

Trade Organization Government Procurement Agreement and the free trade agreements as determined by the United States Trade Representative, according to a pre-determined formula under the agreements.

Dated: June 25, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

Federal Acquisition Circular

Federal Acquisition Circular (FAC) 2005–43 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–43 is effective July 2, 2010, except for Items I, II, and IV which are effective August 2, 2010.

Dated: June 24, 2010.

Shay D. Assad,

Director, Defense Procurement and Acquisition Policy.

Dated: June 24, 2010.

Rodney P. Lantier,

Acting Senior Procurement Executive, Office of Acquisition Policy, U.S. General Services Administration.

Dated: June 23, 2010.

William P. McNally,

Assistant Administrator for Procurement, National Aeronautics and Space Administration.

[FR Doc. 2010–15913 Filed 7–1–10; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 4, 15, 31, 32, 42, 45, and 52

[FAC 2005–43; FAR Case 2008–011;
Item I; Docket 2009–0029; Sequence 1]

RIN 9000–AL41

Federal Acquisition Regulation; FAR Case 2008–011, Government Property

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council

(Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to revise FAR part 45, Government Property, and its associated clauses.

DATES: *Effective Date:* August 2, 2010.

FOR FURTHER INFORMATION CONTACT:

Ms. Jeritta Parnell, Procurement Analyst, at (202) 501–4082, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–43, FAR Case 2008–011.

SUPPLEMENTARY INFORMATION:

A. Background

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 74 FR 39262, August 6, 2009. This rule clarifies and corrects the previous FAR rule for part 45, Government Property, published under FAC 2005–17, FAR Case 2004–025, May 15, 2007 (72 FR 27364).

Sixteen respondents submitted 106 comments. The comments received were grouped under 31 general topics. A discussion of the comments and the changes to the rule as a result of these comments are provided below:

1. Access

There is no revision to the proposed rule based on this category of comment. One respondent recommended revising FAR 52.245–1(g)(4) to provide Government access to contractor site locations at reasonable times. The Councils did not agree. Similar language is already contained in the proposed rule at FAR 52.245–1(g)(1). The proposed FAR language at 52.245–1(g)(1) provides for Government access to all contractor site locations, prime and subcontractor (with prime contractor consent). This language was merely consolidated. The language consolidated and relocated subsections 52.245–1(g)(1) and 52.245–1(g)(4) into one subsection.

2. Closeout

There is no revision to the proposed rule based on this comment category. One respondent suggested adding a new paragraph after FAR 52.245–1(f)(x) entitled Disposition of contractor inventory. The Councils noted the issue raised by the commenter. The recommendations are outside the scope of this particular case.

3. Commingling

There is no revision to the proposed rule based on this comment category. Two respondents suggested that commingling Government and

contractor material should not occur. One respondent questioned whether equipment can be commingled by being located with similar equipment. Another respondent recommended revising FAR 52.245–1(f)(1)(viii)(B) to address commingling while in storage or in stockrooms. The Councils do not agree. The practice of commingling only applies to material. Equipment, special tooling, and special test equipment can be co-located, but by their nature are not commingled. The Councils see no need to limit the applicability of commingling to a particular location(s).

4. Contractor Records

There is no revision to the proposed rule based on this comment category. Two respondents submitted three comments on contractor records. Two comments requested clarification on retention periods in FAR 4.705–3(h). In addition, one commenter requested clarification of the term “property records” in FAR 4.705–3(h). Another respondent recommended removal of language “consisting of equipment usage and status reports” from FAR 4.705–3(c). The Councils disagree. The beginning of the retention period is defined in FAR 4.704(a). The definition of property records is in the proposed rule at FAR 45.101. The recommendation for removal of language from FAR 4.705–3(c) is outside the scope of this particular case and will be considered in the formulation of a new case.

5. Corrective Action

There is a revision to the proposed rule at FAR 52.245–1(g)(3) based on this comment category.

Two respondents recommended revising the action required for corrective action. One respondent recommended additional language to distinguish between the lines of authority and responsibility as follows: “ * * * the contractor shall immediately take all necessary corrective actions and shall prepare a corrective action plan at the request of the Property Administrator.” The Councils partially agree. The language at FAR 52.245–1(g)(3) is revised to add “ * * * the contractor shall prepare a corrective action plan when requested by the Property Administrator and take all necessary corrective actions as specified by the schedule within the corrective action plan.” The second respondent suggested that there needs to be a better audit protocol and due process in property management practices. The Councils noted the issues raised by this respondent and the respondent’s recommended revisions to FAR 52.245–1(g)(3). These revisions are outside the

scope of this case and will be considered in the formulation of a new FAR case.

6. Definitions

There are revisions to the proposed rule based on this comment category. Twenty-two comments were received from five respondents regarding definitions. One respondent recommended changing the definition of “cannibalize” to read as “Cannibalization means the unauthorized permanent removal of parts from Equipment, Special Tooling or Special Test Equipment in order to install them on other Government equipment.” The Councils disagree. The current definition is meant to convey only the act of cannibalization itself, notwithstanding whether or not the act is authorized, or whether the removal of parts is temporary or permanent.

One respondent recommended that FAR part 45.101 include a Web site for 41 CFR 102–71.20, thus providing easier access to the term “Real Property.” The Councils disagree. The Code of Federal Regulations is already easily accessible through most on-line search engines. Moreover, in general, the Councils wish to avoid adding unnecessary hyperlinks to the FAR due to their potentially transient nature.

One respondent recommended that the last sentence of the definition of “Equipment” be expanded to include special test equipment and special tooling in the exclusions. The Councils agree.

One respondent recommended revision of the definition to read: “Cannibalize means to remove worthwhile parts from property for probable use or installation on other property.” The Councils disagree. The Councils revised the definition to limit cannibalization of parts to Government property. The use of cannibalization is governed by its application (*i.e.*, by the terms and conditions of the contract).

One respondent recommended revision of the definition of Government Furnished Property in both FAR 45.101 and 52.245–1. The Councils partially agree. The Councils revised the language to include “Government-furnished property also includes contractor-acquired property if the contractor-acquired property is a deliverable under a cost contract when accepted by the Government for continued use under the contract”.

One respondent recommended a new definition of “Property Loss.” The Councils noted the issue raised by the commenter. The recommendation is outside the scope for the proposed rule. The Councils will consider adding this

new definition as part of a future proposed rule.

One respondent recommended adding a definition of “Prime Property Administrator.” The Councils noted the issue raised by the commenter. The recommendation is outside the scope for the proposed rule. The Councils will consider adding this proposal as part of a future proposed rule.

One respondent agreed with the proposed rule in regard to the definitions of “Equipment,” “Material,” “Plant equipment,” “Government property,” “Real property,” “Plant equipment,” and “Property records.” The same respondent also agreed with the proposed changes to the definition of “Plant clearance officer” in FAR 2.101.

7. Disposal Schedules

There is a revision to the proposed rule based on this comment category. One respondent submitted five comments on disposal schedules. In one comment, the respondent requested amending the language at FAR 52.245–1(j)(1)(i)(B) to eliminate submission of inventory schedules for property that requires demilitarization; is classified, hazardous or dangerous; and for precious metals. The respondent recommended the use of a list in accord with the contractor’s plans or by approval of the property administrator or contracting officer. The Councils noted the issue raised by the commenter. The recommendation is outside of the scope of this case. The proposed revision will be considered in the formulation of a new case.

The respondent, in two comments, agreed with the proposed language in FAR 52.245–1(j)(1)(i)(C) and 52.245–1(j)(3)(iv).

The respondent recommended deletion of paragraph FAR 52.245–1(j)(3)(iv)(A). The Councils agree. The respondent recommended deletion of paragraph FAR 52.215–1(j)(3)(iv)(F). The Councils do not agree. The language is retained and moved to paragraph (A). This language allows the flexibility to determine whether there may be further use of the property.

8. Evaluation

There is no revision to the proposed rule based on this category of comment. One respondent recommended revising FAR 45.202(a) to read: “(a) The contracting officer shall consider any potentially unfair competitive advantage that may result from the prospective contractor possessing Government property. This shall be done by adjusting the offers by applying, for evaluation purposes only, a rental equivalent evaluation factor.” The

Councils noted the issue raised by the commenter. The recommendation is outside the scope for the proposed rule. The Councils will consider adding this proposal as part of a future proposed rule.

9. Fair Value

There is no revision to the proposed rule based on this category of comment. One respondent recommended replacement of the term “acquisition cost” in FAR 45.602–3(b) and in 52.245–1(d)(2)(i)(B) with the term “fair market value”. The Councils note the issue raised by the commenter. The recommendation is outside of the scope of this case. The proposed revision will be considered in the formulation of a new case.

10. Guidance

There is no revision to the proposed rule based on this comment category. One respondent recommended revising 42.302(a)(30)(iii) to add the following language “and guidance at FAR 45.103(a)(4) with the maximum use of Government property already in the contractor’s possession.” The Councils disagree. The intent of this paragraph is to address the use of the clause at FAR 52.245–9, Use and Charges. The use of Government property already in the possession of the contractor to its maximum extent is adequately addressed at FAR 45.103(a)(4) and is not appropriately referenced in this paragraph.

11. Item Unique

There is a revision to the proposed rule based on this comment category. The proposed rule language in FAR 45.201, 52.245–1(f)(1)(iii)(A)(4) and 52.245–1(f)(1)(vi)(B)(4) was deleted and the current FAR language is retained.

Three respondents with five comments recommend changing the proposed rule to use the term “unique item identifier (UII)” in place of “item unique.” One comment recommended a general overall change to UII, two comments recommended revising 52.245–1(f)(1)(iii)(A)(4) to use the term “unique item identifier (UII)” in place of “item unique,” one comment suggested that the term “item unique identifier” is a DoD term and that “asset identifier” is a more widely recognized term, and one comment suggested changing “Item unique” identifier to “Unique item” identifier as prescribed in Defense Acquisition Regulation Supplement (DFARS) 252.211–7007. The Councils agree with the proposal to retain the current FAR language of “unique item” identifier. The Councils did not agree with the term “asset identifier.” The

Councils believe that unique item identifier is used across industry and is reflected in industry practices and standards.

12. Liability

There is no revision to the proposed rule based on this comment category. One respondent, with two comments, recommended revising the language associated with relief of stewardship responsibility to add the term liability (see FAR 52.245–1(f)). One comment recommended adding new language to read: “(vii) Relief of Liability. The Contractor shall have a process to enable the prompt disclosure and reporting of all instances of loss, theft, damage, and destruction of Government property, including Government property in the possession of contractors.” The second comment recommended moving 52.245–1(f)(vi)(A) and (B) to the new paragraph (vii). The Councils noted the issues raised by the commenter. The recommendations are outside of the scope of this case. These recommendations will be considered in the formulation of a new case.

13. Location

There is no revision to the proposed rule based on this comment category. One respondent recommended revising FAR 45.501 and the amended FAR 45.502 to read as follows: “45.501 Prime contractor alternate locations. (a) The property administrator assigned to the prime contract may request support property administration from another contract administration office, for purposes of evaluating prime contractor management of property located at the prime contractor’s alternate locations. (b) Prime contractor consent is not required for support delegations involving prime contractor alternate locations. FAR section 45.502 Subcontractor locations. (c) The prime property administrator shall accept the findings of the delegated support property administrator and advise the prime contractor of the results of property management reviews, including deficiencies found with the subcontractor’s property management system.” The Councils did not agree. The Government is not required to seek prime contractor consent to conduct property reviews at alternate locations of the prime contractor.

14. Lost Property

There is no revision to the proposed rule based on this comment category. Twenty-one comments were received from two respondents regarding lost property.

(a) One respondent provided two comments requesting consistency in the use of language throughout the FAR regarding loss (loss, theft, destruction, or damage).

(b) One respondent provided eighteen comments recommending that “loss, theft, destruction, or damage” be replaced with “lost” only.

(c) One respondent recommended that “loss, theft, destruction, or damage” be replaced with “lost” only and that “all” be removed at 52.245–1(f)(1)(x) from “inventorying all property.”

The Councils recommend no change to the proposed rule. The Councils noted the recommendations for a new definition of “loss.” As a result, the Councils recommend including the definition of “loss” in a separate case. The Councils do not agree with the deletion of “all” at 52.245–1(f)(1)(x). The clause at FAR 52.245–1(b)(1) already allows “the contractor to initiate and maintain the processes, systems, procedures, records, and methodologies necessary for the effective control of Government property consistent with voluntary consensus standards and industry leading practices and standards.” This requirement extends to the physical inventory required at FAR 52.245–1(f)(1)(x).

15. Management Plan

There is a revision to the proposed rule based on this comment category. One respondent recommended revising FAR 52.245–1(g)(1) to allow for multiple contractor property plans. The Councils agree. The language at FAR 52.245–1(g)(1) is revised to allow for multiple plans by revising “plan” to “plan(s).”

16. Management System

There is a revision to the proposed rule based on this comment category.

Two respondents submitted four comments on this category. One respondent suggested that FAR 45.201(c)(4) be replaced with the following: “A description of their Property Management System and the voluntary consensus standards or industry leading practices and standards to be used in the management of Government Property.” Another comment recommended revising FAR 45.105(b) to change “provide a schedule for their completion” to “request prompt correction of deficiencies and a schedule for their completion.” Another comment recommended revising FAR 52.245–1(f)(1)(iii)(B) to delete the language “when approved by the Property Administrator.” Another comment recommended revising FAR 45.105(b) to amend the proposed rule to provide more effective property

management. The Councils disagree with the change to FAR 45.201(c)(4). This recommendation is outside the scope of this case. The Councils partially agree with the recommendation of one respondent to change FAR 45.105(b) and partially concur with another respondent to provide a schedule of completion; therefore, the language in FAR 45.105(b) is revised. The Councils disagree with the recommended request to delete the language “when approved by the Property Administrator.” The Councils believe it is in the best interest of the Government for such approvals by the Government to be made on a contract by contract basis.

17. Markings

There is a revision to the proposed rule based on this comment category. One respondent recommended deleting “Government-affixed” at FAR 52.245–1(j)(8)(ii). The Councils agree.

18. New Coverage

There is no revision to the proposed rule based on this category of comment. Three respondents submitted four comments for this category of comments. One respondent recommended new coverage in FAR 45.103 to cover the contract award process when considering competitive advantage. The Councils disagree. The scope of the effort on the contract or type of contract (e.g., A&E, construction) should not be the consideration for inclusion of the clauses at FAR 52.245–1 and 52.245–9. The sole consideration for use of these clauses is whether Government property is to be provided.

One respondent suggested making all references to “property” consistent by changing the term to “Government property.” The Councils disagree. The Councils believe that all references to property in FAR part 45 inherently mean Government property (see FAR 45.000 Scope of part), and no further clarification is needed.

One respondent submitted two comments proposing new coverage. The first comment recommended new coverage in FAR 45.103 to cover the contract award process when considering competitive advantage. The second comment requested a rewrite of FAR 45.603. The Council noted the issues raised by the commenter. The recommendations are outside of the scope of this case. The proposed revisions will be considered in the formulation of a new case.

19. Policy

There is no revision to the proposed rule based on this category of comment.

Two respondents submitted four comments for this comment category.

One respondent agrees with the revision.

Two respondents proposed coverage outside of the scope of this case. The Councils noted the comments. The proposed revisions are outside of the scope of this case. The proposed revisions will be considered in the formulation of a new case.

One respondent recommended adding a new paragraph (e) in FAR 45.102 to read: "Intangible property, *e.g.*, intellectual property, software, etc., are not subject to this requirements of this FAR part or the Government property clauses found at 52.245." The Councils disagree. The issue of whether Intellectual property is covered under FAR contract property regulations is addressed in the scope of part in FAR 45.000 and in the definitions in FAR 45.101.

20. Profit and Fee

There is a revision to the proposed rule based on this comment category. The proposed language in FAR 15.404–4(a)(3) is relocated to FAR 15.404–4(c)(3) and revised. Nine comments were received from eight respondents regarding profit and fee.

One respondent suggests removal of the proposed language in 15.404–4(a)(3) and inclusion of new language in 15.404–4(c)(3) that "instructs contracting officers to exclude the costs of contractor-acquired property from pre-negotiation cost objectives when calculating the Government's pre-negotiation profit or fee objective, unless the contractor acquired property is a deliverable under the contract." The Councils partially agree with this recommendation and the language is revised accordingly.

One respondent requests clarification of the language added in 15.404–4. The Councils agree with this recommendation.

One respondent suggests that requirement of the language added to 15.404–4(a)(3) will be burdensome and require auditing to ensure zero profit; instead of this method, the respondent suggests that the contracting officer take the value of the contractor acquired property in consideration when negotiating profits. The Councils partially agree with this suggestion. The Councils disagree with the assertion that the requirement is burdensome. The language has been modified to clarify its use and limit its applicability to equipment as defined in FAR 45.101.

One respondent suggests changing the weighted guidelines to address the value of contractor acquired property.

The Councils disagree with this suggestion; however, the revised language provides direction to the contracting officer as to how equipment should be treated within the current guidelines.

Four respondents suggest removal of the language added in 15.404–4(a)(3). The Councils disagree with these suggestions.

One respondent believes there is no basis to eliminate profit on any allowable element of the contract cost, especially property that is required in the performance of a Government contract but not incorporated into the end item deliverable or listed as a deliverable. The Councils disagree with this suggestion. The language is revised to assure that it applies only to equipment as defined in FAR 45.101.

The language has been revised and moved to 15.404–4(c)(3). The revision does not change, expand or constrict existing contracting policy. Rather, the purpose of the revised language is to clarify policy, and ensure its awareness within the acquisition community.

Prior to the publication of FAR Case 2004–025, June 2007, FAR 45.302–2(c) and FAR 45.302–3(c) contained language intended to prevent contractors from acquiring facilities and treating the facilities in the same manner as a contract line item deliverable with associated profit or fee. FAR Case 2004–025 deleted this language. The requirements of this language were added to the proposed rule in FAR 15.404–4 because the policy still applies.

While the application of this policy tended to be obfuscated by the term "facilities," the underlying principle was clear—that when the contractor buys equipment or acquires real property on a "pass through" basis, *i.e.*, when not part of a deliverable, it is the Government—not the contractor—who assumes the risk. Moreover, it is generally held that upon contract award, contractors are required to furnish all property necessary to perform Government contracts (FAR Part 45.102) as well as all the necessary resources needed for contract performance (FAR 9.104–1(f), General standards).

Accordingly, it is not appropriate for the Government to include the cost of contractor acquired property (equipment) when calculating the Government's pre-negotiation profit or fee objective. Including such costs would unduly compensate the contractor for obtaining equipment it should already have; and for risks it did not incur. This is a long held view; however, up until the publication of the proposed rule FAR Case 2008–011, it

had not been adequately addressed in the FAR.

This policy does not exclude the otherwise allowable cost of depreciation under FAR 31.205–11.

21. Rental

There is no revision to the proposed rule based on this category of comment. One respondent submitted two comments recommending amending FAR 45.301 and 45.303. One comment recommended amending FAR 45.301 by inserting a comma after the word "authorized" in paragraph (b) and making two sentences out of paragraph (b) so that it reads as follows: "(b) Rental charges, to the extent authorized, do not apply to Government property that is left in place or installed on contractor-owned property for mobilization or future Government production purposes; (c) Rental charges shall apply to property to be used for non-government commercial purposes." The second comment recommended amending FAR 45.303 to read "The contracting officer may authorize a contractor to use the property on an independent research and development (IR&D) program rent free, if—

(a) Such use will not conflict with the primary use of the property or enable the contractor to retain property that could otherwise be released;

(b) The contractor agrees not to claim rental value against any Government contract for the property; and

(c) Estimated rental proceeds are immaterial or rental cost to the contractor would subsequently, in a substantial way, be charged back to the Government as part of indirect cost."

The Councils note the issue raised by the commenter. The recommendations are outside of the scope of this case. The proposed revisions will be considered in the formulation of a new case.

22. Responsibility vs. Liability

There is no revision to the proposed rule based on this category of comment. One respondent recommended moving the coverage in FAR 52.245–1(f)(vii) to FAR 45.104 or moving this paragraph to FAR 52.245–1(h)(1) and being repeated in 45.104, or replace the word "responsibility" with "liability." The Councils note the issue raised by the commenter. The recommendations are outside of the scope of this case. The proposed revisions will be considered in the formulation of a new case.

23. Sale

One respondent agreed with the proposed language in FAR 45.604–3.

24. Scrap List

There is no revision to the proposed rule based on this category of comment. One respondent requested that the paragraph (FAR 45.606–1(b)) be revised as follows: “For scrap from other than production or testing, the contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the property management plan or approvals by the property administrator or contracting officer). The Councils note the issue raised by the commenter. The recommendations are outside of the scope of this case. The proposed revisions will be considered in the formulation of a new case.

25. Screening

One respondent agreed with the proposed language at FAR 45.602–3(b)(3).

26. Storage

One respondent agreed with the proposed language at FAR 52.245–1(j)(7)(ii).

27. Supply Source

One respondent agreed with the proposed language at FAR 52.251–1.

28. Title

There is no revision to the proposed rule based on this category of comment. The respondent agrees, in two comments, with the proposed language at FAR 52.245–1(e)(2)(ii) and (iii).

The respondent also proposes revising FAR 45.402(a). The Councils note the issue raised by the commenter. The recommendations are outside of the scope of this case. The proposed revisions will be considered in the formulation of a new case.

29. Use

One respondent agreed with the proposed language at FAR 52.245–1(c).

30. Administrative

One respondent agreed with the proposed language at FAR 52.245–1.

31. Wrong Case

One respondent submitted one comment opposing FAR 2009–005.

Summary of Proposed Rule Changes. The Councils made the following changes to the proposed rule as a result of the public comments.

Revised FAR 45.101 and 52.245–1 to clarify the definition of “equipment” by including special test equipment and special tooling in the exclusions.

Revised FAR 45.101 and 52.245–1 to clarify the definition of “cannibalize.”

Revised FAR 45.101 and 52.245–1 to clarify the definition of “Government-furnished property.”

Revised FAR 45.105 and FAR 52.245–1(g)(3) to clarify language necessary for contractors to take the necessary corrective action as specified by the schedule within the corrective action plan.

Revised FAR 52.245–1(j)(3)(iv)(A) to delete the language as proposed in the proposed rule and by moving and retaining the language at FAR 52.245–1(j)(3)(iv)(F) as paragraph (A).

Revised FAR 45.201, FAR 52.245–1(f)(1)(iii)(A)(4) and FAR 52.245–1(f)(1)(vi)(B)(4) to delete the proposed rule language and retain the current FAR language.

Revised FAR 52.245–1(j)(8)(ii) by deleting the language “Government-affixed.”

Revised FAR 52.245–1(a) by removing language duplicating the definition of contractor’s managerial personnel.

Revised FAR 15.404–4(a)(3) by relocating the language to FAR 15.404(c)(3) and clarifying that contracting officers shall exclude the cost of contractor-acquired property when calculating the Government’s pre-negotiation profit or fee objective.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any additional requirements on small businesses. The rule does not affect the method of managing Government property. The rule merely clarifies and corrects the previous FAR rule.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0075.

List of Subjects in 48 CFR Parts 2, 4, 15, 31, 32, 42, 45, and 52

Government procurement.

Dated: June 25, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 4, 15, 31, 32, 42, 45, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 4, 15, 31, 32, 42, 45, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2.101 [Amended]

■ 2. Amend section 2.101, in paragraph (b)(2), by removing from the definition “Plant clearance officer” the words “plants and Federal installations” and adding “plants, Federal installations, and Federal and non-Federal industrial operations,” in its place; and removing from the definition “Special tooling” the words “test equipment, and” and adding “tooling, and” in its place.

PART 4—ADMINISTRATIVE MATTERS

■ 3. Amend section 4.705–3 by adding paragraph (h) to read as follows:

4.705–3 Acquisition and supply records.

* * * * *

(h) Property records (see FAR 45.101 and 52.245–1): Retain 4 years.

PART 15—CONTRACTING BY NEGOTIATION

■ 4. Amend section 15.404–4 by adding a sentence after the first sentence of paragraph (c)(3) to read as follows:

15.404–4 Profit.

* * * * *

(c) * * *

(3) * * * Before applying profit or fee factors, the contracting officer shall exclude from the pre-negotiation cost objective amounts the purchase cost of contractor-acquired property that is categorized as equipment, as defined in FAR 45.101, and where such equipment is to be charged directly to the contract.

* * *

* * * * *

PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES

31.205–19 [Amended]

■ 5. Amend section 31.205–19(e)(2)(iv)(C) by removing “52.245–1(h)(1)(ii)” and adding “52.245–1(a)” in its place.

PART 32—CONTRACT FINANCING**32.503–16 [Amended]**

■ 6. Amend section 32.503–16 by removing from paragraph (a) “loss, theft, destruction, or damage to” and adding “lost, stolen, damaged, or destroyed” in its place.

32.1010 [Amended]

■ 7. Amend section 32.1010 by removing from paragraph (a) “loss, theft, destruction, or damage to property affected by the clause” and adding “lost, stolen, damaged, or destroyed property” in its place.

PART 42—CONTRACT ADMINISTRATION AND AUDIT SERVICES

■ 8. Amend section 42.302 by revising paragraphs (a)(30)(iii) and (a)(30)(v) to read as follows:

42.302 Contract administration functions.

(a) * * *

(30) * * *

(iii) Evaluate the use of Government property on a non-interference basis in accordance with the clause at 52.245–9, Use and Charges;

* * * * *

(v) Modify contracts to reflect the addition of Government-furnished property and ensure appropriate consideration.

* * * * *

PART 45—GOVERNMENT PROPERTY

■ 9. Amend section 45.101 by—

■ a. Revising the definitions “Cannibalize”, “Equipment”, “Government-furnished property”, and “Government property”;

■ b. Removing from the definition “Material” the words “and special test equipment” and adding “special test equipment or real property” in its place;

■ c. Removing the definition “Plant equipment”;

■ d. Adding the definition “Property records”; and

■ e. Revising the definition “Real property.”

■ The revised and added text reads as follows:

45.101 Definitions.

* * * * *

Cannibalize means to remove parts from Government property for use or for installation on other Government property.

* * * * *

Equipment means a tangible item that is functionally complete for its intended purpose, durable, nonexpendable, and

needed for the performance of a contract. Equipment is not intended for sale, and does not ordinarily lose its identity or become a component part of another article when put into use. Equipment does not include material, real property, special test equipment or special tooling.

Government-furnished property means property in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for performance of a contract. Government-furnished property includes, but is not limited to, spares and property furnished for repair, maintenance, overhaul, or modification. Government-furnished property also includes contractor-acquired property if the contractor-acquired property is a deliverable under a cost contract when accepted by the Government for continued use under the contract.

Government property means all property owned or leased by the Government. Government property includes both Government-furnished property and contractor-acquired property. Government property includes material, equipment, special tooling, special test equipment, and real property. Government property does not include intellectual property and software.

* * * * *

Property records means the records created and maintained by the contractor in support of its stewardship responsibilities for the management of Government property.

* * * * *

Real property. See Federal Management Regulation 102–71.20 (41 CFR 102–71.20).

* * * * *

■ 10. Amend section 45.102 by revising paragraph (d) to read as follows:

45.102 Policy.

* * * * *

(d) *Exception.* Property provided under contracts for repair, maintenance, overhaul, or modification is not subject to the requirements of paragraph (b) of this section.

■ 11. Amend section 45.104 by revising the introductory text of paragraph (a) to read as follows:

45.104 Responsibility and liability for Government property.

(a) Generally, contractors are not held liable for loss, theft, damage or destruction of Government property under the following types of contracts:

* * * * *

■ 12. Amend section 45.105 by revising the first sentence of paragraph (b);

revising paragraph (b)(1); and removing from paragraph (d) “damage, destruction or theft” and adding “theft, damage or destruction” in its place.

The revised text reads as follows:

45.105 Contractors’ property management system compliance.

* * * * *

(b) The property administrator shall notify the contractor in writing when the contractor’s property management system does not comply with contractual requirements, and shall request prompt correction of deficiencies and shall request from the contractor a corrective action plan, including a schedule for correction of the deficiencies and shall provide a schedule for their completion. * * *

(1) Revocation of the Government’s assumption of risk for loss, theft, damage or destruction; and/or

* * * * *

45.201 [Amended]

■ 13. Amend section 45.201 by removing from paragraph (d) “When use of property on more than one contract is anticipated, any” and adding “Any” in its place.

■ 14. Amend section 45.402 by revising paragraph (a) to read as follows:

45.402 Title to contractor-acquired property.

(a) Title vests in the Government for all property acquired or fabricated by the contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed-price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the contractor retains title to all property acquired by the contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract through a contract modification listing the item as Government-furnished property.

* * * * *

■ 15. Revise section 45.502 to read as follows:

45.502 Subcontractor and alternate prime contractor locations.

(a) To ensure subcontractor compliance with Government property administration requirements, and with prime contractor consent, the property administrator assigned to the prime contract may request support property administration from another contract

administration office. If the prime contractor does not provide consent to support property administration at subcontractor locations, the property administrator shall refer the matter to the contracting officer for resolution.

(b) The prime property administrator shall accept the findings of the delegated support property administrator and advise the prime contractor of the results of property management reviews, including deficiencies found with the subcontractor's property management system.

(c) Prime contractor consent is not required for support delegations involving prime contractor alternate locations.

45.602-3 [Amended]

■ 16. Amend section 45.602-3 by removing from paragraph (b)(3) "North Capitol and H Streets" and adding "732 North Capitol Street" in its place.

■ 17. Revise section 45.604-3 to read as follows:

45.604-3 Sale of surplus personal property.

Policy for the sale of surplus personal property is contained in the Federal Management Regulation, at Part 102-38 (41 CFR Part 102-38). Agencies may specify implementing procedures.

■ 18. Amend section 45.606-1 by revising paragraph (b) and adding paragraph (c) to read as follows:

45.606-1 Contractor with an approved scrap procedure.

* * * * *

(b) For scrap from other than production or testing, the contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the approved scrap procedures).

(c) Inventory disposal schedules shall be submitted for all aircraft regardless of condition, flight safety critical aircraft parts, and scrap that—

- (1) Requires demilitarization;
- (2) Is a classified item;
- (3) Is generated from classified items;
- (4) Contains hazardous materials or hazardous wastes;
- (5) Contains precious metals that are economically beneficial to recover; or
- (6) Is dangerous to the public health, safety, or welfare.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.232-16 [Amended]

■ 19. Amend section 52.232-16 by—

- a. Removing from the clause heading "(JUL 2009)" and adding "(AUG 2010)" in its place;
- b. Removing from paragraph (d)(2)(ii) "under any other clause of this contract";
- c. Removing from paragraph (d)(3) "or special tooling"; and
- d. Removing from paragraph (e) "is damaged, lost, stolen, or" and adding "is lost, stolen, damaged, or" in its place.

52.232-32 [Amended]

- 20. Amend section 52.232-32 by—
 - a. Removing from the clause heading "(JAN 2008)" and adding "(AUG 2010)" in its place;
 - b. Removing from paragraph (f)(2)(ii) "under any other clause of this contract";
 - c. Removing from paragraph (f)(3) "or special tooling"; and
 - d. Removing from paragraph (g) "is damaged, lost, stolen, or" and adding "is lost, stolen, damaged, or" in its place.
- 21. Amend section 52.245-1 by—
 - a. Revising the date of the clause;
 - b. In paragraph (a) by—
 - i. Revising the definitions "Cannibalize" and "Equipment";
 - ii. Adding two sentences to the end of the definition "Government-furnished property";
 - iii. Adding two sentences to the end of the definition "Government property";
 - iv. Removing from the definition "Material" the word "end-item" and adding the words "end item" in its place; and removing the words "and special test equipment" and adding the words "special test equipment or real property" in its place;
 - v. Removing the definition "Plant equipment";
 - vi. Adding, in alphabetical order, the definition "Property records"; and
 - vii. Revising the definition "Real property";
 - c. Revising the first sentence of paragraph (b)(2), and paragraphs (c), and (e)(2)(ii);
 - d. Removing from paragraphs (e)(2)(iii) and (f)(1)(i) the word "material" and adding the word "property" wherever it occurs (8 times);
 - e. Revising paragraph (f)(1)(v)(A), introductory text of paragraph (f)(1)(vi), paragraphs (f)(1)(vi)(A), (f)(1)(vi)(B)(4), (f)(1)(vi)(B)(10), (f)(1)(vii)(A), (f)(1)(viii)(B), (f)(1)(x), (g), introductory text of paragraph (h)(1), paragraphs (h)(1)(ii) and (h)(1)(iii), the first sentence of paragraph (h)(2), (h)(3), introductory text of paragraph (i), and paragraph (j)(1)(i)(B);
 - f. Add paragraph (j)(1)(i)(C);
 - g. Revise paragraphs (j)(3)(iii)(E) and (j)(3)(iv);

- h. Add paragraphs (j)(3)(v) and (j)(3)(vi);
- i. Remove from paragraph (j)(7)(ii) the word "facility" and add the word "area" in its place;
- j. Revise second sentence of paragraph (j)(8)(ii); and
- k. In Alternate I, revise the date of the alternate, and the first sentence of paragraph (h)(1).

The added and revised text reads as follows:

52.245-1 Government Property.

* * * * *

GOVERNMENT PROPERTY (AUG 2010)

(a) * * *

* * * * *

Cannibalize means to remove parts from Government property for use or for installation on other Government property.

* * * * *

Equipment means a tangible item that is functionally complete for its intended purpose, durable, nonexpendable, and needed for the performance of a contract. Equipment is not intended for sale, and does not ordinarily lose its identity or become a component part of another article when put into use. Equipment does not include material, real property, special test equipment or special tooling.

Government-furnished property * * * Government-furnished property includes, but is not limited to, spares and property furnished for repair, maintenance, overhaul, or modification. Government-furnished property also includes contractor-acquired property if the contractor-acquired property is a deliverable under a cost contract when accepted by the Government for continued use under the contract.

Government property * * * Government property includes material, equipment, special tooling, special test equipment, and real property. Government property does not include intellectual property and software.

* * * * *

Property records means the records created and maintained by the contractor in support of its stewardship responsibilities for the management of Government property.

* * * * *

Real property. See Federal Management Regulation 102-71.20 (41 CFR 102-71.20).

* * * * *

(b) * * *

(2) The Contractor's responsibility extends from the initial acquisition and receipt of property, through stewardship, custody, and use until formally relieved of responsibility by authorized means, including delivery, consumption, expending, sale (as surplus property), or other disposition, or via a completed investigation, evaluation, and final determination for lost, stolen, damaged, or destroyed property. * * *

* * * * *

(c) *Use of Government property.* (1) The Contractor shall use Government property, either furnished or acquired under this contract, only for performing this contract,

unless otherwise provided for in this contract or approved by the Contracting Officer.

(2) Modifications or alterations of Government property are prohibited, unless they are—

(i) Reasonable and necessary due to the scope of work under this contract or its terms and conditions;

(ii) Required for normal maintenance; or

(iii) Otherwise authorized by the Contracting Officer.

(3) The Contractor shall not cannibalize Government property unless otherwise provided for in this contract or approved by the Contracting Officer.

* * * * *

(e) * * *

(2) * * *

(ii) Title vests in the Government for all property acquired or fabricated by the Contractor in accordance with the financing provisions or other specific requirements for passage of title in the contract. Under fixed price type contracts, in the absence of financing provisions or other specific requirements for passage of title in the contract, the Contractor retains title to all property acquired by the Contractor for use on the contract, except for property identified as a deliverable end item. If a deliverable item is to be retained by the Contractor for use after inspection and acceptance by the Government, it shall be made accountable to the contract through a contract modification listing the item as Government-furnished property.

* * * * *

(f) * * *

(1) * * *

(v) * * *

(A) The Contractor shall award subcontracts that clearly identify assets to be provided and shall ensure appropriate flow down of contract terms and conditions (e.g., extent of liability for loss, theft, damage or destruction of Government property).

* * * * *

(vi) *Reports.* The Contractor shall have a process to create and provide reports of discrepancies; loss, theft, damage or destruction; physical inventory results; audits and self-assessments; corrective actions; and other property related reports as directed by the Contracting Officer.

(A) Loss, theft, damage or destruction. Unless otherwise directed by the Property Administrator, the Contractor shall investigate and promptly furnish a written narrative of all incidents of loss, theft, damage or destruction to the property administrator as soon as the facts become known or when requested by the Government.

(B) * * *

(4) Unique-item Identifier (if available).

* * * * *

(10) A statement that the Government will receive any reimbursement covering the loss, theft, damage or destruction in the event the Contractor was or will be reimbursed or compensated.

* * * * *

(vii) * * *

(A) Consumed or expended, reasonably and properly, or otherwise accounted for, in

the performance of the contract, including reasonable inventory adjustments of material as determined by the Property Administrator; or a Property Administrator granted relief of responsibility for loss, theft, damage or destruction of Government property;

* * * * *

(viii) * * *

(B) Unless otherwise authorized in this contract or by the Property Administrator the Contractor shall not commingle Government material with material not owned by the Government.

* * * * *

(x) *Property closeout.* The Contractor shall promptly perform and report to the Property Administrator contract property closeout, to include reporting, investigating and securing closure of all loss, theft, damage or destruction cases; physically inventorying all property upon termination or completion of this contract; and disposing of items at the time they are determined to be excess to contractual needs.

* * * * *

(g) *Systems analysis.* (1) The Government shall have access to the Contractor's premises and all Government property, at reasonable times, for the purposes of reviewing, inspecting and evaluating the Contractor's property management plan(s), systems, procedures, records, and supporting documentation that pertains to Government property. This access includes all site locations and, with the Contractor's consent, all subcontractor premises.

(2) Records of Government property shall be readily available to authorized Government personnel and shall be appropriately safeguarded.

(3) Should it be determined by the Government that the Contractor's (or subcontractor's) property management practices are inadequate or not acceptable for the effective management and control of Government property under this contract, or present an undue risk to the Government, the Contractor shall prepare a corrective action plan when requested by the Property Administrator and take all necessary corrective actions as specified by the schedule within the corrective action plan.

(h) *Contractor Liability for Government Property.*

(1) Unless otherwise provided for in the contract, the Contractor shall not be liable for loss, theft, damage or destruction to the Government property furnished or acquired under this contract, except when any one of the following applies—

* * * * *

(ii) The loss, theft, damage or destruction is the result of willful misconduct or lack of good faith on the part of the Contractor's managerial personnel.

(iii) The Contracting Officer has, in writing, revoked the Government's assumption of risk for loss, theft, damage or destruction, due to a determination under paragraph (g) of this clause that the Contractor's property management practices are inadequate, and/or present an undue risk to the Government, and the Contractor failed to take timely corrective action. If the Contractor can establish by clear and convincing evidence

that the loss, theft, damage or destruction of Government property occurred while the Contractor had adequate property management practices or the loss, theft, damage or destruction of Government property did not result from the Contractor's failure to maintain adequate property management practices, the Contractor shall not be held liable.

(2) The Contractor shall take all reasonable actions necessary to protect the Government property from further loss, theft, damage or destruction. * * *

(3) The Contractor shall do nothing to prejudice the Government's rights to recover against third parties for any loss, theft, damage or destruction of Government property.

* * * * *

(i) *Equitable adjustment.* Equitable adjustments under this clause shall be made in accordance with the procedures of the Changes clause. However, the Government shall not be liable for breach of contract for the following:

* * * * *

(j) * * *

(1) * * *

(i) * * *

(B) For scrap from other than production or testing the Contractor may prepare scrap lists in lieu of inventory disposal schedules (provided such lists are consistent with the approved scrap procedures).

(C) Inventory disposal schedules shall be submitted for all aircraft regardless of condition, flight safety critical aircraft parts, and scrap that—

(1) Requires demilitarization;

(2) Is a classified item;

(3) Is generated from classified items;

(4) Contains hazardous materials or hazardous wastes;

(5) Contains precious metals that are economically beneficial to recover; or

(6) Is dangerous to the public health, safety, or welfare.

* * * * *

(3) * * *

(iii) * * *

(E) Precious metals in raw or bulk form;

* * * * *

(iv) The Contractor shall provide the information required by FAR 52.245–1(f)(1)(iii) along with the following:

(A) Any additional information that may facilitate understanding of the property's intended use.

(B) For work-in-progress, the estimated percentage of completion.

(C) For precious metals, the type of metal and estimated weight.

(D) For hazardous material or property contaminated with hazardous material, the type of hazardous material.

(E) For metals in mill product form, the form, shape, treatment, hardness, temper, specification (commercial or Government) and dimensions (thickness, width and length).

(v) Property with the same description, condition code, and reporting location may be grouped in a single line item.

(vi) Scrap should be reported by "lot" along with metal content, estimated weight and estimated value.

* * * * *

(8) * * *

(ii) * * * Unless otherwise directed by the Contracting Officer or by the Plant Clearance Officer, the Contractor shall remove and destroy any markings identifying the property as U.S. Government-owned property prior to its disposal.

* * * * *

Alternate I (AUG 2010). * * *

(h)(1) The Contractor assumes the risk of, and shall be responsible for, any loss, theft, damage or destruction of Government property upon its delivery to the Contractor as Government-furnished property. * * *

* * * * *

■ 22. Amend section 52.245–2 by revising the date of the clause, and the first two sentences of paragraph (b) to read as follows:

52.245–2 Government Property Installation Operation Services.

* * * * *

**GOVERNMENT PROPERTY
INSTALLATION OPERATION SERVICES
(AUG 2010)**

* * * * *

(b) The Government bears no responsibility for repair or replacement of any lost, stolen, damaged or destroyed-Government property. If any or all of the Government property is lost, stolen, damaged or destroyed or becomes no longer usable, the Contractor shall be responsible for replacement of the property at Contractor expense. * * *

* * * * *

■ 23. Amend section 52.245–9 by revising the date of the clause, and the introductory text of paragraph (a); and removing the definitions "Acquisition cost", "Government property", "Plant equipment", and "Real property".

The revised text reads as follows:

52.245–9 Use and Charges.

* * * * *

USE AND CHARGES (AUG 2010)

(a) *Definitions.* Definitions applicable to this contract are provided in the clause at 52.245–1, Government Property. Additional definitions as used in this clause include:

* * * * *

■ 24. Amend section 52.251–1 by revising the date of the clause, and the last sentence of the clause to read as follows:

52.251–1 Government Supply Sources.

* * * * *

GOVERNMENT SUPPLY SOURCES (AUG 2010)

* * * The provisions of the clause entitled "Government Property," at 52.245–1, shall

apply to all property acquired under such authorization.

[FR Doc. 2010–15918 Filed 7–1–10; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Parts 2, 4, 7, 10, 13, 18, 26, and 52

[FAC 2005–43; FAR Case 2008–035; Item II; Docket 2009–0033, Sequence 1]

RIN 9000–AL30

**Federal Acquisition Regulation; FAR
Case 2008–035, Registry of Disaster
Response Contractors**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted, as final without change, the interim rule amending the Federal Acquisition Regulation (FAR) to implement the Department of Homeland Security Appropriations Act, 2007, section 697, which requires the establishment and maintenance of a registry of disaster response contractors.

DATES: *Effective Date:* August 2, 2010.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Millisa Gary, Procurement Analyst, at (202) 501–0699. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–43, FAR case 2008–035.

SUPPLEMENTARY INFORMATION:

A. Background

Public Law 109–295, the Department of Homeland Security Appropriations Act, 2007, section 697, requires the establishment and maintenance of a registry of contractors willing to perform debris removal, distribution of supplies, reconstruction, and other disaster or emergency relief activities. In addition, contracting officers are required to consult the registry during market research and acquisition planning.

The interim rule was published in the **Federal Register** on October 14, 2009 (74 FR 52847). The public comment

period closed on December 14, 2009. No comments were received in response to the interim rule.

In the interim rule, the Councils amended the language at FAR 2.101 to add a definition of "Disaster Response Registry," and at FAR 4.1104, 18.102, and 26.205 to require contracting officers to consult the registry at <http://www.ccr.gov>. In addition, a requirement was added to FAR 10.001 to require contracting officers to take advantage of commercially available market research methods to identify capabilities to meet agency requirements for disaster relief.

The Disaster Response Registry is located at www.ccr.gov. The Federal Emergency Management Agency (within the Department of Homeland Security) has a link to the registry for vendors on its Web site <http://www.fema.gov/business/contractor.shtm>. The Registry covers disaster and emergency relief activities inside the United States and its outlying areas only. Major disaster and emergency declarations are published in the **Federal Register** and are available at <http://www.fema.gov/news/disasters.fema>.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule does not revise or change existing regulations pertaining to small business concerns seeking Government contracts. In addition, the Councils sought comments from small businesses on the affected FAR parts at the publication of the interim rule. No comments were received.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 2, 4, 7, 10, 13, 18, 26, and 52

Government procurement.