.

(d) The contracting officer must insert the clause at 3452.227–73 (Limitations on the use or disclosure of Government-furnished information marked with restrictive legends) in all contracts of third party vendors who require access to Government-furnished information including other contractors' technical data, proprietary information, or software.

**PART 3428—BONDS AND INSURANCE****Subpart 3428.3—Insurance**

Sec.

3428.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.

3428.311–2 Agency solicitation provisions and contract clauses.

Authority: 5 U.S.C. 301.

**Subpart 3428.3—Insurance****3428.311 Solicitation provision and contract clause on liability insurance under cost-reimbursement contracts.****3428.311–2 Agency solicitation and contract clauses.**

The contracting officer must insert the clause at 3452.228–70 (Required

insurance) in all solicitations and contracts when a cost-reimbursement contract is contemplated.

**PART 3430—COST ACCOUNTING STANDARDS ADMINISTRATION****Subpart 3420.2—CAS Program Requirements**

Sec.

3430.201 Contract requirements.

3430.201–5 Waiver.

Authority: 5 U.S.C. 301; 40 U.S.C. 121(c); and 41 U.S.C. 3102.

**Subpart 3430.201—CAS Program Requirements****3430.201 Contract requirements.****3430.201–5 Waiver.**

(a) The Senior Procurement Executive (SPE) is the head of the agency for the purposes of FAR 30.201–5(a) and (b).

**PART 3431—CONTRACT COST PRINCIPLES AND PROCEDURES****Subpart 3431.1—Applicability**

Sec.

3431.101 Objectives.

**Subpart 3431.2—Contracts With Commercial Organizations**

3421.205 Selected costs.

3431.205–71 Noncontractor travel.

Authority: 5 U.S.C. 301; 40 U.S.C. 121(c); and 41 U.S.C. 3102.

**Subpart 3431.1—Applicability****3431.101 Objectives.**

The Senior Procurement Executive (SPE) is the agency head's designee for the purposes of FAR 31.101.

**Subpart 3431.2—Contracts With Commercial Organizations****3431.205 Selected costs.****3431.205–71 Noncontractor travel.**

The contracting officer may insert the clause at 3452.231–71 (Invitational travel costs) in solicitations and contracts when travel by other than Federal or contractor personnel will be required in performance of the contract.

**PART 3432—CONTRACT FINANCING**

Sec.

3432.000 Scope of part.

3432.006 Reduction or suspension of contract payments upon finding of fraud.

3432.006–3 Responsibilities.

**Subpart 3432.4—Advance Payments for Other Than Commercial Acquisitions**

3432.402 General.

3432.407 Interest.

**Subpart 3432.7—Contract Funding**

3432.706 Contract clauses.

3432.706–2 Clauses for limitation of cost or funds.

Authority: 5 U.S.C. 301.

**3432.000 Scope of part.****3432.006 Reduction or suspension of contract payments upon finding of fraud.****3432.006–3 Responsibilities.**

(b) Department personnel must report immediately and in writing any apparent or suspected instance where the contractor's request for advance, partial, or progress payments is based on fraud. The report must be made to the contracting officer and the Assistant Inspector General for Investigations. The report must outline the events, acts, or conditions which indicate the apparent or suspected violation and include all pertinent documents. The Assistant Inspector General for Investigations will investigate, as appropriate. If appropriate, the Office of the Inspector General will provide a report to the SPE.

**Subpart 3432.4—Advance Payments for Other Than Commercial Acquisitions****3432.402 General.**

The HCA is delegated the authority to make determinations under FAR 32.402(c)(1)(iii). This authority may not be redelegated.

**3432.407 Interest.**

The HCA is designated as the official who may authorize advance payments without interest under FAR 32.407(d).

**Subpart 3432.7—Contract Funding****3432.706 Contract clauses.****3432.706–2 Clauses for limitation of cost or funds.**

(c) The contracting officer must insert the clause at 3452.232–70 (Limitation of cost or funds) in all solicitations and contracts where a limitation of cost or limitation of funds clause is utilized.

(d) The contracting officer must insert the provision in 3452.232–71 (Incremental funding) in a solicitation if a cost-reimbursement contract using incremental funding is contemplated.

(e)(1) The contracting officer must insert the clause at 3452.232–72 (Limitation of Government's obligation) in solicitations and resultant incrementally funded fixed-price contracts or contract line items (CLIN(s)) of such contracts only if—

(i) Sufficient funds are not available to the Department at the time of contract award or exercise of option to fully fund the contract, option, or CLIN(s); and

(ii) The contract (excluding any options), any exercised option, or CLIN(s)—

(A) Is for severable services; and  
(B) Does not exceed one year in length; and

(C) Is incrementally funded using funds available (unexpired) as of the date the funds are obligated; or

(D) Congress has otherwise authorized incremental funding.

(2) When a partially funded contract contains the clause at 3452.232–72 (Limitation of Government's obligation) upon learning that the contractor is approaching the price of the contract or the limit of the funds allotted to the contract or specified CLIN(s) or upon receipt of the contractor's notice under paragraph (b) of the clause at 3452.232–72, the contracting officer must promptly obtain funding information pertinent to the continuation of the applicable CLIN(s) or contract and notify the contractor in writing. This notification must provide that—

(i)(A) Additional funds have been allotted, in a specified amount;

(B) The contract or applicable CLIN(s) is not to be further funded;

(C) The contract or applicable CLIN(s) is to be terminated; or

(D) The Government is considering whether to allot additional funds;

(ii) The contractor is entitled by the contract terms to stop work on applicable CLIN(s) when the funding limit is reached; and

(iii) Any work beyond the funding limit will be at the contractor's risk.

(3) Upon learning that a partially funded contract will receive no further funds, the contracting officer must promptly give the contractor written notice of the decision not to provide funds.

(4) The contracting officer must ensure that sufficient funds are allotted to the contract or applicable CLIN(s) to cover the total amount payable to the contractor in the event of termination for the convenience of the Government.

(5) The Government must not accept supplies or services under an incrementally funded contract or CLIN(s) once funding limits are reached until the contracting officer has given the contractor notice, to be confirmed in writing, that funds are available.

(6) Government personnel encouraging a contractor to continue work in the absence of funds will incur a violation of Revised Statutes section 3679 (31 U.S.C. 1341) that may subject the violator to civil or criminal penalties.

(7) An incrementally funded fixed-price contract and/or CLIN(s) must be fully funded as soon as funds are available.

(8) The contracting officer must insert the information required in the table in paragraph (l) of the clause at 3452.232–72. Since the funds allotted must cover costs of termination of the applicable CLIN(s) for the Government's convenience, the contractor must provide the last date of performance subject to the contracting officer's concurrence. The contracting officer may revise the contractor's notification period in paragraph (b) of the clause from “ninety” to “thirty” or “sixty” days, as appropriate.

## **PART 3433—PROTESTS, DISPUTES, AND APPEALS**

### **Subpart 3433.1—Protests**

Sec.

3433.103 Protests to the agency.

**Authority:** 5 U.S.C. 301.

### **Subpart 3433.1—Protests**

#### **3433.103 Protests to the agency.**

(d)(4)(i) All protests to the agency must be submitted to the contracting officer identified in the solicitation. Interested parties may request an independent review of their protest as an alternative to consideration by the contracting officer. If a protest is silent on this matter, the contracting officer will decide the protest. The Department will not consider an appeal of the contracting officer's protest decision.

(ii) If the protester requests an independent review, the HCA will decide the protest. In the event the HCA is not at least one level above the contracting officer, or if the HCA has been substantially involved in the procurement, the SPE will decide the protest.

(iii) Contracting officers must include the provision at 3452.233–70 in solicitations.

(f)(3) The contracting officer's HCA must approve the justification or determination to continue performance.

## **SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING**

## **PART 3437—SERVICE CONTRACTING**

### **Subpart 3437.1—Service Contracts—General**

Sec.

3437.102 Policy.

3437.170 Observance of administrative closures.

### **Subpart 3437.2—Advisory and Assistance Services**

3437.204 Guidelines for determining availability of personnel.

3437.270 Services of consultants clauses.

### **Subpart 3437.6—Performance-Based Acquisition**

3437.601 General.

3437.670 Contract type.

**Authority:** 5 U.S.C. 301 and 20 U.S.C. 1018a.

### **Subpart 3437.1—Service Contracts—General**

#### **3437.102 Policy.**

If a service contract requires one or more end items of supply, FAR subpart 37.1 and this subpart apply only to the required services.

#### **3437.170 Observance of administrative closures.**

The contracting officer must insert the clause at 3452.237–71 (Observance of administrative closures) in all solicitations and contracts for services.

### **Subpart 3437.2—Advisory and Assistance Services**

#### **3437.204 Guidelines for determining availability of personnel.**

The HCA is the agency head for the purposes of FAR 37.204.

#### **3437.270 Services of consultants clause.**

The contracting officer must insert the clause at 3452.237–70 (Services of consultants) in all solicitations and resultant cost-reimbursement contracts for consultant services that do not provide services to Federal Student Aid (FSA).

### **Subpart 3437.6—Performance-Based Acquisition**

#### **3437.601 General.**

It is the Department's policy that all new service contracts be performance-based, with clearly defined deliverable and performance standards. Any deviations from this policy must be fully justified in writing and approved by the HCA.

#### **3437.670 Contract type.**

Award-term contracting may be used for performance-based contracts and task orders that provide opportunities for significant improvements and benefits to the Department. Use of award-term contracting must be approved in advance by the HCA.

## **PART 3439—ACQUISITION OF INFORMATION TECHNOLOGY**

### **Subpart 3439.70—Department Requirements for Acquisition of Information Technology**

Sec.

3439.701 Internet protocol version 6.

3439.702 Department information security and privacy requirements.

Authority: 5 U.S.C. 301 and 20 U.S.C. 1018a.

### **Subpart 3439.70—Department Requirements for Acquisition of Information Technology**

#### **3439.701 Internet protocol version 6.**

The contracting officer must insert the clause at 3452.239–70 (internet protocol version 6 (IPv6)) in all solicitations and resulting contracts for hardware and software.

#### **3439.702 Department information security and privacy requirements.**

The contracting officer must include the clause at 3452.239–71 (Department information security and privacy requirements) in all solicitations and contracts.

### **SUBCHAPTER G—CONTRACT MANAGEMENT**

### **PART 3442—CONTRACT ADMINISTRATION AND AUDIT SERVICES**

#### **Subpart 3442.70—Contract Monitoring**

Sec.

- 3442.7001 Litigation and claims clause.
- 3442.7002 Delays clause.

#### **Subpart 3442.71—Accessibility of Meetings, Conferences, and Seminars to Persons With Disabilities**

- 3442.7101 Policy and clause.

Authority: 5 U.S.C. 301.

#### **Subpart 3442.70—Contract Monitoring**

##### **3442.7001 Litigation and claims clause.**

The contracting officer must insert the clause at 3452.242–70 (Litigation and claims) in all solicitations and resultant cost-reimbursement contracts.

##### **3442.7002 Delays clause.**

The contracting officer must insert the clause at 3452.242–71 (Notice to the Government of delays) in all solicitations and contracts other than purchase orders.

#### **Subpart 3442.71—Accessibility of Meetings, Conferences, and Seminars to Persons With Disabilities**

##### **3442.7101 Policy and clause.**

(a) It is the policy of the Department that all meetings, conferences, and seminars be accessible to persons with disabilities.

(b) The contracting officer must insert the clause at 3452.242–73 (Accessibility of meetings, conferences, and seminars to persons with disabilities) in all solicitations and contracts where conferences are contemplated.

### **PART 3443—CONTRACT MODIFICATIONS**

#### **Subpart 3443.1—General**

Sec.

- 3443.107 Contract clause.

Authority: 5 U.S.C. 301.

#### **Subpart 3443.1—General**

##### **3443.107 Contract clause.**

The contracting officer must insert a clause substantially the same as the clause at 3452.243–70 (Key personnel) in all solicitations and contracts in which it will be essential for the contracting officer to be notified that a change of designated key personnel is to take place by the contractor.

### **PART 3445—GOVERNMENT PROPERTY**

#### **Subpart 3445.3—Authorizing the Use and Rental of Government Property**

Sec.

- 3445.302 Contracts with foreign governments or international organizations.

Authority: 5 U.S.C. 301.

#### **Subpart 3445.3—Authorizing the Use and Rental of Government Property**

##### **3445.302 Contracts with foreign governments or international organizations.**

Requests by, or for the benefit of, foreign governments or international organizations to use ED production and research property must be approved by the HCA. The HCA must determine the amount of cost to be recovered or rental charged, if any, based on the facts and circumstances of each case.

### **PART 3447—TRANSPORTATION**

#### **Subpart 3447.7—Foreign Travel**

Sec.

- 3447.701 Foreign travel clause.

Authority: 5 U.S.C. 301.

#### **Subpart 3447.7—Foreign Travel**

##### **3447.701 Foreign travel clause.**

The contracting officer must insert the clause at 3452.247–70 (Foreign travel) in all solicitations and resultant cost-reimbursement contracts where foreign travel is contemplated.

### **SUBCHAPTER H—CLAUSES AND FORMS**

### **PART 3452—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

#### **Subpart 3452.2—Text of Provisions and Clauses**

Sec.

- 3452.201–70 Contracting Officer's Representative (COR).

3452.202–1 Definitions—Department of Education.

3452.204–70 Records management.

3452.204–71 Contractor security vetting requirements.

3452.208–72 Paperwork Reduction Act.

3452.209–70 Conflict of interest certification.

3452.209–71 Conflict of interest.

3452.215–70 Release of restricted data.

3452.216–70 Additional cost principles.

3452.216–71 Award-Term.

3452.224–70 Release of information under the Freedom of Information Act.

3452.224–71 Notice about research activities involving human subjects.

3452.224–72 Research activities involving human subjects.

3452.224–73 Protection of student privacy in compliance with FERPA.

3452.227–70 Publication and publicity.

3452.227–71 Advertising of awards.

3452.227–72 Use and non-disclosure agreement.

3452.227–73 Limitations on the use or disclosure of Government-furnished information marked with restrictive legends.

3452.228–70 Required insurance.

3452.231–71 Invitational travel costs.

3452.232–70 Limitation of cost or funds.

3452.232–71 Incremental funding.

3452.232–72 Limitation of Government's obligation.

3452.233–70 Agency level protests.

3452.237–70 Services of consultants.

3452.237–71 Observance of administrative closures.

3452.239–70 Internet protocol version 6 (IPv6).

3452.239–71 Department information security and privacy requirements.

3452.242–70 Litigation and claims.

3452.242–71 Notice to the Government of delays.

3452.242–73 Accessibility of meetings, conferences, and seminars to persons with disabilities.

3452.243–70 Key personnel.

3452.247–70 Foreign travel.

Authority: 5 U.S.C. 301.

#### **Subpart 3452.2—Text of Provisions and Clauses**

##### **3452.201–70 Contracting Officer's Representative (COR).**

As prescribed in 3401.604–70, insert a clause substantially the same as:

##### **Contracting Officer's Representative (COR) (Mar 2011)**

(a) The Contracting Officer's Representative (COR) is responsible for the technical aspects of the project, technical liaison with the contractor, and any other responsibilities that are specified in the contract. These responsibilities include inspecting all deliverables, including reports, and recommending acceptance or rejection to the contracting officer.

(b) The COR is not authorized to make any commitments or otherwise obligate the Government or authorize any changes that affect the contract price, terms, or conditions. Any contractor requests for changes shall be

submitted in writing directly to the contracting officer or through the COR. No such changes shall be made without the written authorization of the contracting officer.

(c) The COR's name and contact information:

(d) The COR may be changed by the Government at any time, but notification of the change, including the name and address of the successor COR, will be provided to the contractor by the contracting officer in writing.

(End of Clause)

#### **3452.202–1 Definitions—Department of Education.**

As prescribed in 3402.201, insert the following clause in solicitations and contracts in which the clause at FAR 52.202–1 is required.

#### **Definitions—Department of Education (Mar 2011)**

(a) The definitions at FAR 2.101 are appended with those contained in Education Department Acquisition Regulations (EDAR) 3402.101.

(b) The EDAR is available via the internet at [www.ed.gov/policy/fund/reg/clibrary/edar.html](http://www.ed.gov/policy/fund/reg/clibrary/edar.html).

(End of Clause)

#### **3452.204–70 Records management.**

As prescribed in 3404.770, insert the following clause:

#### **Records Management (Oct 2023)**

##### **A. Applicability**

This clause applies to all Contractors and subcontractors that receive, create, work with, or otherwise handle Federal records, as defined in paragraph B, regardless of the medium in which the record exists.

##### **B. Definitions**

“Federal record,” as defined in 44 U.S.C. 3301, means all recorded information, regardless of form or characteristics, made or received by the Department under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by the Department or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the U.S. Government or because of the informational value of data in them.

“Records inventory,” as used in this clause, means a descriptive listing of each Federal record series or system that a Contractor creates, receives, or maintains in performance of its contract with the Department, together with an indication of its location, retention, custodian, volume, and other pertinent data.

##### **C. Requirements**

1. The Contractor shall comply with all applicable records management laws and regulations, as well as National Archives and Records Administration (NARA) records policies, including the Federal Records Act (44 U.S.C. chapters 21, 29, 31, and 33),

NARA regulations at 36 CFR chapter XII, subchapter B, including 36 CFR part 1236, and those policies associated with the safeguarding of Federal records covered by the Privacy Act of 1974, as amended (Privacy Act) (5 U.S.C. 552a). These laws, regulations, and policies include the appropriate preservation of all Federal records, regardless of form or characteristics, mode of transmission, or state of completion.

2. In accordance with 36 CFR 1222.32, all data created for U.S. Government use and delivered to, or falling under the legal control of, the U.S. Government are Federal records subject to the provisions of 44 U.S.C. chapters 21, 29, 31, and 33, the Freedom of Information Act, as amended (FOIA) (5 U.S.C. 552), and the Privacy Act, and must be managed and scheduled for disposition only as permitted by Federal statute or regulation.

3. In accordance with 36 CFR 1222.32, the Contractor shall maintain and manage all Federal records created for U.S. Government use, created during performance of this contract, and/or delivered to, or under the legal control of, the U.S. Government in accordance with Federal law. Electronic Federal records and associated metadata specified for delivery under this contract must be accompanied by sufficient technical documentation to facilitate their understanding and use.

4. (a) The Contractor shall provide a records inventory to the Contracting Officer Representative and Contracting Officer within 60 business days after contract or order award. The Department will review the records inventory for accuracy and accept or reject the records inventory within 60 business days after receipt.

(b) If the Contractor creates, receives, or maintains a Federal record series or system that is not included in the records inventory, the Contractor shall notify the Contracting Officer Representative and Contracting Officer within five business days of the Contractor's creation, receipt, or maintenance of such Federal record series or system, and provide the Contracting Officer with a revised records inventory. The Department will review the records inventory for accuracy and accept or reject the records inventory within 60 business days after receipt.

(c) The Department will periodically review, and may, in its sole discretion, update, the records inventory to ensure that it is current, accurate, and complete. The Department will provide the Contractor with a copy of any such updated records inventory.

5. The U.S. Government reserves the right to inspect, at any time, Contractor and subcontractor policies, procedures, and strategies for ensuring that Federal records are appropriately maintained.

6. The Contractor is responsible for preventing the alienation or unauthorized destruction of Federal records under this contract, including all forms of mutilation. Federal records may not be removed from the legal custody of the Department or destroyed except in accordance with the provisions of this contract and the Federal Records Act. Willful and unlawful destruction, damage, or

alienation of Federal records is subject to the fines and penalties imposed by 18 U.S.C. 2701. The Contractor shall report any unlawful or accidental removal, defacing, alteration, or destruction of Federal records to the Contracting Officer within one business day.

7. The Contractor shall ensure that the appropriate personnel, administrative, technical, and physical safeguards are established to ensure the security and confidentiality of all Federal records in accordance with this contract and applicable law.

8. The Contractor shall not remove material from U.S. Government facilities or systems, or facilities or systems operated or maintained on the U.S. Government's behalf, without the express prior written authorization of the Contracting Officer.

9. The Contractor shall not create or maintain any Federal records containing any non-public Department information not specified or authorized by this contract.

10. (a) During the term of this contract, the Contractor shall not (i) disclose any Federal record, or any copy thereof, that contains information covered by 32 CFR part 2002 or FOIA (with the exception, for the purposes of FOIA, of information that exclusively implicates the exemption 4 interests of the Contractor); or (ii) sell any Federal record, or any copy thereof.

(b) After expiration or termination of this contract, the Contractor shall not retain or have access to any Federal record, or any copy thereof, that contains information covered by 32 CFR part 2002 or that is generally protected from public disclosure by an exemption under FOIA with the exception, for the purposes of FOIA, of information that exclusively implicates the exemption 4 interests of the Contractor.

(c) Under no circumstances shall the Contractor destroy Federal records except in accordance with the provisions of this contract and the Federal Records Act.

11. All Contractor employees assigned to this contract who create, work with, or otherwise handle Federal records are required to complete Department-provided records management training. The Contractor is responsible for confirming training has been completed according to Department policies, including initial training and any annual or refresher training.

12. The Contractor is required to notify the Contracting Officer of any contractual relationship (sub-contractor) in support of this contract requiring the disclosure of information, documentary material and/or Federal records generated under, or relating to, contracts. The Contractor (and any sub-contractor) is required to abide by U.S. Government and the Department's guidance for protecting sensitive, proprietary information, classified, and controlled unclassified information.

(a) The Contractor shall incorporate the substance of this clause, its terms and requirements including this paragraph, in all subcontracts requiring the disclosure to a subcontractor of information, documentary material, and/or Federal records generated under, or relating to, the performance of this contract, and require written subcontractor acknowledgement of the same.



(b) Violation by a subcontractor of any provision set forth in this clause will be attributed to the Contractor.

(End of Clause)

#### **3452.204–71 Contractor security vetting requirements.**

As prescribed in 3404.470–1, insert the following clause:

##### **Contractor Security Vetting Requirements (Oct 2023)**

(a) The Contractor and its subcontractors shall comply with Department of Education personnel, cyber, privacy, and security policy requirements set forth in “Contractor Security Vetting Requirements” at <http://www.ed.gov/fund/contract/about/bsp.html>.

(b) Contractor employees who will have access to proprietary or sensitive Department information including “Controlled Unclassified Information” as defined in 32 CFR 2002.4(h), Department IT systems, Contractor systems operated with Department data or interfacing with Department systems, or Department facilities or space, or perform duties in a school or in a location where children are present, must undergo a personnel security screening and receive a favorable determination and are subject to reinvestigation as described in the “Contractor Vetting Security Requirements.” Compliance with the “Contractor Vetting Security Requirements,” as amended, is required.

(c) The type of security investigation required to commence work on a Department contract is dictated by the position designation determination assigned by the Department. All Department Contractor positions are designated commensurate with their position risk/sensitivity, in accordance with title 5 of the Code of Federal Regulations (5 CFR 731.106) and OPM’s Position Designation Tool (PDT) located at: <https://pdt.nbis.mil/>. The position designation determines the risk level and the corresponding level of background investigations required.

(d) The Contractor shall comply with all Contractor position designations established by the Department.

(e) The following are the Contractor employee positions required under this contract and their designated risk levels:

*High Risk (HR)*: (Specify HR positions or Insert “Not Applicable”)

*Moderate Risk (MR)*: (Specify MR positions or Insert “Not Applicable”)

*Low Risk (LR)*: Specify LR positions or Insert “Not Applicable”)

(f) For performance-based contracts where the Department has not identified required labor categories for Contractor positions, the Department considers the risk sensitivity of the services to be performed and the access to Department facilities and systems that will be required during performance, to determine the uniform Contractor position risk level designation for all Contractor employees who will be providing services under the contract. The uniform Contractor position risk level designation applicable to this performance-based contract is: (Contracting Officer to complete with overall risk level; or insert “Not Applicable”).

(g) Only U.S. citizens will be eligible for employment on contracts requiring a Low Risk/Public Trust, Moderate Risk/Public Trust, High Risk/Public Trust, or a National Security designation.

(h) An approved waiver, in accordance with the “Contractor Vetting Security Requirements,” is required for any exception to the requirements of paragraph (g) of this section.

(i) The Contractor shall—

(1) Comply with the Principal Office (PO) processing requirements for personnel security screening;

(2) Ensure that no Contractor employee is placed in a higher risk position than for which the employee is approved;

(3) Ensure Contractor employees submit required security forms for reinvestigation in accordance with the time frames set forth in the “Contractor Vetting Security Requirements”;

(4) Report to the COR any information (e.g., personal conduct, criminal conduct, financial difficulties) that would raise a concern about the suitability of a Contractor employee or whether a Contractor employee’s continued employment would promote the efficiency of the service or violate the public trust;

(5) Protect sensitive and Privacy Act-protected information, including “Controlled Unclassified Information” as defined in 32 CFR 2002.4(h), from unauthorized access, use, or misuse by its Contractor employees, prevent unauthorized access by others, and report any instances of unauthorized access, use, or misuse to the COR;

(6) Report to the COR any removal of a Contractor employee from a contract within one business day if removed for cause or within two business days if otherwise removed;

(7) Upon the occurrence of any of the events listed under paragraph (b) of the clause at FAR 52.204–9, Personal Identity Verification of Contractor Personnel, return a PIV ID to the COR within seven business days of the Contractor employee’s departure; and

(8) Report to the COR any change to job activities that could result in a change in the Contractor employee’s position or the need for increased security access.

(j) Failure to comply with any of the personnel security requirements in the “Contractor Security Vetting Requirements” at <http://www.ed.gov/fund/contract/about/bsp.html>, may result in a termination of the contract for default or cause.

(End of Clause)

#### **3452.208–72 Paperwork Reduction Act.**

As prescribed in 3408.871, insert the following clause in all relevant solicitations and contracts:

##### **Paperwork Reduction Act (Mar 2011)**

(a) The Paperwork Reduction Act of 1995 applies to contractors that collect information for use or disclosure by the Federal government. If the contractor will collect information requiring answers to identical questions from 10 or more people, no plan, questionnaire, interview guide, or other similar device for collecting information may

be used without first obtaining clearance from the Chief Acquisition Officer (CAO) or the CAO’s designee within the Department of Education (ED) and the Office of Management and Budget (OMB). Contractors and Contracting Officers’ Representatives shall be guided by the provisions of 5 CFR part 1320, Controlling Paperwork Burdens on the Public, and should seek the advice of the Department’s Paperwork Clearance Officer to determine the procedures for acquiring CAO and OMB clearance.

(b) The contractor shall obtain the required clearances through the Contracting Officer’s Representative before expending any funds or making public contacts for the collection of information described in paragraph (a) of this clause. The authority to expend funds and proceed with the collection shall be in writing by the contracting officer. The contractor must plan at least 120 days for CAO and OMB clearance. Excessive delay caused by the Government that arises out of causes beyond the control and without the fault or negligence of the contractor will be considered in accordance with the Excusable Delays or Default clause of this contract.

(End of Clause)

#### **3452.209–70 Conflict of interest certification.**

As prescribed in 3409.507–1, insert the following provision in all solicitations anticipated to result in contract actions for services above the simplified acquisition threshold:

##### **Conflict of Interest Certification (Mar 2011)**

(a)(1) The contractor, subcontractor, employee, or consultant, by signing the form in this clause, certifies that, to the best of its knowledge and belief, there are no relevant facts or circumstances that could give rise to an organizational or personal conflict of interest, (see FAR subpart 9.5 for organizational conflicts of interest) (or apparent conflict of interest), for the organization or any of its staff, and that the contractor, subcontractor, employee, or consultant has disclosed all such relevant information if such a conflict of interest appears to exist to a reasonable person with knowledge of the relevant facts (or if such a person would question the impartiality of the contractor, subcontractor, employee, or consultant). Conflicts may arise in the following situations:

(i) *Unequal access to information.* A potential contractor, subcontractor, employee, or consultant has access to non-public information through its performance on a government contract.

(ii) *Biased ground rules.* A potential contractor, subcontractor, employee, or consultant has worked, in one government contract, or program, on the basic structure or ground rules of another government contract.

(iii) *Impaired objectivity.* A potential contractor, subcontractor, employee, or consultant, or member of their immediate family (spouse, parent, or child) has financial or other interests that would impair, or give the appearance of impairing, impartial judgment in the evaluation of government

programs, in offering advice or recommendations to the government, or in providing technical assistance or other services to recipients of Federal funds as part of its contractual responsibility. "Impaired objectivity" includes but is not limited to the following situations that would cause a reasonable person with knowledge of the relevant facts to question a person's objectivity:

(A) Financial interests or reasonably foreseeable financial interests in or in connection with products, property, or services that may be purchased by an educational agency, a person, organization, or institution in the course of implementing any program administered by the Department;

(B) Significant connections to teaching methodologies or approaches that might require or encourage the use of specific products, property, or services; or

(C) Significant identification with pedagogical or philosophical viewpoints that might require or encourage the use of a specific curriculum, specific products, property, or services.

(2) Offerors must provide the disclosure described above on any actual or potential conflict of interest (or apparent conflict of interest) regardless of their opinion that such a conflict or potential conflict (or apparent conflict of interest) would not impair their objectivity.

(3) In a case in which an actual or potential conflict (or apparent conflict of interest) is disclosed, the Department will take appropriate actions to eliminate or address the actual or potential conflict, including but not limited to mitigating or neutralizing the conflict, when appropriate, through such means as ensuring a balance of views, disclosure with the appropriate disclaimers, or by restricting or modifying the work to be performed to avoid or reduce the conflict. In this clause, the term "potential conflict" means reasonably foreseeable conflict of interest.

(b) The contractor, subcontractor, employee, or consultant agrees that if "impaired objectivity", or an actual or potential conflict of interest (or apparent conflict of interest) is discovered after the award is made, it will make a full disclosure in writing to the contracting officer. This disclosure shall include a description of actions that the contractor has taken or proposes to take to avoid, mitigate, or neutralize the actual or potential conflict (or apparent conflict of interest).

(c) *Remedies.* The Government may terminate this contract for convenience, in whole or in part, if it deems such termination necessary to avoid the appearance of a conflict of interest. If the contractor was aware of a potential conflict of interest prior to award or discovered an actual or potential conflict after award and did not disclose or misrepresented relevant information to the contracting officer, the Government may terminate the contract for default, or pursue such other remedies as may be permitted by law or this contract. These remedies include imprisonment for up to five years for violation of 18 U.S.C. 1001 and fines of up to \$5000 for violation of 31 U.S.C. 3802.

Further remedies include suspension or debarment from contracting with the Federal government. The contractor may also be required to reimburse the Department for costs the Department incurs arising from activities related to conflicts of interest. An example of such costs would be those incurred in processing Freedom of Information Act requests related to a conflict of interest.

(d) In cases where remedies short of termination have been applied, the contractor, subcontractor, employee, or consultant agrees to eliminate the organizational conflict of interest, or mitigate it to the satisfaction of the contracting officer.

(e) The contractor further agrees to insert in any subcontract or consultant agreement hereunder, provisions that conform substantially to the language of this clause, including specific mention of potential remedies and this paragraph (e).

**(f) Conflict of Interest Certification.**

The offeror, [insert name of offeror], hereby certifies that, to the best of its knowledge and belief, there are no present or currently planned interests (financial, contractual, organizational, or otherwise) relating to the work to be performed under the contract or task order resulting from Request for Proposal No. [insert number] that would create any actual or potential conflict of interest (or apparent conflicts of interest) (including conflicts of interest for immediate family members: spouses, parents, children) that would impinge on its ability to render impartial, technically sound, and objective assistance or advice or result in it being given an unfair competitive advantage. In this clause, the term "potential conflict" means reasonably foreseeable conflict of interest. The offeror further certifies that it has and will continue to exercise due diligence in identifying and removing or mitigating, to the Government's satisfaction, such conflict of interest (or apparent conflict of interest).

Offeror's Name \_\_\_\_\_  
RFP/Contract No. \_\_\_\_\_  
Signature \_\_\_\_\_  
Title \_\_\_\_\_  
Date \_\_\_\_\_

(End of Provision)

**3452.209-71 Conflict of interest.**

As prescribed in 3409.507-2, insert the following clause in all contracts for services above the simplified acquisition threshold:

**Conflict of Interest (Mar 2011)**

(a)(1) The contractor, subcontractor, employee, or consultant has certified that, to the best of its knowledge and belief, there are no relevant facts or circumstances that could give rise to an organizational or personal conflict of interest (see FAR subpart 9.5 for organizational conflicts of interest) (or apparent conflict of interest) for the organization or any of its staff, and that the contractor, subcontractor, employee, or consultant has disclosed all such relevant information if such a conflict of interest appears to exist to a reasonable person with knowledge of the relevant facts (or if such a

person would question the impartiality of the contractor, subcontractor, employee, or consultant). Conflicts may arise in the following situations:

(i) *Unequal access to information*—A potential contractor, subcontractor, employee, or consultant has access to non-public information through its performance on a government contract.

(ii) *Biased ground rules*—A potential contractor, subcontractor, employee, or consultant has worked, in one government contract, or program, on the basic structure or ground rules of another government contract.

(iii) *Impaired objectivity*—A potential contractor, subcontractor, employee, or consultant, or member of their immediate family (spouse, parent, or child) has financial or other interests that would impair, or give the appearance of impairing, impartial judgment in the evaluation of government programs, in offering advice or recommendations to the government, or in providing technical assistance or other services to recipients of Federal funds as part of its contractual responsibility. "Impaired objectivity" includes but is not limited to the following situations that would cause a reasonable person with knowledge of the relevant facts to question a person's objectivity:

(A) Financial interests or reasonably foreseeable financial interests in or in connection with products, property, or services that may be purchased by an educational agency, a person, organization, or institution in the course of implementing any program administered by the Department;

(B) Significant connections to teaching methodologies that might require or encourage the use of specific products, property, or services; or

(C) Significant identification with pedagogical or philosophical viewpoints that might require or encourage the use of a specific curriculum, specific products, property, or services.

(2) Offerors must provide the disclosure described above on any actual or potential conflict (or apparent conflict of interest) of interest regardless of their opinion that such a conflict or potential conflict (or apparent conflict of interest) would not impair their objectivity.

(3) In a case in which an actual or potential conflict (or apparent conflict of interest) is disclosed, the Department will take appropriate actions to eliminate or address the actual or potential conflict (or apparent conflict of interest), including but not limited to mitigating or neutralizing the conflict, when appropriate, through such means as ensuring a balance of views, disclosure with the appropriate disclaimers, or by restricting or modifying the work to be performed to avoid or reduce the conflict. In this clause, the term "potential conflict" means reasonably foreseeable conflict of interest.

(b) The contractor, subcontractor, employee, or consultant agrees that if "impaired objectivity", or an actual or potential conflict of interest (or apparent conflict of interest) is discovered after the award is made, it will make a full disclosure

in writing to the contracting officer. This disclosure shall include a description of actions that the contractor has taken or proposes to take, after consultation with the contracting officer, to avoid, mitigate, or neutralize the actual or potential conflict (or apparent conflict of interest).

(c) *Remedies.* The Government may terminate this contract for convenience, in whole or in part, if it deems such termination necessary to avoid the appearance of a conflict of interest. If the contractor was aware of a potential conflict of interest prior to award or discovered an actual or potential conflict (or apparent conflict of interest) after award and did not disclose or misrepresented relevant information to the contracting officer, the Government may terminate the contract for default, or pursue such other remedies as may be permitted by law or this contract. These remedies include imprisonment for up to five years for violation of 18 U.S.C. 1001 and fines of up to \$5000 for violation of 31 U.S.C. 3802. Further remedies include suspension or debarment from contracting with the Federal government. The contractor may also be required to reimburse the Department for costs the Department incurs arising from activities related to conflicts of interest. An example of such costs would be those incurred in processing Freedom of Information Act requests related to a conflict of interest.

(d) In cases where remedies short of termination have been applied, the contractor, subcontractor, employee, or consultant agrees to eliminate the organizational conflict of interest, or mitigate it to the satisfaction of the contracting officer.

(e) The contractor further agrees to insert in any subcontract or consultant agreement hereunder, provisions that conform substantially to the language of this clause, including specific mention of potential remedies and this paragraph (e).

(End of Clause)

#### **3452.215–70 Release of restricted data.**

As prescribed in 3415.209, insert the following provision in solicitations:

##### **Release of Restricted Data (Mar 2011)**

(a) Offerors are hereby put on notice that regardless of their use of the legend set forth in FAR 52.215–1(e), Restriction on Disclosure and Use of Data, the Government may be required to release certain data contained in the proposal in response to a request for the data under the Freedom of Information Act (FOIA). The Government's determination to withhold or disclose a record will be based upon the particular circumstance involving the data in question and whether the data may be exempted from disclosure under FOIA. In accordance with Executive Order 12600 and to the extent permitted by law, the Government will notify the offeror before it releases restricted data.

(b) By submitting a proposal or quotation in response to this solicitation:

(1) The offeror acknowledges that the Department may not be able to withhold or deny access to data requested pursuant to FOIA and that the Government's FOIA officials shall make that determination;

(2) The offeror agrees that the Government is not liable for disclosure if the Department has determined that disclosure is required by FOIA;

(3) The offeror acknowledges that proposals not resulting in a contract remain subject to FOIA; and

(4) The offeror agrees that the Government is not liable for disclosure or use of unmarked data and may use or disclose the data for any purpose, including the release of the information pursuant to requests under FOIA.

(c) Offerors are cautioned that the Government reserves the right to reject any proposal submitted with:

(1) A restrictive legend or statement differing in substance from the one required by the solicitation provision in FAR 52.215–1(e), Restriction on Disclosure and Use of Data, or

(2) A statement taking exceptions to the terms of paragraphs (a) or (b) of this provision.

(End of Provision)

#### **3452.216–70 Additional cost principles.**

Insert the following clause in solicitations and contracts as prescribed in 3416.307(b):

##### **Additional Cost Principles (Aug 1987)**

(a) *Bid and Proposal Costs.* Bid and proposal costs are the immediate costs of preparing bids, proposals, and applications for potential Federal and non-Federal grants, contracts, and other agreements, including the development of scientific, cost, and other data needed to support the bids, proposals, and applications. Bid and proposal costs of the current accounting period are allowable as indirect costs; bid and proposal costs of past accounting periods are unallowable as costs of the current period. However, if the organization's established practice is to treat these costs by some other method, they may be accepted if they are found to be reasonable and equitable. Bid and proposal costs do not include independent research and development costs or pre-award costs.

(b) *Independent research and development costs.* Independent research and development is research and development that is not sponsored by Federal and non-Federal grants, contracts, or other agreements. Independent research and development shall be allocated its proportionate share of indirect costs on the same basis as the allocations of indirect costs of sponsored research and development. The costs of independent research and development, including its proportionate share of indirect costs, are unallowable.

(End of Clause)

#### **3452.216–71 Award-Term.**

As prescribed in 3416.470, insert a clause substantially the same as the following in all solicitations and contracts where an award-term arrangement is anticipated:

##### **Award-Term (Oct 2023)**

(a) The initial [insert initial contract term] contract term or ordering period may be

extended or reduced on the basis of contractor performance, resulting in a contract term or an ordering period lasting at least [insert minimum contract term] years from the date of contract award, to a maximum of [insert maximum contract term] years after the date of contract award.

(b) The contractor's performance will be measured against stated standards by the performance monitors, who will report their findings to the Award Term Determining Official (or Board).

(c) Bilateral changes may be made to the award-term plan at any time. If agreement cannot be made within 60 days, the Government reserves the right to make unilateral changes prior to the start of an award-term period.

(d) The contractor will submit a brief written self-evaluation of its performance within X days after the end of the evaluation period. The self-evaluation report shall not exceed seven pages, and it may be considered in the Award Term Review Board's (ATRB's) (or Term Determining Official's) evaluation of the contractor's performance during this period.

(e) The contract term or ordering period requires bilateral modification to reflect the ATRB's decision. If the contract term or ordering period has one year remaining, the operation of the contract award-term feature will cease and the contract term or ordering period will not extend beyond the maximum term stated in the contract.

(f) Award terms that have not begun may be cancelled (rather than terminated), should the need for the items or services no longer exists. No equitable adjustments to the contract price are applicable, as this is not the same procedure as a termination for convenience.

(g) The decisions made by the ATRB or Term Determining Official may be made unilaterally. Alternate Dispute Resolution procedures shall be utilized when appropriate.

(End of Clause)

#### **3452.224–70 Release of information under the Freedom of Information Act.**

As prescribed in 3424.203, insert the following clause in solicitations and contracts.

##### **Release of Information Under the Freedom of Information Act (Mar 2011)**

By entering into a contract with the Department of Education, the contractor, without regard to proprietary markings, approves the release of the entire contract and all related modifications and task orders including, but not limited to:

- (1) Unit prices, including labor rates;
- (2) Statements of Work/Performance Work Statements generated by the contractor;
- (3) Performance requirements, including incentives, performance standards, quality levels, and service level agreements;
- (4) Reports, deliverables, and work products delivered in performance of the contract (including quality of service, performance against requirements/standards/service level agreements);

(5) Any and all information, data, software, and related documentation first provided under the contract;

(6) Proposals or portions of proposals incorporated by reference; and

(7) Other terms and conditions.

(End of Clause)

### **3452.224–71 Notice about research activities involving human subjects.**

As prescribed in 3424.170, insert the following provision in any solicitation where a resultant contract will include, or is likely to include, research activities involving human subjects covered under 34 CFR part 97:

#### **Notice About Research Activities Involving Human Subjects (Oct 2023)**

(a) Applicable Regulations. In accordance with Department of Education regulations on the protection of human subjects, title 34, Code of Federal Regulations, part 97 (the Regulations), Contractors and subcontractors, engaged in covered (nonexempt) research activities are required to establish and maintain procedures for the protection of human subjects. In addition, the Contractor must notify other entities (known to the Contractor) engaged in the covered research activities of their responsibility to comply with the Regulations.

(b) Definitions.

(1) The Regulations define research as “a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge.” (34 CFR 97.102(l)). If an activity follows a deliberate plan designed to develop or contribute to generalizable knowledge, it is research. Research includes activities that meet this definition, whether or not they are conducted under a program considered research for other purposes. For example, some demonstration and service programs may include research activities (34 CFR 97.102(l)).

(2) The Regulations define a human subject as a living individual about whom an investigator (whether professional or student) conducting research obtains data through intervention or interaction with the individual or obtains, uses, studies, analyzes, or generates identifiable private information. (34 CFR 97.102(e)(1)). Under this definition:

(i) The investigator gathers information about a living person through—

(A) Intervention—Manipulating the subject’s environment for research purposes, as might occur when a new instructional technique is tested; or

(B) Interaction—Communicating or interacting with the individual, as occurs with surveys and interviews.

(ii) Identifiable private information is private information about a living person that can be linked to that individual (the identity of the subject is or may be readily ascertained by the investigator or associated with the information).

(iii) Private information includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information

that has been provided for specific purposes by an individual and that an individual can reasonably expect will not be made public (for example, a school health record).

(c) Exemptions. 34 CFR 97.104(d) provides exemptions from the Federal Policy for the Protection of Human Subjects for research activities in which the only involvement of human subjects will be in one or more of the categories set forth in 34 CFR 97.104(d). However, if the research subjects are children, the exemption at 34 CFR

97.104(d)(2) (*i.e.*, research involving the use of educational tests, survey procedures, interview procedures or observation of public behavior) is modified by 34 CFR 97.401(b), as explained in paragraph (d) of this provision.

(d) Children as research subjects. 34 CFR 97.402(a) defines children as “persons who have not attained the legal age for consent to interventions or procedures involved in the research, under the applicable law of the jurisdiction in which the research will be conducted.” 34 CFR 97.401(b) provides that, if the research involves children as subjects—

(1) The exemption in 34 CFR 97.104(d)(2) does not apply to activities involving—

(i) Survey or interview procedures involving children as subjects; or

(ii) Observations of public behavior of children in which the investigator or investigators will not participate in the activities being observed.

(2) The exemption in 34 CFR 97.104(d)(2) continues to apply, unmodified, by 34 CFR 97.401(b), to—

(i) Educational tests; and

(ii) Observations of public behavior in which the investigator or investigators will not participate in the activities being observed.

(e) Proposal Instructions. An offeror proposing to do research that involves human subjects must provide information to the Department on the proposed exempt and nonexempt research activities. The offeror should submit this information as an attachment to its technical proposal. No specific page limitation applies to this requirement, but the offeror should be brief and to the point.

(1) For exempt research activities involving human subjects, the offeror should identify the exemption(s) that applies and provide sufficient information to allow the Department to determine that the designated exemption(s) is appropriate.

(2) For nonexempt research activities involving human subjects, the offeror must cover the following seven points in the information it provides to the Department. This seven-point narrative can usually be provided in two pages or less:

(i) *Human subjects’ involvement and characteristics*: Describe the characteristics of the subject population, including their anticipated number, age range, and health status. Identify the criteria for inclusion or exclusion of any subpopulation. Explain the rationale for the involvement of special classes of subjects, such as children, children with disabilities, adults with disabilities, persons with mental disabilities, pregnant women, institutionalized individuals, or others who are likely to be vulnerable.

(ii) *Sources of materials*: Identify the sources of research material obtained from or

about individually identifiable living human subjects in the form of specimens, records, or data.

(iii) *Recruitment and informed consent*: Describe plans for the recruitment of subjects and the consent procedures to be followed.

(iv) *Potential risks*: Describe potential risks (physical, psychological, social, financial, legal, educational, or other) and assess their likelihood and seriousness. Where appropriate, discuss alternative interventions and procedures that might be advantageous to the subjects.

(v) Protection against risk: Describe the procedures for protecting against or minimizing potential risks, including risks to confidentiality, and assess the likely effectiveness of such procedures. Where appropriate, discuss provisions for ensuring necessary medical or professional intervention in the event of adverse effects to the subjects. Also, where appropriate, describe the provisions for monitoring the data collected to ensure the safety of the subjects.

(vi) Importance of knowledge to be gained: Discuss why the risks to the subjects are reasonable in relation to the importance of the knowledge that may reasonably be expected to result.

(vii) Collaborating sites: If research involving human subjects will take place at collaborating site(s), name the sites and briefly describe their involvement or role in the research.

(3) If a reasonable potential exists that a need to conduct research involving human subjects may be identified after award of the contract and the offeror’s proposal contains no definite plans for such research, the offeror should briefly describe the circumstances and nature of the potential research involving human subjects.

(f) Assurances and certifications.

(1) In accordance with the Regulations and the terms of this provision, all Contractors and subcontractors that will be engaged in research activities involving human subjects shall be required to comply with the requirements for Assurances and Institutional Review Board approvals, as set forth in the contract clause at 3452.224–72 (Research activities involving human subjects).

(2) The Contracting Officer reserves the right to require that the offeror have or apply for the assurance and provide documentation of Institutional Review Board (IRB) approval of the proposed research prior to award. Based on 34 CFR 97.114 Cooperative Research, any institution involved in cooperative research projects (*i.e.*, research projects covered by this Regulation that involve more than one institution) shall enter into a joint review arrangement or rely upon the approval of a single IRB (sIRB) and a reliance agreement for any research conducted within the United States.

(g) Additional information:

(1) The Regulations, and related information on the protection of human research subjects, can be found on the Department’s protection of human subjects in research website: <https://www2.ed.gov/about/offices/list/ocfo/humansub.html>.

(2) Offerors may also contact the following office to obtain information about the

Regulations, the protection of human subjects, and related policies and guidelines: Protection of Human Subjects Coordinator, U.S. Department of Education, Office of Finance and Operations, Office of Acquisition, Grants, and Risk Management, 400 Maryland Avenue SW, Washington, DC 20202–4331. Email: [HumanSubjectsResearch@ed.gov](mailto:HumanSubjectsResearch@ed.gov).

(End of Provision)

#### **3452.224–72 Research activities involving human subjects.**

As prescribed in 3424.170, insert the following clause in any contract that includes research activities involving human subjects covered under 34 CFR part 97:

##### **Research Activities Involving Human Subjects (Oct 2023)**

(a) In accordance with Department of Education (the “Department”) regulations on the protection of human subjects in research, title 34, Code of Federal Regulations, part 97 (the Regulations), Contractors and subcontractors engaged in covered (nonexempt) research activities shall establish and maintain procedures for the protection of human subjects. The Contractor must include the substance of this clause in all subcontracts. In addition, the Contractor shall notify other entities (known to the Contractor) engaged in the covered research activities of their responsibility to comply with the regulations. The definitions in 34 CFR 97.102 apply to this clause. As used in this clause, “covered research” means research involving human subjects that is not exempt under 34 CFR 97.104 and 97.401(b).

(b) If the Department determines that proposed research activities involving human subjects are covered (*i.e.*, not exempt under the regulations), the Contracting Officer (CO) or Contracting Officer’s Representative (COR) will require the Contractor to apply for the Federal Wide Assurance from the Office for Human Research Protections, U.S. Department of Health and Human Services, if the Contractor does not already have certification on file. The CO will also require that the Contractor obtain and send to the Department documentation of Institutional Review Board (IRB) review and approval of the proposed research.

(c) Under no condition shall the Contractor conduct, or allow to be conducted, any research activity involving human subjects prior to the Department’s receipt of the certification that the proposed research has been reviewed and approved by the IRB (34 CFR 97.103(f)). No research involving human subjects shall be initiated under this contract until the Contractor has provided the CO (or the COR) a properly completed certification form certifying IRB review and approval of the research activity, and the CO or COR has acknowledged the receipt of such certification.

(d) In accordance with 34 CFR 97.109(f)(1), unless IRB or the Department determines otherwise, continuing review of research is not required in the following conditions:

1. Research is eligible for expedited review;

2. Research is reviewed by the IRB in accordance with the limited IRB review as described 34 CFR 97.104(d)(2)(iii); or

3. Research that is part of the IRB-approved study that has progressed to the point that it involves only one or both of the following:

- i. data analysis, including analysis of identifiable private information or identifiable biospecimens, or
- ii. accessing follow-up clinical data from interventions that subjects would undergo as part of clinical care.

(1) For each activity under this contract that requires continuing review, the Contractor shall submit an annual written representation to the CO or COR stating whether research activities have been reviewed and approved by the IRB within the previous 12 months. The Contractor may use the form titled “U.S. Department of Health and Human Services (HHS) Subpart C Certification Form” for this representation. For multi-institutional projects, the Contractor shall provide this representation on its behalf and on behalf of any subcontractor engaged in research activities for which continuing IRB reviews are required.

(2) If the IRB disapproves, suspends, terminates, or requires modification of any research activities under this contract, the Contractor shall immediately notify the CO in writing of the IRB’s action.

(e) The Contractor shall bear full responsibility for performing, as safely as is feasible, all activities under this contract involving the use of human subjects and for complying with all applicable regulations and requirements concerning human subjects. Neither the Contractor, subcontractor, agents of the Contractor, or employees of the Contractor, nor any person, organization, institution, or group of any kind involved in the performance of such activities under this contract, shall be deemed to constitute an agent or employee of the Department or of the Federal government with respect to such activities. The Contractor agrees to discharge its obligations, duties, and undertakings and the work pursuant thereto, whether requiring professional judgment or otherwise, as an independent contractor without imputing liability on the part of the Government for the acts of the Contractor, subcontractor, or their employees.

(f) Upon discovery of any noncompliance with any of the requirements or standards as stated in this clause, the Contractor shall correct such noncompliance as soon as practicable, typically no later than 1 business day. If the CO determines, in consultation with the Protection of Human Subjects Coordinator, Office of Acquisition, Grants, and Risk Management, Office of Finance and Operations, or the sponsoring office, that the Contractor is not in compliance with the requirements or standards stated in this clause, the CO may suspend work under this contract, in whole or in part, until it is determined that the Contractor has corrected such noncompliance and the CO authorizes the continuation of work.

1. Initial notice of suspension. The initial notice of suspension under this clause may be communicated orally or in writing by the CO.

2. Notice of suspension of work. The CO shall provide written notice of suspension of work under this clause. The notice shall contain the following:

- a. The effective date of suspension of work.
- b. The requirements and/or standards for which the Contractor is out of compliance.
- c. Any special instructions for the suspension of work.

3. Authorization to resume work. If the CO determines that the noncompliance has been remedied and it is in the best interest of the Government, the CO may authorize work to resume under the contract. The CO will provide written notice to the Contractor of such authorization.

(g) Non-compliance with the requirements or standards as stated in this clause may result in the Government termination of this contract for default, in full or in part, in accordance with FAR 49.401. Such termination may be in lieu of or in addition to suspension of work under the contract. Nothing herein shall be construed to limit the Government’s right to terminate the contract for failure to fully comply with such requirements or standards.

(h) The Regulations, and related information on the protection of human research subjects, can be found on the Department’s protection of human subjects in research website: <https://www2.ed.gov/about/offices/list/ocfo/humansub.html>.

Contractors may also contact the following office to obtain information about the regulations for the protection of human subjects and related policies and guidelines: Protection of Human Subjects Coordinator, U.S. Department of Education Office of Finance and Operations, Office of Acquisition, Grants, and Risk Management, 400 Maryland Avenue SW, Washington, DC 20202–4331. Email: [HumanSubjectsResearch@ed.gov](mailto:HumanSubjectsResearch@ed.gov).

(End of Clause)

#### **3452.224–73 Protection of student privacy in compliance with FERPA.**

As prescribed in 3424.704, insert the following clause in solicitations and contracts:

##### **Protection of Student Privacy in Compliance With FERPA (Oct 2023)**

(a) Pursuant to the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g, and its implementing regulations, 34 CFR part 99, the Department designates the Contractor to serve as an authorized representative of the Secretary of Education, solely for the purpose of carrying out an audit or evaluation of federally supported education programs, the enforcement or compliance with Federal legal requirements that relate to federally supported education programs, or conducting a study for or on behalf of the Department, to develop, validate, or administer predictive tests, administer student aid programs, or improve instruction, as specified in the statement of work, the schedule, and other similar documents to the contract.

(b) The Contractor shall collect or receive access to the following personally identifiable information from student

education records that is protected by FERPA: [specify the PII from student education records to be collected or accessed by the Contractor, as identified by the requiring activity] (collectively, the PII).

(c) The Contractor shall only use the PII to meet the purpose set forth in paragraph (a) of this clause and for the activity, scope, and duration specified in the statement of work, the schedule, and other similar documents to the contract. Prior to collecting or receiving access to the PII, the Contractor shall establish policies and procedures, consistent with FERPA and other Federal confidentiality and privacy provisions, to protect the PII from further disclosure (except back to the Department) and unauthorized use, including limiting use of the PII to only authorized representatives with legitimate interests in the purpose set forth in paragraph (a) of this clause.

(d) To the extent required to ensure the Contractor's compliance with the provisions of FERPA and other Federal provisions, the Contractor shall afford the Department and its authorized agents access to all of the facilities, installations, technical capabilities, operations, documentation, records, databases, policies, procedures, and systems of the Contractor and any subcontractor.

(e) The Contractor shall limit access to the PII to the Contractor's personnel who require the PII to satisfy the Contractor's obligations under the contract.

(f) If the Contractor collects or receives access to the PII to conduct a study for, or on behalf of, an educational agency or institution, then the Contractor shall conduct such study in a manner that does not permit personal identification of parents and students by anyone other than representatives of the Contractor, or subcontractors, with legitimate interests in the study.

(g) Once the purpose for which the PII was collected or accessed is fully satisfied, the Contractor shall notify the Department immediately and seek the Department's instruction and authorization regarding destruction of the PII in accordance with law.

(h) If the Contractor subcontracts any of the contract work requiring collection or access to the PII, then the Contractor shall include this clause (including this paragraph (h)) in any such subcontract and, further, the Contractor shall ensure that subcontractors at any tier comply with all terms, conditions, and obligations imposed on the Contractor herein and under FERPA.

(i) Violation by a subcontractor of any provision set forth in this clause will be attributed to the Contractor.

(End of Clause)

#### **3452.227–70 Publication and publicity.**

As prescribed in 3427.409, insert the following clause in all solicitations and contracts other than purchase orders:

##### **Publication and Publicity (Mar 2011)**

(a) Unless otherwise specified in this contract, the contractor is encouraged to publish and otherwise promote the results of its work under this contract. A copy of each article or work submitted by the contractor

for publication shall be promptly sent to the contracting officer's representative. The contractor shall also inform the representative when the article or work is published and furnish a copy in the published form.

(b) The contractor shall acknowledge the support of the Department of Education in publicizing the work under this contract in any medium. This acknowledgement shall read substantially as follows:

"This project has been funded at least in part with Federal funds from the U.S. Department of Education under contract number [Insert number]. The content of this publication does not necessarily reflect the views or policies of the U.S. Department of Education nor does mention of trade names, commercial products, or organizations imply endorsement by the U.S. Government."

(End of Clause)

#### **3452.227–71 Advertising of awards.**

As prescribed in 3427.409, insert the following clause in all solicitations and contracts other than purchase orders:

##### **Advertising of Awards (Mar 2011)**

The contractor agrees not to refer to awards issued by, or products or services delivered to, the Department of Education in commercial advertising in such a manner as to state or imply that the product or service provided is endorsed by the Federal government or is considered by the Federal government to be superior to other products or services.

(End of Clause)

#### **3452.227–72 Use and non-disclosure agreement.**

As prescribed in 3427.409, insert the following clause in all contracts over the simplified acquisition threshold, and in contracts under the simplified acquisition threshold as appropriate:

##### **Use and Non-Disclosure Agreement (Mar 2011)**

(a) Except as provided in paragraph (b) of this clause, proprietary data, technical data, or computer software delivered to the Government with restrictions on use, modification, reproduction, release, performance, display, or disclosure may not be provided to third parties unless the intended recipient completes and signs the use and non-disclosure agreement in paragraph (c) of this clause prior to release or disclosure of the data.

(1) The specific conditions under which an intended recipient will be authorized to use, modify, reproduce, release, perform, display, or disclose proprietary data or technical data subject to limited rights, or computer software subject to restricted rights must be stipulated in an attachment to the use and non-disclosure agreement.

(2) For an intended release, disclosure, or authorized use of proprietary data, technical data, or computer software subject to special license rights, modify paragraph (c)(1)(iv) of this clause to enter the conditions, consistent with the license requirements, governing the

recipient's obligations regarding use, modification, reproduction, release, performance, display, or disclosure of the data or software.

(b) The requirement for use and non-disclosure agreements does not apply to Government contractors that require access to a third party's data or software for the performance of a Government contract that contains the clause at 3452.227–73, Limitations on the use or disclosure of Government-furnished information marked with restrictive legends.

(c) The prescribed use and non-disclosure agreement is:

##### *Use and Non-Disclosure Agreement*

The undersigned, [Insert Name], an authorized representative of the [Insert Company Name], (which is hereinafter referred to as the "recipient") requests the Government to provide the recipient with proprietary data, technical data, or computer software (hereinafter referred to as "data") in which the Government's use, modification, reproduction, release, performance, display, or disclosure rights are restricted. Those data are identified in an attachment to this agreement. In consideration for receiving such data, the recipient agrees to use the data strictly in accordance with this agreement.

(1) The recipient shall—

(i) Use, modify, reproduce, release, perform, display, or disclose data marked with Small Business Innovative Research (SBIR) data rights legends only for government purposes and shall not do so for any commercial purpose. The recipient shall not release, perform, display, or disclose these data, without the express written permission of the contractor whose name appears in the restrictive legend (the contractor), to any person other than its subcontractors or suppliers, or prospective subcontractors or suppliers, who require these data to submit offers for, or perform, contracts with the recipient. The recipient shall require its subcontractors or suppliers, or prospective subcontractors or suppliers, to sign a use and non-disclosure agreement prior to disclosing or releasing these data to such persons. Such an agreement must be consistent with the terms of this agreement.

(ii) Use, modify, reproduce, release, perform, display, or disclose proprietary data or technical data marked with limited rights legends only as specified in the attachment to this agreement. Release, performance, display, or disclosure to other persons is not authorized unless specified in the attachment to this agreement or expressly permitted in writing by the contractor.

(iii) Use computer software marked with restricted rights legends only in performance of contract number [insert contract number(s)]. The recipient shall not, for example, enhance, decompile, disassemble, or reverse engineer the software; time share; or use a computer program with more than one computer at a time. The recipient may not release, perform, display, or disclose such software to others unless expressly permitted in writing by the licensor whose name appears in the restrictive legend.

(iv) Use, modify, reproduce, release, perform, display, or disclose data marked

with special license rights legends [To be completed by the contracting officer. See paragraph (a)(2) of this clause. Omit if none of the data requested is marked with special license rights legends].

(2) The recipient agrees to adopt or establish operating procedures and physical security measures designed to protect these data from inadvertent release or disclosure to unauthorized third parties.

(3) The recipient agrees to accept these data “as is” without any Government representation as to suitability for intended use or warranty whatsoever. This disclaimer does not affect any obligation the Government may have regarding data specified in a contract for the performance of that contract.

(4) The recipient may enter into any agreement directly with the contractor with respect to the use, modification, reproduction, release, performance, display, or disclosure of these data.

(5) The recipient agrees to indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of data received from the Government with restrictive legends by the recipient or any person to whom the recipient has released or disclosed the data.

(6) The recipient is executing this agreement for the benefit of the contractor. The contractor is a third party beneficiary of this agreement who, in addition to any other rights it may have, is intended to have the rights of direct action against the recipient or any other person to whom the recipient has released or disclosed the data, to seek damages from any breach of this agreement, or to otherwise enforce this agreement.

(7) The recipient agrees to destroy these data, and all copies of the data in its possession, no later than 30 days after the date shown in paragraph (8) of this agreement, to have all persons to whom it released the data do so by that date, and to notify the contractor that the data have been destroyed.

(8) This agreement shall be effective for the period commencing with the recipient's execution of this agreement and ending upon [Insert Date]. The obligations imposed by this agreement shall survive the expiration or termination of the agreement.

[Insert business name.]

Recipient's Business Name

[Have representative sign.]

Authorized Representative

[Insert date.]

Date

[Insert name and title.]

Representative's Typed Name and Title

(End of Clause)

### **3452.227–73 Limitations on the use or disclosure of Government-furnished information marked with restrictive legends.**

As prescribed in 3427.409, insert the following clause in all contracts of third party vendors who require access to

Government-furnished information including other contractors' technical data, proprietary information, or software:

### **Limitations on the Use or Disclosure of Government-Furnished Information Marked With Restrictive Legends (Mar 2011)**

(a) For contracts under which data are to be produced, furnished, or acquired, the terms *limited rights* and *restricted rights* are defined in the rights in data—general clause (FAR 52.227–14).

(b) Proprietary data, technical data, or computer software provided to the contractor as Government-furnished information (GFI) under this contract may be subject to restrictions on use, modification, reproduction, release, performance, display, or further disclosure.

(1) *Proprietary data with legends that serve to restrict disclosure or use of data.* The contractor shall use, modify, reproduce, perform, or display proprietary data received from the Government with proprietary or restrictive legends only in the performance of this contract. The contractor shall not, without the express written permission of the party who owns the data, release, or disclose such data or software to any person.

(2) *GFI marked with limited or restricted rights legends.* The contractor shall use, modify, reproduce, perform, or display technical data received from the Government with limited rights legends or computer software received with restricted rights legends only in the performance of this contract. The contractor shall not, without the express written permission of the party whose name appears in the legend, release or disclose such data or software to any person.

(3) *GFI marked with specially negotiated license rights legends.* The contractor shall use, modify, reproduce, release, perform, or display proprietary data, technical data, or computer software received from the Government with specially negotiated license legends only as permitted in the license. Such data or software may not be released or disclosed to other persons unless permitted by the license and, prior to release or disclosure, the intended recipient has completed the use and non-disclosure agreement. The contractor shall modify paragraph (c)(1)(iii) of the use and non-disclosure agreement (3452.227–72) to reflect the recipient's obligations regarding use, modification, reproduction, release, performance, display, and disclosure of the data or software.

(c) Indemnification and creation of third party beneficiary rights.

(1) The contractor agrees to indemnify and hold harmless the Government, its agents, and employees from every claim or liability, including attorneys fees, court costs, and expenses, arising out of, or in any way related to, the misuse or unauthorized modification, reproduction, release, performance, display, or disclosure of proprietary data, technical data, or computer software received from the Government with restrictive legends by the contractor or any person to whom the contractor has released or disclosed such data or software.

(2) The contractor agrees that the party whose name appears on the restrictive

legend, in addition to any other rights it may have, is a third party beneficiary who has the right of direct action against the contractor, or any person to whom the contractor has released or disclosed such data or software, for the unauthorized duplication, release, or disclosure of proprietary data, technical data, or computer software subject to restrictive legends.

(End of Clause)

### **3452.228–70 Required insurance.**

As prescribed in 3428.311–2, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

### **Required Insurance (Mar 2011)**

(a) The contractor shall procure and maintain such insurance as required by law or regulation, including but not limited to the requirements of FAR subpart 28.3. Prior written approval of the contracting officer shall be required with respect to any insurance policy, the premiums for which the contractor proposes to treat as a direct cost under this contract, and with respect to any proposed qualified program of self-insurance. The terms of any other insurance policy shall be submitted to the contracting officer for approval upon request.

(b) Unless otherwise authorized in writing by the contracting officer, the contractor shall not procure or maintain for its own protection any insurance covering loss or destruction of, or damage to, Government property.

(End of Clause)

### **3452.231–71 Invitational travel costs.**

As prescribed in 3431.205–71, insert a provision substantially the same as the following:

### **Invitational Travel Costs (Oct 2023)**

No invitational travel, which is defined as Official Government travel conducted by a non-Federal employee in order to provide a “Direct Service” (e.g., presenting on a topic, serving as a facilitator, serving on a Federal Advisory Committee Act, or advising in an area of expertise to the Government, may be provided under this contract or in association with this contract unless consent is provided below. The cost of invitational travel under this contract not identified in the consent section of this clause is unallowable unless the Contractor receives written consent from the Contracting Officer prior to the incurrence of the cost. If the Contractor wishes to be reimbursed for a cost related to invitational travel, a request must be in writing at least 21 days prior to the day that costs would be incurred. The Contractor must include in its request the following: why the invitational travel cost is integral to fulfill a Government requirement in the contract, and the proposed cost that must be in accordance with Federal Travel Regulations. The lack of a timely response from the Contracting Officer must not constitute constructive acceptance of the allowability of the proposed charge.

Consent is hereby given to the Contractor to \_\_\_\_\_.



(End of Clause)

#### **3452.232–70 Limitation of cost or funds.**

The following clause shall be inserted in all contracts that include a Limitation of cost or Limitation of funds clause in accordance with 3432.706–2:

##### **Limitation of Cost or Funds (Mar 2011)**

(a) Under the circumstances in FAR 32.704(a)(1), the contractor shall submit the following information in writing to the contracting officer:

- (1) Name and address of the contractor.
- (2) Contract number and expiration date.
- (3) Contract items and amounts that will exceed the estimated cost of the contract or the limit of the funds allotted.
- (4) The elements of cost that changed from the original estimate (for example: labor, material, travel, overhead), furnished in the following order:
  - (i) Original estimate.
  - (ii) Costs incurred to date.
  - (iii) Estimated cost to completion.
  - (iv) Revised estimate.
  - (v) Amount of adjustment.
- (5) The factors responsible for the increase.
- (6) The latest date by which funds must be available to the contractor to avoid delays in performance, work stoppage, or other impairments.

(b) A fixed fee provided in a contract may not be changed if a cost overrun is funded. Changes in a fixed fee may be made only to reflect changes in the scope of work that justify an increase or decrease in the fee.

(End of Clause)

#### **3452.232–71 Incremental funding.**

As prescribed in 3432.706–2, insert the following provision in solicitations if a cost-reimbursement contract using incremental funding is contemplated:

##### **Incremental Funding (Mar 2011)**

Sufficient funds are not presently available to cover the total cost of the complete project described in this solicitation. However, it is the Government's intention to negotiate and award a contract using the incremental funding concepts described in the clause titled "Limitation of Funds" in FAR 52.232–22. Under that clause, which will be included in the resultant contract, initial funds will be obligated under the contract to cover an estimated base performance period. Additional funds are intended to be allotted to the contract by contract modification, up to and including the full estimated cost of the entire period of performance. This intent notwithstanding, the Government will not be obligated to reimburse the contractor for costs incurred in excess of the periodic allotments, nor will the contractor be obligated to perform in excess of the amount allotted.

(End of Provision)

#### **3452.232–72 Limitation of Government's Obligation.**

As prescribed in 3432.706–2(c), insert the following clause. The Contracting Officer may vary the 90-day period from

90 to 30 or 60 days and the 85 percent from 85 to 75 percent. "Task Order," "contract," or other appropriate designation may be substituted for "CLIN(s)" wherever that word appears in the clause:

##### **Limitation of Government's Obligation (Oct 2023)**

Sufficient funds are not presently available to cover the total price of the CLIN(s) listed in paragraph (l) below. The CLIN(s) identified in paragraph (l) below are incrementally funded to cover the identified period of performance. Additional funds are intended to be allotted to the applicable CLIN(s) by contract modification up to and including the full price of the entire period of performance. This notwithstanding, the Government will not be obligated to pay the Contractor for amounts payable in excess of the amount actually allotted, nor will the Contractor be obligated to perform in excess of such amount.

(a) The CLIN(s) in paragraph (l) of this clause is/are incrementally funded. Paragraph (l) also lists the allotment amount presently available for payment and allotted to the CLIN(s), inclusive of any termination costs for the Government's convenience, and the allotment schedule that provides the last date of Contractor performance for which it is estimated the allotted amount will cover. The parties contemplate that the Government may allot additional funds incrementally to the applicable CLIN(s) under the contract, up to the full price specified in the contract. The Contractor agrees to perform work under the applicable CLIN(s) up to the point at which the total amount paid and payable by the Government under the contract for the applicable CLIN(s), including estimated costs in the event of termination of those CLIN(s) for the Government's convenience, approximates the total amount currently allotted to such CLIN(s).

(b) Notwithstanding the dates specified in the allotment schedule in paragraph (l) of this clause, the Contractor shall notify the Contracting Officer in writing at least ninety (90) days prior to the date when, in the Contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for the Government's convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the applicable CLIN(s). The notification will state (1) the estimated date when that point will be reached, and (2) an estimate of additional funding, if any, needed to continue performance of applicable CLIN(s) up to the date in paragraph (l) of this clause, or to a mutually agreed upon substitute date.

(c) If, after notification pursuant to paragraph (b) of this clause, additional funds are not allotted by the date identified in paragraph (l), the date identified in the Contractor's notification, or by an agreed substitute date, upon the Contractor's written request, the Contracting Officer may terminate for the Government's convenience any CLIN(s) for which additional funds have not been allotted. If the Contractor estimates that the funds available will allow it to

continue to discharge its obligations beyond that date, it may specify a later date in its request to terminate the applicable CLIN(s), and the Contracting Officer may terminate such CLIN(s) on that later date. In no event is the Contractor authorized to continue work on those CLIN(s) beyond the time when the amount payable, to include costs of termination for the Government's convenience, is equal to the funds allotted.

(d) If, solely by reason of failure of the Government to allot additional funds, by the dates indicated in paragraph (l) of this clause, in amounts sufficient for timely performance of the CLIN(s) identified in paragraph (l) 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, the Contractor may request an equitable adjustment to the price or prices (including appropriate target, billing, and ceiling prices, where applicable) of the applicable CLIN(s), or in the time of delivery, or both, by written request to the Contracting Officer with sufficient documentation to support such equitable adjustment. Failure to agree to any such equitable adjustment hereunder will be a dispute concerning a question of fact within the meaning of the clause titled "Disputes." Notwithstanding anything to the contrary herein, in no event will an equitable adjustment under this paragraph (d) be due to the Contractor for costs that arise from or relate to the Contractor's breach of the notification obligations in paragraph (b) of this clause.

(e) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—

(1) The Government is not obligated to pay for goods or services, to include reimbursement of costs for termination for the Government's convenience, in excess of the total amount allotted by the Government to the CLIN(s) identified in paragraph (l) of this clause; and

(2) The Contractor is not authorized to continue performance of the CLIN(s) identified in paragraph (l) of this clause in excess of the amount allotted by the Government to the applicable CLIN(s).

(3) As used in this clause, the total amount payable by the Government in the event of termination of applicable CLIN(s) for convenience includes reasonable costs, profit, and termination settlement costs for those item(s).

(f) No communication or representation in any form other than in writing from the Contracting Officer shall affect the amount allotted by the Government to this contract and applicable CLIN(s). The Government is not obligated to reimburse the Contractor for any costs in excess of the total amount allotted by the Government to the applicable CLIN(s), whether incurred during the course of the contract or as a result of termination.

(g) The Government may at any time prior to termination allot additional funds for the performance of the CLIN(s) identified in paragraph (l) of this clause.

(h) When additional funds are allotted for continued performance of the CLIN(s) identified in paragraph (l) of this clause, the parties will agree as to the period of contract performance that will be covered by the

funds. The provisions of this clause will apply in like manner to the additional allotted funds and agreed substitute date, and the contract will be modified accordingly.

(i) The termination provisions of this clause do not limit the rights of the Government to terminate the contract, in whole or in part, for cause in the event of any breach or default by the Contractor. The provisions of this clause are limited to the work and allotment of funds for the CLIN(s) set forth in paragraph (l) 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 paragraph (d) of this clause.

(j) Nothing in this clause affects the right of the Government to terminate this contract, in whole or in part, for convenience or cause.

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

(l) Incremental funds are allotted to the CLIN(s) under this contract as follows:

| CLIN | Amount allotted | Last date of performance |
|------|-----------------|--------------------------|
|      |                 |                          |

(End of Clause)

#### **3452.233–70 Agency level protests.**

As prescribed in 3433.103, insert the following clause:

##### **Agency Level Protests (Oct 2023)**

All protests to the agency must be submitted to the Contracting Officer. In accordance with FAR 33.103(d)(4), interested parties may request an independent review at a level above the Contracting Officer as an alternative to consideration by the Contracting Officer. If a protest is silent on this matter, consideration and decision will be made by the Contracting Officer.

(End of Provision)

#### **3452.237–70 Services of consultants.**

As prescribed in 3437.270, insert the following clause in all solicitations and resultant cost-reimbursement contracts that do not provide services to FSA:

##### **Services of Consultants (Mar 2011)**

Except as otherwise expressly provided elsewhere in this contract, and notwithstanding the provisions of the clause of the contract entitled “Subcontracts” (FAR 52.244–2), the prior written approval of the contracting officer shall be required—

(a) If any employee of the contractor is to be paid as a “consultant” under this contract; and

(b)(1) For the utilization of the services of any consultant under this contract exceeding the daily rate set forth elsewhere in this contract or, if no amount is set forth, \$800, exclusive of travel costs, or if the services of any consultant under this contract will exceed 10 days in any calendar year.

(2) If that contracting officer's approval is required, the contractor shall obtain and furnish to the contracting officer information concerning the need for the consultant services and the reasonableness of the fee to be paid, including, but not limited to, whether fees to be paid to any consultant exceed the lowest fee charged by the consultant to others for performing consultant services of a similar nature.

(End of Clause)

#### **3452.237–71 Observance of administrative closures.**

As prescribed in 3437.170, insert the following clause in all solicitations and service contracts:

##### **Observance of Administrative Closures (Mar 2011)**

(a) The contract schedule identifies all Federal holidays that are observed under this contract. Contractor performance is required under this contract at all other times, and compensated absences are not extended due to administrative closures of Government facilities and operations due to inclement weather, Presidential decree, or other administrative issuances where Government personnel receive early dismissal instructions.

(b) In cases of contract performance at a Government facility when the facility is closed, the vendor may arrange for performance to continue during the closure at the contractor's site, if appropriate.

(End of Clause)

#### **3452.239–70 Internet protocol version 6 (IPv6).**

As prescribed in 3439.701, insert the following clause in all solicitations and resulting contracts for hardware and software:

##### **Internet Protocol Version 6 (Oct 2023)**

(a) Any system hardware, software, firmware, or networked component (voice, video, or data) developed, procured, or acquired in support or performance of this contract shall be capable of transmitting, receiving, processing, forwarding, and storing digital information across system boundaries utilizing the next-generation internet Protocol (IP) version 6 (IPv6) as defined in revised USGv6 profile (most recent version of NIST Special Publication 500–267B) and NISTv6 profile (most recent version of NIST Special Publication 500–267A).

(b) Specifically, any new IP product or system developed, acquired, or produced must—

(1) Provide IPv6 technical capabilities as outlined in the most recent version of USGv6 Capabilities Table (UCT);

(2) Maintain interoperability with both IPv6 and any existing IPv4 systems and products; and

(3) Have available Contractor/vendor IPv6 technical support for development and implementation and fielded product management.

(c) Any exceptions to the use of IPv6 require the agency's CIO to give advance, written approval.

(End of Clause)

#### **3452.239–71 Department information security and privacy requirements.**

As prescribed in 3439.702, include the following clause in all solicitations and contracts.

##### **Department Information Security and Privacy Requirements (Oct 2023)**

(a) The Contractor shall, at all times, maintain compliance with the most current version of Department security requirements as set forth in “Department Information Security and Privacy Requirements.” These requirements are posted at <http://www.ed.gov/fund/contract/about/bsp.html>.

(b) The Contractor shall be notified when the “Department Information Security and Privacy Requirements” have been updated.

(c) If any such change causes a material increase or decrease in the cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, the Contractor may request an equitable adjustment to the contract price or the delivery schedule, as applicable. The Contracting Officer shall make an equitable adjustment in the contract price, the delivery schedule, or both, and shall modify the contract.

(d) The Contractor must assert its right to an equitable adjustment under this clause within 30 days from the date of receipt of notice of the changed requirement. However, if the Contracting Officer determines that the facts justify it, the Contracting Officer may receive and act upon the Contractor's request for equitable adjustment submitted before final payment of the contract. Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(e) The Contractor shall incorporate the substance of this clause, its terms and requirements, including this paragraph, in all subcontracts, and require written subcontractor acknowledgement of the same. Violation by a subcontractor of any provision set forth in this clause will be attributed to the Contractor.

(f) Failure to comply with this clause, including the embedded Department Information Security and Privacy Requirements, may result in a termination of the contract for default or cause.

(g) Performance of this contract [ ] does include [ ] does not include the following: access to, collection of, or maintenance of information on behalf of the Department; or Department information technology (IT) products, systems, or hardware that are (1) used or operated by the Contractor on behalf of the Department, or (2) used in the performance of services or the furnishing of products. IT products, systems, hardware, and services include agency-hosted, outsourced, and cloud-based solutions, as well as incidental IT equipment that is acquired by the Contractor to support contract performance. When “does include” is selected, the categorizations shown below apply:

(1) In accordance with the Federal Information Processing Standard (FIPS 199),

Standards for Security Categorization of Federal Information and Information Systems, the Information Security Categorization applicable to each security objective has been determined to be:

Confidentiality: [ ] Low [ ] Moderate [ ] High  
 Integrity: [ ] Low [ ] Moderate [ ] High  
 Availability: [ ] Low [ ] Moderate [ ] High  
 Overall Risk Level: [ ] Low [ ] Moderate [ ] High

(2) Performance of this contract [ ] does involve [ ] does not involve Personally Identifiable information (PII) as defined in OMB A-130 (2016).

(3) Performance of this contract [ ] does involve [ ] does not involve "Controlled Unclassified Information" as defined in 32 CFR 2002.4(h).

(End of Clause)

#### 3452.242-70 Litigation and claims.

As prescribed in 3442.7001, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

##### Litigation and Claims (Mar 2011)

(a) The contractor shall give the contracting officer immediate notice in writing of—

(1) Any legal action, filed against the contractor arising out of the performance of this contract, including any proceeding before any administrative agency or court of law, and also including, but not limited to, the performance of any subcontract hereunder; and

(2) Any claim against the contractor for cost that is allowable under the "allowable cost and payment" clause.

(b) Except as otherwise directed by the contracting officer, the contractor shall immediately furnish the contracting officer copies of all pertinent papers received under that action or claim.

(c) If required by the contracting officer, the contractor shall—

(1) Effect an assignment and subrogation in favor of the Government of all the contractor's rights and claims (except those against the Government) arising out of the action or claim against the contractor; and

(2) Authorize the Government to settle or defend the action or claim and to represent the contractor in, or to take charge of, the action.

(d) If the settlement or defense of an action or claim is undertaken by the Government, the contractor shall furnish all reasonable required assistance. However, if an action against the contractor is not covered by a policy of insurance, the contractor shall notify the contracting officer and proceed with the defense of the action in good faith.

(e) To the extent not in conflict with any applicable policy of insurance, the contractor may, with the contracting officer's approval, settle any such action or claim.

(f)(1) The Government shall not be liable for the expense of defending any action or for any costs resulting from the loss thereof to the extent that the contractor would have been compensated by insurance that was required by law, regulation, contract clause, or other written direction of the contracting officer, but that the contractor failed to secure through its own fault or negligence.

(2) In any event, unless otherwise expressly provided in this contract, the contractor shall not be reimbursed or indemnified by the Government for any cost or expense of liability that the contractor may incur or be subject to by reason of any loss, injury, or damage, to the person or to real or personal property of any third parties as may arise from the performance of this contract.

(End of Clause)

#### 3452.242-71 Notice to the Government of delays.

As prescribed in 3442.7002, insert the following clause in all solicitations and contracts other than purchase orders:

##### Notice to the Government of Delays (Mar 2011)

The contractor shall notify the contracting officer of any actual or potential situation, including but not limited to labor disputes, that delays or threatens to delay the timely performance of work under this contract. The contractor shall immediately give written notice thereof, including all relevant information.

(End of Clause)

#### 3452.242-73 Accessibility of meetings, conferences, and seminars to persons with disabilities.

As prescribed in 3442.7101(b), insert the following clause in all solicitations and contracts:

##### Accessibility of Meetings, Conferences, and Seminars to Persons With Disabilities (Mar 2011)

The contractor shall assure that any meeting, conference, or seminar held pursuant to the contract will meet all applicable standards for accessibility to persons with disabilities pursuant to section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 794) and any implementing regulations of the Department.

(End of Clause)

#### 3452.243-70 Key personnel.

As prescribed in 3443.107, insert a clause substantially the same as the following in all solicitations and resultant contracts in which it will be essential for the contracting officer to be notified that a change of designated key personnel is to take place by the contractor:

##### Key Personnel (Oct 2023)

(a) The personnel designated as key personnel in this contract are considered to be essential to the work being performed hereunder. Prior to diverting any of the specified individuals to other programs, or otherwise substituting any other personnel for specified personnel, the contractor shall notify the contracting officer reasonably in advance and shall submit justification (including proposed substitutions) in sufficient detail to permit evaluation of the impact on the contract effort. No diversion or substitution shall be made by the contractor without written consent of the contracting officer; provided, that the contracting officer may ratify a diversion or substitution in writing and that ratification shall constitute the consent of the contracting officer required by this clause. The contract shall be modified to reflect the addition or deletion of key personnel.

(b) The following personnel have been identified as Key Personnel in the performance of this contract:

| Labor Category     | Name           |
|--------------------|----------------|
| [Insert category.] | [Insert name.] |

(End of Clause)

#### 3452.247-70 Foreign travel.

As prescribed in 3447.701, insert the following clause in all solicitations and resultant cost-reimbursement contracts:

##### Foreign Travel (Mar 2011)

Foreign travel shall not be undertaken without the prior written approval of the contracting officer. As used in this clause, *foreign travel* means travel outside the Continental United States, as defined in the Federal Travel Regulation. Travel to non-foreign areas (including the States of Alaska and Hawaii, the Commonwealths of Puerto Rico, Guam and the Northern Mariana Islands and the territories and possessions of the United States) is considered "foreign travel" for the purposes of this clause.

(End of Clause)

[FR Doc. 2023-16918 Filed 8-31-23; 8:45 am]

BILLING CODE 4000-01-P